# *Office of Congressional Workplace Rights*

**OCWR BROWN BAG LUNCH SERIES**
**PUBLIC ACCESS PROVISIONS OF ADA TITLES II AND III UNDER THE CAA**
**AUGUST 21, 2019**

## I. Introduction

The Congressional Accountability Act of 1995 (CAA), 2 U.S.C. §§ 1301 *et seq.*, applies the rights and protections established by the employment and public access provisions of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12112 *et seq*. Accordingly, the ADA is unique among the other laws applied by the CAA because it affords protections to both employees and members of the public. The rights and protections for the public are found in section 210 of the CAA, which incorporates Titles II and III of the ADA. 2 U.S.C. § 1331(b). These public access provisions, as applied by the CAA, require that employing offices make their services, programs, and activities for the public, as well as the facilities where these services, programs, and activities are provided, accessible to all, including individuals with a disability.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Title III prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation…" 42 U.S.C. § 12182(a).

## II. Legislative Branch Process

Public accessibility enforcement in the legislative branch is unique for a number of reasons. First, the substantive laws from which public access rights and protections are derived are different. The executive branch is covered by Title V of the Rehabilitation Act and the Architectural Barriers Act, rather than the ADA, for disability rights purposes.[1] The legislative branch, on the other hand, is covered by the ADA as applied by the CAA. While CAA section 201 does apply certain employment anti-discrimination provisions of the Rehabilitation Act in

[1] The Rehabilitation Act does, however, apply the same standards as those used under the ADA to determine disability discrimination in employment and public access.

addition to ADA employment anti-discrimination provisions, the CAA only applies the corresponding provisions of the ADA for public access purposes. *Compare* 2 U.S.C. § 1311(a)(3), *with* 2 U.S.C. §1331(b)(1).

Second, both Titles II and III of the ADA apply to the legislative branch through the CAA. These titles traditionally govern two different arenas – state and local government for the former and private entities that are considered places of public accommodation for the latter. Congress applied both titles to provide to individuals with disabilities the greatest amount of access to public services, programs, activities and accommodations available under the law. To clarify what this dual application means in practice, the Board of Directors ("Board") of the Office of Congressional Workplace Rights ("OCWR") has explained that covered offices "must at all times provide services, programs and activities that are in compliance with Title II of the ADA and, when those services, programs, activities or accommodations are provided directly to the public (as in places of public accommodations), they must also comply with Sections 302, 303 and 309 of Title III of the ADA." 162 Cong. Rec. H557, H558 (daily ed. Feb. 3, 2016); 162 Cong. Rec. S624, S625 (daily ed. Feb. 3, 2016).

The Department of Justice ("DOJ") implementing regulations for Titles II and III are codified in the Code of Federal Regulations at 28 C.F.R. Parts 35 and 36, respectively. With limited exception, the Board has adopted nearly all of the corresponding DOJ regulations for the ADA public access sections applied through the CAA. The regulations under Parts 35 and 36 are substantially similar, but there are a few differences. The Board has adopted only the DOJ's Title II regulation where the DOJ Title II and III regulations address the same subject, having determined that under this circumstance, "compliance with the applicable Title II regulation will be sufficient to meet the requirements of both Title II and Title III." 162 Cong. Rec. H557, H558 (daily ed. Feb. 3, 2016); 162 Cong. Rec. S624, S625 (daily ed. Feb. 3, 2016). Further, when adopted regulations conflict, the regulation providing the most access applies. OCWR Adopted ADA Regulations, § 1.105(b).

Although Congressional approval of the ADA public access regulations adopted by the Board is pending, under Section 411 of the CAA the applicable DOJ regulations will still apply in any ADA public access hearings, civil actions, Board appeals, or actions to review Board decisions by the Federal Circuit Court of Appeals brought under CAA sections 405, 406, 407, or 408. 2 U.S.C. § 1411.

Finally, there is no private right of action for alleged violations of the ADA public access provisions applied by the CAA, and individuals may not file claims (as that term is defined by the CAA) with the OCWR. The General Counsel enforces these provisions and has exclusive authority to file ADA public access complaints with the OCWR. 2 U.S.C. § 1331(d).

<u>General Counsel Enforcement Process</u>

Individuals alleging a violation of the ADA public access provisions as applied by the CAA may file a request for inspection with the General Counsel. If the request is filed by an individual with a disability, it will be treated as an ADA charge of discrimination. Upon receipt of such requests and charges, the General Counsel will conduct an investigation. For charges of discrimination, the General Counsel may file complaints with the OCWR if, after investigating,

the General Counsel believes that a violation has occurred. 2 U.S.C. § 1331(d)(3). The complaint will be submitted to a hearing officer for decision. This decision is subject to Board review and the decision of the Board is subject to judicial review by the Federal Circuit Court of Appeals. 2 U.S.C. §§ 1331(d)(3), (d)(4). For ADA requests for inspection not treated as charges of discrimination, the General Counsel may issue a report documenting the investigation findings and identifying necessary corrective actions.

The General Counsel also conducts biennial ADA public access inspections of facilities of legislative branch offices. 2 U.S.C. § 1331(f)(1). Results of these inspections are published in a report that is submitted to the Speaker of the House of Representatives, the President pro tempore of the Senate, and the Office of the Architect of the Capitol or other entity responsible for correcting any violations. 2 U.S.C. § 1331(f)(2).

ADA Coordinator

Under 28 C.F.R. § 35.107, which has been adopted by the Board, "a public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under [Part 35], including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by [Part 35]. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph." State and local governments traditionally refer to this role as the "ADA Coordinator," although the use of that term is not required by law. Section 35.107 also requires that "a public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part." While it is not clear how the 50-employee threshold in this regulation would be applied to employing offices with fewer than 50 employees, the OCWR recommends that such offices designate at least one person to coordinate their ADA public access compliance efforts.

## III. Essential Elements of ADA Public Access Claims

Because Titles II and III of the ADA traditionally govern two different settings (state and local government, and private businesses that are places of public of accommodation, respectively), claims of discrimination arising under these titles require proof of different sets of elements. Although the Board has not yet had occasion to address an ADA public access claim, the particular context in which a legislative branch case arises will determine whether Title II or Title III analysis applies.

To establish a violation of Title II of the ADA, a plaintiff must show that: (1) he is a qualified individual with a disability; (2) he was either excluded from participation in, or denied benefits of, a public entity's services, programs or activities, or was otherwise discriminated against by a public entity; and (3) this exclusion, denial of benefit, or discrimination was by reason of the

plaintiff's disability. 42 U.S.C. § 12132; *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1083 (11th Cir. 2007).

A claim of a violation of Title III of the ADA requires proof that: (1) the plaintiff is disabled within the meaning of the ADA; (2) the defendant is a place of public accommodation; and (3) the defendant discriminated against the plaintiff by denying him a full and equal opportunity to enjoy the goods and services it provides. 42 U.S.C. § 12182; *Brown v. Whole Foods Mkt. Grp., Inc*., 789 F.3d 146, 151 (D.C. Cir. 2015).

The discrimination element in both frameworks typically involves an issue of communication, program access, or architectural access. *See* 42 U.S.C. § 12181(b)(2)(A) (defining discrimination under the ADA to include certain actions pertaining to programmatic, communication, and architectural access); *Chapman v. Pier 1 Imports (U.S.), Inc*., 631 F.3d 939, 945 (9th Cir. 2011) (noting that the third element requires a plaintiff to show that "there was a violation of applicable accessibility standards."). In other words, the plaintiff in an ADA public access case is typically alleging that he experienced a disability-related communication concern (e.g., no interpreters) or a disability-related concern with participating in or accessing a program or facility (e.g., a facility is not wheelchair accessible) and that these concerns had the effect of excluding him, on a discriminatory basis, from participating in or receiving the benefits of public services, programs, or activities, or denying him a full and equal opportunity to enjoy goods and services.

## IV. Access in Communications

The ADA requires that a public entity take steps necessary to ensure that its communication with members of the public with disabilities is equally as effective as its communications with others. 28 C.F.R. § 35.160(a)(1). To facilitate equally effective communication, covered entities may be required to provide auxiliary aids or services to individuals with disabilities. 28 C.F.R. § 35.160(b)(1). Because communication varies widely depending on the context and entity involved, the type of auxiliary aid or service needed to communicate effectively with a person with a disability in a given circumstance will also vary. To determine the right solution, employing offices must take into account the nature, length, and complexity of the communication, as well as the person's normal method of communication. 28 C.F.R. § 35.160(b)(2).

Title II of the ADA also requires that primary consideration be given to the specific type of auxiliary aid or service requested by the person with a disability. *Id.* However, under certain circumstances, a public entity may not be required to honor the person's request. An employing office can provide a different aid or service than what was requested if it can demonstrate that there is another equally effective means of communication available. Further, an office is not required to provide the aid or service requested if it would fundamentally alter the nature of the program or service or if it would place an undue burden on the office. 28 C.F.R. § 35.164. Note,

however, that the employing office would still be required to provide an alternative auxiliary aid or service that does not cause an undue burden or fundamental alteration. *Id.*

Regulations

- 28 C.F.R. § 35.160
- 28 C.F.R. § 35.161
- 28 C.F.R. § 35.162
- 28 C.F.R. § 35.163
- 28 C.F.R. § 35.164

1) Primary Consideration Given to Request of Individual with Disability

Because each individual's disability is different, an accommodation that works for one person might not work as well – or at all – for another. It follows that public entities are required to give primary consideration to the request of each specific individual when determining which accommodation to provide.

a) *Duvall v. Cty. of Kitsap*, 260 F.3d 1124 (9th Cir. 2001) – Speculation that an individual's requested accommodation is not feasible or available does not absolve a public entity of its obligation to give primary consideration to the accommodation requested by the individual. Here, the plaintiff was hearing impaired and requested videotext display to participate in his divorce-related court proceedings upon the advice of the U.S. Department of Justice. He had submitted his request to various court and county officials, including the court administrator who served as the ADA Coordinator, several weeks before the court proceedings. Rather than provide him with his requested accommodation, the court administrator informed him that the trial would be held in a courtroom equipped for the hearing impaired that was outfitted with an assistive audio system. According to the plaintiff, the available system was inappropriate for individuals like him who used hearing aids that are precisely adjusted to the user's hearing needs, because the system would not be able to transmit audio to the plaintiff's hearing aids and make use of their customized settings. Further, he would have been required to remove his hearing aids and to use earbuds, which provided only general amplification and impeded the use of his natural hearing ability. The plaintiff's attorney made a motion to the court on the first day of the trial again requesting videotext display, which the judge denied on the basis that it was not available. However, evidence in the record contradicted the judge's availability assessment: The ADA coordinator had attended a demonstration by one of the county's court reporters of the use of videotext display, and the plaintiff submitted declarations from other local court reporters stating that they could have provided videotext display at the time of his trial. The court determined that even though the county defendants were not aware of a court reporting service that provided his requested accommodation at the time of his request, "the ADA imposes an obligation to investigate whether a requested accommodation is reasonable." There was convincing evidence that the county would have been able to provide his requested

accommodation if the defendants had given due consideration to the plaintiff's request and investigated the availability of real-time transcription.

b) *Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185 (9th Cir. 2007) – A public entity's duty to provide an auxiliary aid or service to a person with a disability is triggered by knowledge of the person's disability and his need for an accommodation. An entity may have knowledge of the person's need for an accommodation because it is obvious or because the individual requests one. An individual's request may be valid even if he does not necessarily request a specific auxiliary aid. This is so even though a public entity is required to give primary consideration to the request of the individual in providing an auxiliary aid or service. "While it is true that a public entity, in providing an auxiliary aid to prevent discrimination, must 'give primary consideration to the requests of the individual with disabilities,' 28 C.F.R. § 35.160(b)(2), the regulations do not require the plaintiff to request a specific auxiliary aid."

c) *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164 (D.D.C. 2011) – Plaintiff, a blind law graduate, requested to use an accessible screen reading program called JAWS (Job Access With Speech) as an accommodation to sit for the DC bar exam. While the National Conference of Bar Examiners (NCBE) offered other accommodations, including a human reader or an audio CD with the exam – which the plaintiff contended were ineffective for her – it refused to let her use JAWS. The defendants argued that the accommodations offered were adequate as a matter of law because they are included on the lists of auxiliary aids specifically described in the ADA and its implementing regulations, and because the ADA did not require that they provide the plaintiff with her requested accommodation. The court noted that the lists of aids included in the ADA and the regulations were "illustrative, not exhaustive, and the fact that other qualified individuals with visual impairments may have used them does not mean that they are accessible to Plaintiff as a matter of law[ ]." The court further noted that just because the defendants were not necessarily required to provide the specific aid the plaintiff requested, they still had to provide an accommodation that was "at least 'as effective' as her preferred accommodation." If a plaintiff can establish that the alternative accommodations offered to her do not make the exam accessible to her in the same way that her requested accommodation does, then the defendants must provide her with her requested accommodation unless they can establish that doing so would fundamentally alter the nature of the examination or constitute an undue burden. The court granted injunctive relief and ordered NCBE to allow the plaintiff to use her preferred accommodation.

2) Equally Effective Alternative

Under some circumstances, even if a public entity does not provide the requested accommodation, it may still be in compliance with the ADA if the accommodation it does provide results in equally effective communication.

a) *Loye v. Cty. of Dakota*, 625 F.3d 494 (8th Cir. 2010) – Some "miscreant boys" found two bottles of mercury in an abandoned building, took the bottles to a playground,

and released the mercury while playing, thereby contaminating residences, vehicles, and other children and adults. The county's special operations team (SOT) interviewed contaminated people, including the four deaf plaintiffs. All those who were contaminated were decontaminated, taken to a shelter or hotel while their homes were being decontaminated, and/or treated for contamination. Plaintiffs alleged that the county violated Title II of the ADA and Section 504 of the Rehabilitation Act when it did not provide American Sign Language (ASL) interpreters at every interaction with the deaf plaintiffs throughout the decontamination process. The county held large group meetings to discuss the health effects of mercury exposure, the need to decontaminate homes and cars, the need to investigate whether children or pets had been exposed, temporary housing arrangements, and when the residents could return to their homes. A sign language interpreter was made available at the meetings once the county learned that some of those affected were hearing impaired. The court found that the county effectively communicated with the plaintiffs regarding the decontamination process during the large group meetings. The county also assigned a public health nurse to meet specifically with those affected with hearing impairment to provide housing, health-related and other services on an individual basis. Although the plaintiffs argued that they could not fully communicate their questions and concerns with the public health nurse, the court explained that the legal standard is effective communication "that results in meaningful access to government services." The court found no evidence that the plaintiffs failed to obtain any services due to misunderstanding, nor that the nurse ignored any specific request for more effective communication, to include an ASL interpreter. Instead the court found strong evidence of effective communication between the plaintiffs and the nurse, including that there was substantial email communication between the nurse and plaintiffs, the nurse delivered personal items to the plaintiffs, and the plaintiffs were successfully returned to their decontaminated homes. Finally, there was no evidence that the county's communications with the hearing impaired plaintiffs was less effective than its communications with the large number of non-impaired victims.

b) *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072 (11th Cir. 2007) – A hearing-impaired individual was arrested for DUI, transported to the police station, and booked into jail. He did not know sign language and relied primarily on lip reading. He alleged that at all three stages of the process the police violated Title II of the ADA by failing to provide effective communication: during the field sobriety tests, when the police officer did not call for someone to help him; at the police station, when he had trouble understanding the officer who tried to obtain his consent to an Intoxilyzer test; and at the jail, when his request for a TDD phone was denied. The Eleventh Circuit affirmed the district court's grant of summary judgement for the defendants, holding that even though the plaintiff was not provided with the auxiliary aids he requested, the police were nonetheless able to communicative with him effectively. The plaintiff understood and attempted to perform the tasks required for the field sobriety tests; the communication at the police station was short, one-on-one, not complex, and was understood by the plaintiff, and moreover the police provided the plaintiff with a written form that he could have read, but chose not to; and because the police called the plaintiff's girlfriend for him, and this call achieved the intended goal of

informing her of his arrest and having her pick him up from the jail when he was released, the failure to provide a TDD phone did not cause the plaintiff any harm.

c) *Poway Unified Sch. Dist. v. K.C. ex rel. Cheng*, No. 10CV897-GPC (DHB), 2014 WL 129086 (S.D. Cal. Jan. 14, 2014) – The plaintiff, a high school student with profound hearing loss, had tried 3 different accommodations – CART, TypeWell, and C-Print – and found that CART was the only one that was effective for her; she found the other two confusing, she was unable to follow discussions in class while using them, and they gave her headaches because she had to concentrate so hard to understand what was going on. However, the school denied her request for CART and provided her with TypeWell, which it argued was an effective alternative. The court denied the school district's motion for summary judgment, holding that a genuine issue of material fact existed as to whether the decision to provide the student with TypeWell instead of her requested accommodation of CART interfered with plaintiff's "meaningful access" and "equal opportunity" in violation of Title II of the ADA.

d) *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164 (D.D.C. 2011) – Whether a particular accommodation is as effective as another depends on context. In the context of a test like the bar examination, the court must consider the volume and complexity of information involved to assess what would be effective for a test taker and as well as any specific evidence proffered by the plaintiff addressing the effectiveness of offered accommodations.

3) Undue Burden

Whether an "undue burden" exists and thus relieves an entity from its duty to provide a reasonable accommodation or modification is very fact-specific. While some of the cases below do not directly address "undue burden" within the context of communication accessibility, they still illustrate how courts will weigh evidence to determine whether a requested, facially reasonable accommodation or modification will amount to an undue burden.

a) *Wright v. N.Y. State Dep't of Corr.*, 831 F.3d 64 (2nd Cir. 2016) – The plaintiff, a mobility impaired inmate in a prison, requested permission to use his motorized wheelchair within the corrections facilities to enable him to access services, programs, and activities. The corrections facility had a blanket policy precluding inmates from using motorized wheelchairs, but allowed for the use of manual wheelchairs. This left those mobility impaired inmates who could not propel themselves in a manual wheelchair reliant upon inmate mobility aides to move throughout the facility to attend programs and access services. Because the plaintiff could not effectively use a manual wheelchair, he was almost entirely dependent on the mobility assistance program. In considering the question of whether the corrections facility would be "unduly burdened" by allowing the plaintiff to use a motorized wheelchair, the court found that the plaintiff presented evidence suggesting that the risks and costs of allowing him to use the motorized wheelchair were relatively low. The corrections facility would not incur financial costs to purchase a chair because the plaintiff already had his own, and there was evidence that the chair

was safe and there was no history of behavioral problems that would suggest that the plaintiff would use the chair to ram other inmates. On the other hand, the corrections facility presented evidence that the facility's hallways were narrow, that it would need to inspect the device frequently and transport the device to a technician for maintenance, and that due to the heaviness of the chair, even inadvertent bumps could cause injury to other inmates. The court stated that the facility could not rely on general safety and security concerns to show that it was unduly burdened by the plaintiff's request, but a finder of fact could conclude that the facility's safety and administrative worries were sufficiently burdensome; at the same time, it was just as likely that a finder of fact would conclude that there was no undue burden on the facility to allow the plaintiff to use his motorized chair. The court therefore remanded for further proceedings.

b) *Robertson v. Las Animas Cty. Sheriff's Dep't,* 500 F.3d 1185 (10th Cir. 2007) – A deaf pre-trial detainee was arrested and detained. During his detention, he was unable to use a phone to call his attorney due to lack of auxiliary aids, nor was he provided with any auxiliary aids or assistance during his video probable cause hearing. The defendants asserted an "undue burden" defense to the allegations that they failed to provide the plaintiff with an auxiliary aid for the telephone, claiming that they did not have enough time to accommodate his request once they became aware of it. The court held that whether the "undue burden" exception applied was a question of fact, and that among the facts to consider was the number of hours between the request to make a telephone call and the time the plaintiff was taken to his hearing. Further, the court indicated that even if supplying the requested auxiliary aids would result in an undue burden, the public entity must take other action that would not result in such a burden, but would ensure to the "maximum extent possible" that the individual with disability received the benefit or service provided by the public entity.

c) *Bonnette v. D.C. Court of Appeals,* 796 F. Supp. 2d 164 (D.D.C. 2011) – The National Conference of Bar Examiners (NCBE) argued that allowing a test taker to use screen reading software to take the bar as an accommodation would amount to an undue burden, citing costs and administrative concerns. The court found that while the NCBE had valid security concerns about administering the exam in a computer-based format, it was unpersuaded that these concerns rose to the level of an undue burden, since the record suggested that the NCBE was able to ensure that the bar exam could be administered at least as securely as its paper-and-pencil version. Further, the $5,000 cost associated with the requested accommodation was not an undue burden for an organization whose operating budget exceeds $12 million.

d) *Am. Council of the Blind v. Paulson*, 525 F.3d 1256 (D.C. Cir. 2008) – In this case, blind and visually impaired plaintiffs sued the Department of the Treasury alleging discrimination due to the Treasury Department's failure to design and issue paper currency that is readily distinguishable to the visually impaired. The Court held that the Secretary had not met his burden to show, as an affirmative defense, that each identified accommodation that was facially reasonable, effective, and feasible, would impose an undue burden. Specifically, the court noted that a large majority of other currency systems have accommodated the visually impaired, and that the Secretary

did not explain why the United States should be any different. Moreover, the financial costs identified by the Secretary were not out of line with the costs associated with other currency changes that the Secretary had made, and could be reduced if accommodations were made as part of other planned changes. Therefore, the court remanded the case to the district court to address the request for injunctive relief.

e) *Ball v. AMC Entm't*, 246 F. Supp. 2d 17 (D.C. Cir. 2003) – In this case, deaf and hard-of-hearing plaintiffs alleged that the defendant movie theater chain violated the ADA when it failed to provide their requested reasonable accommodations, including captioning and interpretive aids. Specifically, the plaintiffs alleged that the defendants should be required to show films with rear window captioning (RWC) as an auxiliary aid in their movie theaters. The court noted that although the requested technology wasn't available at the time the ADA was enacted, this did not preclude requiring the defendant to exhibit RWC films. The court explained that even though a particular technology might not have been available when the ADA was enacted, the ADA and the implementing regulations must be read in light of the clear congressional intent that the ADA might require new technology to be used, as it is developed, to further accommodate individuals with disabilities. Thus, given that the closed captions for RWC-compatible films can be provided to deaf individuals during normal screening of those films, installation of the RWC can be required under the ADA because it would not change the nature of the service supplied by the defendants – i.e., screening of first-run movies to the public. However, the court denied summary judgment because it found that issues of material fact existed as to whether requiring defendants to install RWC would constitute an undue burden. The court indicated that while the defendants argued that installing such technology would be a financial burden resulting in "enormous annual financial losses," the plaintiffs countered that they were not seeking installation of the RWC in all theaters, thereby reducing the financial burden. The plaintiffs also argued that costs would be offset by tax benefits and by increased revenues from ticket sales to deaf families and their friends.

4) Fundamental Alteration

Even if an accommodation is reasonable on its face, the entity need not provide the requested accommodation if it "fundamentally alters" the essential aspects of the program. A fundamental alteration occurs either through a significant change that alters an essential aspect of the program, or through a peripheral change that gives the participant with a disability some advantage over others.

a) *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) – The ADA's basic requirement is that the need of a disabled person be evaluated on an individual basis, and that allowing a golfer with a disability that affected his ability to walk to use a golf cart during the PGA Tour instead of walking did not fundamentally alter the nature of the event. To do so there would have to be a change of an essential aspect of golf, which the court identified as "shot making." The rule that players must walk from hole to hole was not "outcome-affecting," despite the PGA Tour's argument that having the

"stamina" to walk the course was a requirement to participate in the PGA Tour, as it subjects players to fatigue. In this case, expert testimony showed that the "walking rule" was not outcome-affecting because walking a golf course was a low intensity activity and the primary impacting factor of fatigue was fluid loss from the hot weather conditions rather than energy expending from walking. Allowing a player with a disability to use a cart would not give him an advantage over his fellow participants because even if everyone walked, there was no guarantee that they would be traveling under identical conditions. Further, failure to consider the plaintiff's personal circumstances when considering whether the specific modification requested was reasonable and necessary while not requiring a fundamental alternation was out of line with the requirements of the ADA. The court ultimately determined that the walking rule was peripheral to the nature of the athletic event and thus could be waived without fundamentally altering the nature of the event. Finally, the court found that even if it accepted that walking created fatigue, the golfer's particular disability subjected him to more fatigue than that experienced by his able-bodied walking peers – even with the use of a cart – and thus the reason for the walking rule was not compromised.

b) *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144 (2d Cir. 2013) – A modification to an "essential aspect" of a program constitutes a fundamental alteration to the nature of the program and is not required under the ADA. Waiving an essential eligibility requirement – i.e., a requirement that determines an individual's eligibility for a service – would fundamentally alter that service. Whether an eligibility requirement is essential is determined on a fact-specific, case-by-case basis by consulting the importance of the requirement to the program in question. Here the court could not find, as a matter of law, that the plaintiff's proposed alternation to the state's retirement disability program was an unreasonable modification or a fundamental alteration of program requirements. Specifically, it found that the state had waived or extended deadlines in certain instances, and thus the question of whether the accommodation was reasonable required a fact-specific, individualized analysis of the disabled person's circumstances and the accommodations that might allow him or her to meet the program's standards.

c) *Tamara v. El Camino Hosp.*, 964 F. Supp. 2d 1077 (N.D. Cal. 2013) – The defendant did not establish how the service animal would fundamentally alter the function of the psychiatric ward, especially when reasonable accommodations could be made to combat concerns about disrupting patient healing, such as shutting doors to prevent the dog from being seen by others. The defendant failed to conduct an individualized assessment of the plaintiff; relying on generalized speculation about the potential threats of any animal in the psychiatric ward was insufficient to justify banning the plaintiff's service animal.

d) *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837 (9th Cir. 2004) – Concert hall staff discriminated against the plaintiff, a quadriplegic patron who used a wheelchair and service animal, when they informed her that the dog was not allowed inside due to the noises it had made at previous performances. The court determined that "yipping" was an acceptable service animal behavior, and that actions at previous

events could not ban a service animal from future ones. The concert hall's purpose would not be fundamentally altered by some noises from the dog because there was a policy to accept human disruptions of the same caliber without removing those patrons. Furthermore, the plaintiff was deterred from attending future performances based on her service animal being banned.

e) *A.H. by Holzmueller v. Ill. High Sch. Ass'n*, 881 F.3d 587 (7th Cir. 2018) – The IHSA did not discriminate unlawfully against the plaintiff, a runner with cerebral palsy, by refusing to change its qualification standards for him, because allowing a different standard for one participant would fundamentally alter the nature of IHSA's programs (competitive running events, specifically the state championship). The court noted that fundamental alteration occurs either through a significant change that affects all participants alike, or through a peripheral change that gives a disabled athlete an advantage over others. In this case, the requested accommodations would provide the latter: an advantage over others. Here, the plaintiff had the ability to compete in qualifying events but was unable to meet the qualifying running times, similar to the 90% of all runners who are not able to reach the performance threshold required to participate in the state championships. Therefore, neither the Rehabilitation Act nor the ADA required the IHSA to alter the fundamental nature of its track and field events.

## V. Programmatic Access

Title II of the ADA prohibits public entities from discriminating against qualified individuals with disabilities or excluding them from participation in, or the benefits of, their services or programs, and Title III provides injunctive relief against private entities who discriminate against individuals with disabilities in the operations of places of public accommodation.

Regulations

- 28 C.F.R. § 35.104
- 28 C.F.R. § 35.130
- 28 C.F.R. § 35.131
- 28 C.F.R. § 35.132
- 28 C.F.R. § 35.135
- 28 C.F.R. § 35.136
- 28 C.F.R. § 35.137
- 28 C.F.R. § 35.138
- 28 C.F.R. § 35.139
- 28 C.F.R. § 36.104
- 28 C.F.R. § 36.201
- 28 C.F.R. § 36.202
- 28 C.F.R. § 36.203
- 28 C.F.R. § 36.301
- 28 C.F.R. § 36.302

1) Non- discriminatory eligibility or program requirements

Individuals with disabilities must be able to meet the same "essential eligibility requirements" as non-disabled individuals, either with or without reasonable modifications to the program that do not fundamentally alter the nature of the program or create an undue burden. Essential eligibility requirements may include things like age, income, or educational background criteria. However, a covered entity may not impose eligibility

requirements that screen out or tend to screen out individuals with disabilities unless the requirements are necessary for the service, program, or activity being offered.

a) *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994) – A student with learning disabilities that caused him to repeat grades, and thereby made him over the age of 19 for his senior year of high school, requested and was denied an exception to an age limit for student athletes. The court found that the plaintiff was not an "otherwise qualified individual" because he could not meet all the program requirements in spite of his disability. The court found that failure to meet the age limit was an essential or necessary eligibility requirement for a high school interscholastic program, because it helps reduce the competitive advantage flowing to teams using older athletes, protects younger athletes from harm, discourages student athletes from delaying their education to gain athletic maturity, and prevents over-zealous coaches from engaging in repeated red-shirting to gain a competitive advantage. The court noted that the plaintiff could still be "otherwise qualified" if reasonable accommodations would enable him to meet the age requirement; however, the court found that the only possible accommodation was to waive the age limit, which was an essential requirement. Thus, the plaintiff could not meet the essential eligibility requirement and was not an "otherwise qualified" individual.

b) *Shepard v. U.S. Olympic Comm.*, 464 F. Supp. 2d 1072 (D. Colo. 2006) – Elite Paralympic wheelchair athletes brought claims under Title III of the ADA and the Rehabilitation Act alleging that the United States Olympic Committee (USOC) provided inferior programming, privileges, and financial support to disabled athletes compared to those of non-disabled athletes. The court noted that the USOC operates separate programs for Olympic athletes and Paralympic athletes, and that in order to show that a qualification is discriminatory the plaintiffs would have to show that it either screens out or tends to screen out disabled individuals, and also that it is unnecessary or nonessential. To the extent that the USOC's eligibility criteria screen out disabled individuals, the court found that the plaintiff Paralympians cannot and do not purport to be able to compete in the Olympics with or without accommodation. Instead they compete through a separate participation policy as Paralympians. Thus, it was irrelevant whether the USOC chose to provide Olympic programing only to Olympic athletes, as long as the gateway to that program operates in a nondiscriminatory manner.

c) *Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach*, 846 F. Supp. 986 (S.D. Fla. 1994) – Plaintiffs alleged violations of the ADA when the city eliminated city-sponsored programs that essentially denied disabled individuals the benefit of the city's recreational programs. As a result of budgeting issues, the city made various cuts to programs, including those in the Department of Leisure Services, effectively eliminating *all* the previously existing programs for persons with disabilities. The court noted that while many recreational or athletic activities might require a threshold level of physical or mental abilities to constitute an "essential eligibility requirement" that a disabled person cannot meet, the only "essential eligibility requirement" to the city's recreational program as a whole (a variety of individual recreational, social, and educational activities) was the request for the

benefits of a recreational program. To highlight the difference between access to a specific activity and access to a recreational program as a whole, the court used the example of a wheelchair-bound child being unable to meet the "essential eligibility requirement" to play on a soccer team, as the child would not be able to run or kick a ball. However, with regard to the "essential eligibility requirement" to access the city's recreational program as a whole, the court pointed out that even if certain physical and mental abilities were considered essential eligibility requirements, the same "non-qualifying" disabled individuals may be able to meet such requirements when reasonable modifications to the program are made. For example, the creation of a wheelchair soccer team or something of comparable recreational value within the recreation program might be considered a reasonable modification. The court therefore found violations of Title II of the ADA.

2) Reasonable Modification of Policies and Procedures

To avoid liability for discrimination, places of public accommodation must make reasonable modifications in their policies, practices, or procedures as necessary to accommodate individuals with disabilities. Such reasonable modifications shall be made when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations. As illustrated by the cases below, whether a requested modification is necessary or reasonable involves a fact-specific inquiry in light of the nature of the disability in question, the requested modification, and the cost to the organization to implement it.

a) *Baughman v. Walt Disney World Co.*, 685 F.3d 1131 (9th Cir. 2012) – The plaintiff sought modification to the policy prohibiting her from using a two-wheeled, self-balancing motorized device (Segway) for transportation in the defendant's parks. At the outset, the court noted that facilities are not required to make any and all possible accommodations that would provide full and equal access to disabled patrons; they need only make accommodations that are reasonable. In deciding what's reasonable, facilities may consider the costs of such accommodations, disruption of their business, and safety. But they must also take into account evolving technology that might make it cheaper and easier to ameliorate the plight of those with disabilities. The court found that the plaintiff's requested modification would make it easier for the plaintiff to visit the defendant's attractions, concessions, and facilities, and that if the defendant can make plaintiff's experience less onerous and more akin to that enjoyed by able-bodied patrons, it must take reasonable steps to do so. The court ultimately did not hold that the defendant must permit the use of Segways at its parks. However, the court indicated that it the defendant sought to exclude their use, it would have to prove that the Segway could not be operated safely based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

b) *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075 (9th Cir. 2004) – The plaintiff, a quadriplegic patron at a movie theater, alleged that the theater violated the ADA

when it refused to remove a "noncompanion" from a designated "companion" seat adjoining the space reserved for a wheelchair so that the patron's wife could sit next to him. The court held that the movie theater failed to make reasonable modifications in "policies, practices, or procedures" that were necessary to accommodate the plaintiff's disability. The court first looked to whether the requested modification was necessary, and determined that because the plaintiff requires an aide or companion to attend and enjoy movies at the theater, the modification requested – to ensure that his companion was seated next to him – was necessary. Second, the court determined that the requested modification was reasonable based on the specific facts, the effectiveness of the modification in light of the nature of the disability in question, and the cost to the organization that would implement it. The court found that the requested modification required "no less and no more of AMC," and therefore held that the theater must adopt a policy that ensures companion seating will be made available to individuals for whom they are designed: the companions of wheelchair-bound patrons. Third, the court found that modifications to the policy would not result in excessive financial cost or extensive administrative burden to the theater. Finally, the court found that the requested modification did not fundamentally alter the nature of the services provided by the theater.

c) *Anderson v. Franklin Inst.*, 185 F. Supp. 3d 628 (E.D. Pa. 2016) – The plaintiff in this case was a severely disabled person who required significant assistance from a personal care attendant (PCA) in order to have an opportunity to fully participate in the services offered by the defendant museum. Without the assistance of the PCA, the plaintiff could not engage in any of the interactive exhibits, use the restrooms, drink water, take necessary medications, consume food, or safely move around the museum. The plaintiff requested modification to the museum's admissions policy that charged additional and separate admission fees to government-funded PCAs, whose sole purpose is to provide severely disabled individuals with the opportunity to fully participate in the services offered by the museum. Reasonableness of requested modifications to policies, such as the museum's admissions policy, is determined by whether the modification alters the essential nature of the program or imposes an undue burden or hardship in light of the overall program. In this case the museum could not show that waiver of any and all PCA admission fees to accommodate profoundly disabled persons would cause it to incur an undue burden or fundamentally alter the nature of the benefits or services offered by the museum. Thus, the court ultimately found that it was "patently reasonable" for the museum to modify its policies and practices by waiving the general admission fees for PCAs, the admission fees for PCAs occupying temporary folding chair seats in the handicapped section of the IMAX theater, and the admission fees for PCAs to attend special events, in order for the PCAs to help their severely disabled clients.

3) Integrated Setting

Title III of the ADA requires that "Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. § 12182(b)(1)(B). The DOJ regulations under both Titles II and III include versions of this requirement: "A public entity

shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities," and "A public accommodation shall afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual." 28 C.F.R. §§ 35.130(d), 36.203(a). The Title III regulations also provide that "Notwithstanding the existence of separate or different programs or activities provided in accordance with this subpart, a public accommodation shall not deny an individual with a disability an opportunity to participate in such programs or activities that are not separate or different." 28 C.F.R. § 36.203(b).

a) *Caruso v. Blockbuster-Sony Music Entm't Ctr. at the Waterfront*, 193 F.3d 730 (3d Cir. 1999) – A wheelchair user who had attended a concert at a facility that had both pavilion and lawn seating alleged, among other things, that there was no wheelchair access to the lawn. The district court granted summary judgment for the defendant, on the theory that the wheelchair-accessible seats in the pavilion were at least as good as lawn seats, if not better, and cost the same amount. The Third Circuit reversed and remanded, chastising the district court for relying on "precisely the type of justification that the DOJ commentary finds repugnant to the ADA." The court quoted part of the DOJ's commentary to 28 C.F.R. part 36 stating that the provisions regarding integrated settings and separate benefits are "intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public accommodations are required to make decisions based on facts applicable to individuals and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do… Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities."

b) *Kalani v. Starbucks Corp.*, 117 F. Supp. 3d 1078 (N.D. Cal. 2015), *aff'd in relevant part sub nom. Kalani v. Starbucks Coffee Co.*, 698 F. App'x 883 (9th Cir. 2017) – A wheelchair-bound Starbucks customer successfully alleged that Starbucks violated Title III by orienting its wheelchair-accessible tables to face the wall, thereby preventing him from seeing or interacting with other individuals in the store, which he argued constituted part of the "Starbucks experience" that patrons without disabilities were able to enjoy. After a bench trial the court granted the plaintiff's request for injunctive relief, ordering Starbucks to locate at least one interior table so that an individual in a wheelchair could sit facing the interior of the store. The Ninth Circuit affirmed, explaining that "The district court could reasonably conclude that, by failing to provide any interior facing accessible seating, Starbucks Company deprived its wheelchair-bound customers of the opportunity to participate, to the same extent as non-disabled patrons, in the social aspects of the 'full and rewarding coffeehouse experience' Starbucks Company consciously affords its able-bodied patrons."

c) *Anderson v. Macy's, Inc.*, 943 F. Supp. 2d 531 (W.D. Pa. 2013) – A plaintiff suffering from obesity due to an underlying thyroid condition alleged, among other things, that the placement of the plus-sized women's clothing department at the back of the store, away from the regular and petite sizes, violated Title III's integrated setting requirement. The court dismissed this count of her claim because she did not allege that she was prevented from interacting with non-disabled individuals in the plus-size section or anywhere else in the store.

d) *Moeller v. Taco Bell Corp.*, 816 F. Supp. 2d 831 (N.D. Cal. 2011) – Taco Bell restaurants violated the integrated setting requirement of the ADA by having narrow queue lines that forced patrons using wheelchairs and electric scooters to line up separately off to the side.

e) *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009) – The proper inquiry in determining whether the Title II integrated setting requirement has been met is whether the setting enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible, not merely whether they have *any* opportunity for contact with non-disabled persons.

f) *United States v. Nat'l Amusements, Inc.*, 180 F. Supp. 2d 251 (D. Mass. 2001) – When there is a specific regulation governing a particular design issue, that specific provision is determinative as to whether there is a violation of the more general regulatory and statutory provisions. In this case, the Attorney General alleged that two stadium-style movie theater operators were violating Title III of the ADA because the wheelchair-accessible seating was toward the front of the theaters and thus provided inferior sightlines. The Attorney General alleged that the placement of the accessible seating violated both a specific provision of the Access Board guidelines (the ADAAG) governing wheelchair-accessible seating in assembly areas and several general provisions of the ADA, including the "integrated setting" requirement. The court dismissed the claims based on the general provisions, holding that the Attorney General could not bring a complaint for violation of the general regulatory provisions where there was a specific governing standard. Whether the theaters were ADA-compliant would depend solely on whether they satisfied the ADAAG standards.

4) Direct threat exception

Title III of the ADA, and the DOJ regulations under both Titles II and III, create an exception to the public access accommodation requirements when an individual with a disability "poses a direct threat to the health or safety of others." 42 U.S.C. § 12182(b)(3); 28 C.F.R. §§ 35.139(a), 36.208(a). "Direct threat" is defined in 28 C.F.R. §§ 35.104 and 36.104 to mean "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services[.]" The regulations also require that "In determining whether an individual poses a direct threat to the health or safety of others, a public [entity or accommodation] must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether

reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk." 28 C.F.R. §§ 35.139(b), 36.208(b).

a) *Roe v. Providence Health Sys.–Or.*, 655 F. Supp. 2d 1164 (D. Or. 2009) – A hospital patient's St. Bernard service dog created problems for hospital staff and other patients, including putrid odors, allergic reactions, and the risk of infection that could spread in the hospital. Additionally, the dog's size created difficulties for the hospital staff attempting to maneuver in the patient's room, the dog growled at a nurse on at least one occasion, and it sometimes wandered outside the room. While not banning the dog or the patient, the hospital made certain requests of the patient, including bathing the dog more frequently, keeping the door to her room closed, and using a hospital-provided HEPA filter in her room, but the patient refused to comply, and instead sued the hospital for discrimination under Title III of the ADA. The court found that the hospital had established a direct threat affirmative defense: The dog's presence created a significant risk to the staff and other patients, and the risk could not be eliminated by a modification of policies, practices, or procedures, because the hospital had suggested a variety of measures to mitigate the risks but the plaintiff had refused to consider any of them. Not only did the court dismiss the plaintiff's ADA claim, but it also granted the hospital's request for injunctive relief, prohibiting the plaintiff from bringing a service animal into the hospital when she went in for treatment.

b) *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342 (D. Ariz. 1992) – A wheelchair-bound Little League coach alleged that a policy of prohibiting him from on-field base coaching violated Title III of the ADA. He had spent three years as an on-field base coach without incident, but then the league began enforcing a policy restricting him to coaching from the dugout. The court found that the league failed to establish that the wheelchair posed a direct threat; indeed, there was no evidence that the league had conducted any kind of inquiry – let alone the required individualized assessment – to ascertain the nature of any risk, the chance of injury, or whether reasonable modifications could be made to policies, practices, or procedures to mitigate the risk.

c) *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005) – "[A] structural modification is not readily achievable within the meaning of [42 U.S.C.] § 12181(9) if it would pose a direct threat to the health or safety of others."

## VI. Architectural Access

Included within the federal regulations for the ADA are accessibility standards called the ADA Standards for Accessible Design ("Standards"). The Standards, first issued in 1991 and later updated to their current version in 2010, incorporate the ADA Accessibility Guidelines (ADAAG) and set the minimum requirements for what makes a facility accessible. They are generally technical in nature and address architectural issues that impact people with disabilities, such as accessible parking spaces, wheelchair and mobility device ramps, width of doorways, reach range, accessible restrooms, and communication barriers that are structural in nature. They were implemented to provide guidance on how to remove the architectural barriers people with

disabilities face that make it difficult or impossible for them to access government and business services and programs. Failing to remove architectural barriers can constitute discrimination under the ADA. 42 U.S.C. §§ 12182 (b)(2)(A)(iv), 12183(a); 28 C.F.R. § 35.149.

Compliance with the Standards is evaluated differently depending on whether the facility involved is an existing building or new construction. This is because the ADA takes into account the difficulty that comes with making changes to an existing structure, versus building a structure at the outset in accordance with the Standards.

Existing Facilities

For existing facilities, covered entities must remove architectural barriers when it is "readily achievable" to do so. "Readily achievable" is defined under the ADA as "easily accomplishable without much difficulty or expense." 42 U.S.C. § 128181(9). When removal of an architectural barrier is not readily achievable, the entity is still obligated to provide access to its goods, services, facilities, privileges, advantages, or accommodations through alternative methods if such methods are readily achievable. 42 U.S.C. § 12182(b)(2)(A)(v).

There are also certain parameters and exceptions applicable to existing facilities governing when and whether they must comply with the 1991 Standards or the 2010 Standards. The "safe harbor" exception, for example, provides that existing facilities that made alterations to achieve compliance with the 1991 standards before March 15, 2012, do not need to make further modifications to comply with the 2010 standards. The safe harbor exception applies on an element-by-element basis. Moreover, if an entity makes an alteration to its facilities, it must make the alteration accessible.

New Construction

The ADA requires that all newly-constructed facilities be accessible to and usable by people with disabilities. 42 U.S.C. § 12183. Generally, this means that facilities constructed after March 15, 2012 must comply with the 2010 Standards. The "readily achievable" analysis does not apply.

Regulations

- 28 C.F.R. § 35.150
- 28 C.F.R. § 35.151
- 28 C.F.R. § 35.152
- 28 C.F.R. § 36.304
- 28 C.F.R. § 36.305
- 28 C.F.R. § 36.402
- 28.C.F.R. § 36.403
- 28 C.F.R. § 36.404
- 28 C.F.R. § 36.405
- 28 C.F.R. § 36.406

a) *Chapman v. Pier 1 Imports (U.S.) Inc.*, 779 F.3d 1001 (9th Cir. 2015) – A furniture store customer who used a wheelchair filed suit against the store alleging two ADA barriers: first, the accessible customer service counter was cluttered by merchandise such that customers with disabilities were prevented from easily purchasing items; second, routes for wheelchair users were inaccessible because they were obstructed by merchandise and other items. The court found that the obstructed routes were not the "isolated or temporary interruptions in access" that are allowable under the

regulations, as the aisles were blocked on each of the plaintiff's eleven separate visits to the store over a two-year period as well as during the visit of the plaintiff's expert on a different day. The blockages resulted in a functional width of less than the 36 inches required by the Standards. The court further found irrelevant the store's evidence that aisles were the required width and clear of goods on two other occasions, because there was no dispute that the aisles were noncompliant on the eleven occasions when the plaintiff visited. Similarly, the store's policies requiring that the aisles remain unobstructed by merchandise did not establish that the obstructions were temporary. While the store contended that aisle blockages would be moved upon request or in time, the court determined that this did not make them temporary, citing DOJ interpretive authorities which explain that the presence of items in aisles is not temporary just because obstructing items in the aisles were placed there by customers and would have been moved upon request or eventually. Although the "regulations implementing the ADA do not contemplate perfect service" (citations omitted), qualification for the isolated or temporary hindrances liability exception requires a "truly *isolated* failure [] to maintain readily accessible facilities." As to the sales counter barrier, the court found that the presence of small items on an otherwise accessible sales counter did not deprive individuals using wheelchairs "of 'full and equal' access to the use of the counters for their intended use—placing items for purchase and transacting sales." Unlike the blocked aisles, the plaintiff had only encountered the "clutter" on the counter on two or three visits, and the plaintiff was able to put the merchandise he wished to purchase on the counter after the employee promptly moved the obstructing items.

b) *Kohler v. Presidio Int'l, Inc*., 782 F.3d 1064 (9th Cir. 2015) – A customer who used a wheelchair sued a retail store alleging that he encountered certain ADA barriers while shopping, including too-high checkout counters. The court found that the store's policy of having clipboards available to customers as a workaround for checkout counters that were higher than allowed by the Standards did not absolve the store of its responsibility to make the counter height ADA compliant. Citing a DOJ ADA interpretive manual, the court held that "the use of a clipboard in lieu of lowered counters is permitted only as a temporary measure, 'until more permanent changes can be made.'"

c) *Sharp v. Capitol City Brewing Co.*, 680 F. Supp. 2d 51 (D.D.C. 2010) – A restaurant patron who was quadriplegic sued a restaurant regarding various wheelchair access related architectural barriers in the men's restroom of the restaurant. The court found that he did not have standing to sue about some of the barriers because he could not demonstrate that he had suffered any "injury in fact" given the nature of his disability. Too-high grab bars did not cause him any injury in fact because he would not have been able to use the grab bar at any height. Similarly, a trash can in the stall that blocked clear floor space did not cause the plaintiff any injury in fact because he would not have been able to transfer himself to the toilet whether the trash can was in his way or not. As to the barriers for which he did have standing, the court granted in part and denied in part the patron's motion for summary judgment. The claim about the ADA-compliant toilet paper dispenser that was empty was denied, for example, because the ADA regulations permit a reasonable amount of time to "maintain" the

ADA-compliant toilet paper dispenser – i.e., to reload it with toilet paper. On the other hand, the court granted the patron's summary judgment motion on his claim that a curtain hung below a sink blocked the required clearance space, because the patron should have been able to roll his wheelchair under the sink without apprehension that damage or major inconvenience would occur as a result. Because he could not do so without such apprehension, the curtain was a barrier to his access to the sink.

d) *Ramirez v. Dist. of Columbia*, No. 99-803, 2000 WL 517758 (D.D.C. March 28, 2000) – A public school student with cerebral palsy brought suit against the city government, alleging that the city's public school system violated the ADA by failing to provide him with accessible bathroom accommodations and an accessible path of travel to the bathroom at the school he attended. Assessments of the bathrooms in question indicated that the doors leading to the bathrooms and stalls were less than the required 36 inches wide, the stalls were missing the required grab bars, single-level faucets should be installed, and the sinks were not the correct height. Further, the classroom and corridor doors had door width clearances of less than the required 32 inches, and all the doors in the student's path required far more pressure to open than the allowed 5 pounds. Because the bathrooms were inaccessible, the student was carried by a teacher or aide to the toilet. When he no longer wished to be carried to the bathroom, he parked his wheelchair at the door of the bathroom and resorted to crawling across the floor to use the toilet and sink. Granting summary judgment to the plaintiff, the court determined that while program accessibility is defined broadly by the DOJ, an accessible bathroom is a minimum requirement of a program under the ADA. Further, while program accessibility may be achieved in numerous ways, providing an aide to carry the student to a restroom daily "is an unacceptable method of compliance with… the ADA." The court also rejected as irrelevant the city's evidence that the school had instructed the student on how to maneuver his wheelchair through the bathroom door. Because the bathroom was not in compliance with the ADA Standards, it was irrelevant whether the student was actually able to enter the bathroom door.

## VII. Website Accessibility

The courts and the DOJ all seem to agree on the general principle that the ADA applies to the websites of public accommodations, and that those sites should therefore be accessible to individuals with disabilities. However, although the DOJ has previously issued notices of proposed rulemaking for website accessibility under Titles II and III, in December 2017 those rulemakings were withdrawn. *See* Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60,932 (Dec. 26, 2017). Thus, while there are industry standards that public accommodations can adopt, those standards are currently voluntary, and as the DOJ has explained, public accommodations therefore have "flexibility" in determining how to bring their websites into compliance with the ADA. Congress has repeatedly attempted to push the DOJ to clarify what that means, including in a recent letter from Senator Chuck Grassley to Attorney General William Barr requesting an

update. *See* https://www.grassley.senate.gov/news/news-releases/grassley-senators-seek-updates-further-action-justice-department-efforts-clarify (July 30, 2019).

In the meantime, courts continue to look to the language and purpose of the ADA to determine the scope of the ADA's applicability to individual entities' websites in a steady stream of lawsuits.

1) When does a website or social media page need to be accessible? – The courts are divided with regard to whether a website must be tied to a physical place of public accommodation in order to be covered by the ADA, or whether a website can be a place of public accommodation in and of itself.

   Nexus with physical place of public accommodation is or may be required:

   a) *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019), *petition for cert. filed*, Docket No. 18-1539 (U.S. June 13, 2019) – A blind plaintiff alleged that he could not order pizza through the Domino's web site or mobile app because they did not work with his screen-reading software. Focusing on the nexus between the Domino's website and app and its physical restaurants, the court held that the Title III of the ADA applied to the online ordering system because the web site and app "facilitate access" and "connect customers" to the physical restaurants, which are indisputably places of public accommodation.

   b) *Earll v. eBay, Inc.*, 599 F. App'x 695 (9th Cir. 2015) – The court affirmed dismissal of the plaintiff's ADA Title III claim, holding that eBay is not subject to the ADA because its services are not connected to any "actual, physical place."

   c) *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017), *appeal docketed*, No. 17-13467 (11th Cir. Aug. 1, 2017) – After a non-jury trial, the court found in favor of a legally blind plaintiff on his claim that Winn-Dixie was in violation of Title III of the ADA because its website was not accessible to customers using screen-reader software. Without deciding whether the website was a public accommodation in and of itself, the court held that Title III of the ADA applied to plaintiff's claim because "the website is heavily integrated with Winn-Dixie's physical store locations and operates as a gateway to the physical store locations." The court pointed out that "the ADA does not merely require physical access to a place of public accommodation. Rather, the ADA requires that disabled individuals be provided 'full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation....' 42 U.S.C. § 12182(a). The services offered on Winn-Dixie's website, such as the online pharmacy management system, the ability to access digital coupons that link automatically to a customer's rewards card, and the ability to find store locations, are undoubtedly services, privileges, advantages, and accommodations offered by Winn-Dixie's physical store locations."

   d) *Young v. Facebook*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011) – Title III of the ADA does not apply to Facebook because it "operates only in cyberspace" and therefore is

not a place of public accommodation under Ninth Circuit precedent. "While Facebook's physical headquarters obviously is a physical space, it is not a place where the online services to which [plaintiff] claims she was denied access are offered to the public." Moreover, although the plaintiff alleged that Facebook sells gift cards in retail stores throughout the country, she did not allege that Facebook owned, leased, or operated those retail stores, and "Facebook's internet services thus do not have a nexus to a physical place of public accommodation for which Facebook may be liable under the statute."

e) *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006) – Plaintiffs alleged that Target's website was inaccessible to blind customers. The court rejected Target's argument that to be in violation of the ADA, a website must deny individuals access to physical stores. The court explained, "The statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation… [I]t is clear that the purpose of the statute is broader than mere physical access—seeking to bar actions or omissions which impair a disabled person's 'full enjoyment' of services or goods of a covered accommodation." Because the website allowed customers to purchase many items that were available in Target stores, and also to "perform functions related to Target stores" such as accessing information on store locations and hours, refilling prescriptions or ordering photo prints for pick-up at a store, and printing coupons to redeem at a store, the court found that the plaintiffs had alleged a nexus between the website and the physical stores sufficient to survive Target's motion to dismiss.

No connection to physical place required:

a) *Nat'l Ass'n of the Deaf v. Harvard Univ.*, 377 F. Supp. 3d 49 (D. Mass. 2019) – In a putative class action, the plaintiffs alleged that closed captioning on Harvard's online educational videos was so poor that it made the videos inaccessible to hearing-impaired viewers. Harvard argued that its website is not a place of public accommodation and that the plaintiffs failed to allege a sufficient nexus with a good or service provided at a physical location. The court rejected this argument, citing First Circuit precedent holding that the ADA's plain terms do not require actual physical structures that individuals must physically enter for the purpose of obtaining services. Although that precedent did not address websites, and although other Circuit Courts of Appeal have adopted a nexus requirement, this court declined to do so and rejected Harvard's argument. In any event, even if a nexus were required, the court determined that the plaintiffs had sufficiently pled such a nexus by alleging that the school's online education courses were meant to extend its on-campus offerings to online users.

b) *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565 (D. Vt. 2015) – Plaintiffs alleged that Scribd, an online digital library, was inaccessible to blind individuals because it used an exclusively visual interface that was incompatible with screen reading software. Scribd moved to dismiss, arguing that it was not a place of public accommodation, but the court denied the motion. The court acknowledged the existence of a circuit split on whether a website unconnected to a physical location

can be considered a public accommodation under Title III, and that "clearly there is more than one reasonable interpretation of the language at issue here." Finding that canons of statutory construction were insufficient to resolve the issue, the court turned to the legislative history and determined that it favored the plaintiffs, because Congress intended for the statute to be construed liberally, and because "the Committee Reports suggest that the important quality public accommodations share is that they offer goods or services to the public, not that they offer goods or services to the public at a physical location." Moreover, "the Committee Reports also make it clear that Congress intended that the statute be responsive to changes in technology, at least with respect to available accommodations. … It seems likely that making websites compatible with screen reader software is the kind of advanced technology Congress was envisioning." Ultimately, the court reasoned, "Now that the Internet plays such a critical role in the personal and professional lives of Americans, excluding disabled persons from access to covered entities that use it as their principal means of reaching the public would defeat the purpose of this important civil rights legislation."

c) *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012) – Plaintiffs alleged that Netflix's video streaming web site, "Watch Instantly," violated Title III of the ADA because it was inaccessible to hearing-impaired individuals, and sought injunctive and declaratory relief requiring Netflix to provide closed captioning for all of its Watch Instantly content. Netflix moved to dismiss on several bases, including that its streaming service was not a place of public accommodation. The court denied the motion, finding persuasive the plaintiffs' argument that the website was analogous to a video rental store, and reasoning that "In a society in which business is increasingly conducted online, excluding businesses that sell services through the Internet from the ADA would 'run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.'" (quoting *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England*, 37 F.3d 12, 19 (1st Cir. 1994)). The court went on to note that while these types of web-based services did not exist when the ADA was enacted and therefore were not included in the statute, "the legislative history of the ADA makes clear that Congress intended the ADA to adapt to changes in technology." Because the Watch Instantly site fell into a least one of the general categories of public accommodations enumerated in the statute, it was covered by Title III.

2) In the absence of specific regulations, what is an entity required to do in order to satisfy its statutory obligations?

a) *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019), *petition for cert. filed*, Docket No. 18-1539 (U.S. June 13, 2019) – In moving to dismiss a claim that its website and mobile app were inaccessible to blind customers, Domino's argued that applying the ADA violated its right to due process because the DOJ had failed to enact regulations or provide meaningful guidance to specify what criteria must be satisfied. The district court dismissed the claim, but the Ninth Circuit reversed. First,

the court noted that between the ADA's clear language about "full and equal enjoyment" of goods and services, and the DOJ's consistently held position since 1996 that Title III applies to websites of public accommodations, "at least since 1996, Domino's has been on notice that its online offerings must effectively communicate with its disabled customers and facilitate 'full and equal enjoyment' of Domino's goods and services." The court then went on to address Domino's arguments regarding the absence of specific technical regulations. Domino's argued that it lacked "fair notice of what *specifically* the ADA requires companies to do in order to make their websites accessible," but the court rejected this argument, because the lack of specific regulations does not eliminate an entity's statutory obligation, and the Constitution "does not require that Congress or DOJ spell out exactly how Domino's should fulfill this obligation." The lack of specific regulations gives Domino's some flexibility in determining how to comply with the ADA, rather than absolving it of its statutory duty to comply.

b) *Reed v. 1-800-Flowers.com, Inc.*, 327 F. Supp. 3d 539 (E.D.N.Y. 2018) – A blind would-be customer alleged that on several occasions, while attempting to use the defendant's web site, she encountered multiple accessibility barriers that made her screen-reading programs ineffective. The court rejected the defendant's argument that the DOJ had primary jurisdiction over ADA compliance and therefore the court should abstain from deciding the issue because the DOJ had not yet issued regulations on website accessibility. On the contrary, the court found that "These determinations remain within the core competency of the judiciary, regardless of the DOJ's involvement in issuing guidance on accessibility… While Congress may have tasked the DOJ with providing guidance and technical expertise to develop standards that public accommodations must comply with under the ADA, it did not charge the DOJ with determining whether a defendant's actions, or lack thereof, violate the ADA." The court likewise rejected the defendant's argument that the lack of particular standards for website or mobile app accessibility implicated its right to due process, because "The lack of specific regulations do[es] not excuse non-compliance with the ADA… [T]he statutory mandate of Title III provides the Defendant ample notice of its duty not to discriminate. DOJ regulations may amplify or augment the ADA's general mandate. The absence of those regulations does not displace the affirmative obligation created by the statute."

c) *Gorecki v. Hobby Lobby Stores, Inc.*, No. CV 17-1131-JFW(SKx), 2017 WL 2957736 (C.D. Cal. June 15, 2017) – The plaintiff, who is legally blind, alleged that Hobby Lobby's website is not fully accessible to visually impaired individuals. Numerous elements on the site could not be used with screen-reading software, and the plaintiff was thereby precluded from fully accessing all of the goods and services available. The court rejected Hobby Lobby's due process claim, holding that Hobby Lobby had long been on notice that the DOJ believed the ADA applied to websites, and "The lack of specific regulations does not eliminate Hobby Lobby's obligation to comply with the ADA or excuse its failure to comply with the mandates of the ADA." The court explained that the DOJ had consistently maintained and repeatedly clarified its position, and that the Advanced Notice of Proposed Rulemaking (ANPR) made clear "that places that meet the definition of a public accommodation have a degree of

> flexibility in choosing how to comply with Title III's general requirements of nondiscrimination and effective communication – but, still, they must comply." The court also summarized the relevant legislative history: "When Congress passed the ADA in 1990, the Internet was in its infancy. However, Congress intended that the ADA address not only physical barriers, but also communication barriers. *See* H.R. Rep. No. 101-485, pt. 2, at 108. Congress also intended that the ADA 'keep pace with the rapidly changing technology of the times.' *Id*. Congress also acknowledged that technological advances may 'require public accommodations to provide auxiliary aids and services in the future which today would not be required because they would be held to impose undue burdens on such entities.' *Id*."

## VIII. Best Practices

The following tips can help you address accessibility issues as effectively and efficiently as possible:

1) *Anticipate issues and be familiar with accommodation solutions.* Brainstorm possible accommodation requests that your office may receive and develop a plan of action to address them. Research available technology and accommodation alternatives.

2) *Designate an individual in the office to handle public access compliance issues.* As noted earlier, certain employing offices are required to appoint an ADA Coordinator. Other offices might not be subject to this requirement, but those offices should still assign someone to oversee the office's efforts to comply with the ADA public access requirements. That person would become familiar with the most common access issues that might arise for that office; be responsible for liaising with OCAS and other possible providers of resources and guidance; and serve as a contact person for individuals with disabilities who have questions or are seeking accommodations.

3) *Be clear about timelines*. If accommodation requests should be submitted in advance, advertise this clearly.

4) *Contact the Office of Congressional Accessibility Services (OCAS)*. The OCAS can assist with procuring specific accommodations and services for individuals with disabilities, such as sign language interpreting and adaptive tours.

5) *Stay up to date with accessibility guidance and tips*. Visit the OCWR website for resources on accessibility.

## IX. Resources

Please see the following for more information:

- OCWR ADA training: https://www.ocwr.gov/resources-and-training
- OCWR ADA Inspection Tutorial: https://www.ocwr.gov/videos/ada-inspection-tutorial
- Preventing Disability Discrimination in the Congressional Workplace – Senate version: https://www.ocwr.gov/videos/preventing-disability-discrimination-congressional-workplace-senate-version
- Preventing Disability Discrimination in the Congressional Workplace – House version: https://www.ocwr.gov/videos/preventing-disability-discrimination-congressional-workplace-house-version
- OCWR ADA Biennial Inspection Reports: https://www.ocwr.gov/ada-public-access/ada-biennial-inspection-reports
- OCWR Tips: https://www.ocwr.gov/sites/default/files/adarevised.pdf
- The Office of Congressional Accessibility Services (OCAS) provides a variety of services for individuals with disabilities, both staff and visitors, including adaptive tours of the Capitol building, wheelchair loans, and interpreting services for hearing-impaired individuals: https://www.aoc.gov/accessibility-services