Legal Q&A
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Q. What is Title II of the Americans with Disability Act?

A. The Americans with Disability Act (ADA) is a federal law that was first enacted in 1990 and subsequently amended and updated by the ADA Amendments Act in 2008. 42 U.S.C. §12131-12134. Title II of the ADA ("Title II") specifically prohibits a public entity from, on the basis of disability, excluding a qualified individual with a disability from participating in or being denied the benefits of services, programs, and activities provided by a public entity, or discriminating against such individuals. 28 C.F.R. §35.130-152. A public entity includes any state or local government, and any department, agency, special purpose district, or other instrumentality of a state or local government. *Id.* §35.104. To determine whether an entity that has both public and private functions is truly a public entity, the following four factors should be considered: (1) whether the entity is funded 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. ADA Title II Technical Assistance Manual II-1.2000.

Q. Who is protected under Title II of the ADA?

A. The protections of Title II apply only to qualified individuals with a disability. 42 U.S.C. §12132. A qualified individual with a disability is an individual with a disability who "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 28 C.F.R. §35.104. A disability is: (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) a record of a physical or mental impairment that substantially limits one or more of the major life activities of an individual; or (3) being regarded as having such an impairment, regardless of whether an individual has an impairment or not. *Id*. §35.108.

Title II requires that the definition of "disability" be broadly construed in favor of providing expansive coverage to those who may face discrimination. *Id.* However, a city is not required to allow a person who poses a direct threat to the health and safety of others to participate in services, programs or benefits offered by the city. *Id.* §35.139. If a city believes an individual may pose a direct threat, the city must make an individualized

assessment of the individual using reasonable judgment based on existing medical knowledge or on the best available objective evidence. *Id.* The assessment should determine the nature, duration, and severity of the risk; the probability of harm actually occurring; or whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk. *Id*.

Q. Is a city required to comply with Title II of the ADA when constructing new facilities?

A. Every facility or part of a facility constructed by, on behalf of, or for the use of a city must be constructed in a manner that makes the facility readily accessible to and usable by individuals with disabilities. *Id.* §35.151(a). Facilities include "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." *Id.* §35.104.

When constructing new facilities or altering existing facilities, a city must comply with the federal 2010 ADA Standards for Accessible Design ("2010 Standards"). The 2010 Standards can be accessed on the United States Department of Justice website (www.ada.gov). Texas has also developed a set of standards – the 2012 Texas Accessibility Standards – which are generally consistent with the federal standards, but in some cases add heightened requirements for accessibility. The 2012 Texas Accessibility Standards can be accessed on the Texas Department of Licensing and Regulation website (www.tdlr.texas.gov). A city is required to adhere to both the federal and state requirements for accessibility, but if the federal and state requirements are in conflict, the state requirements should be followed provided that the state regulation is within the state's regulatory authority. *Id*. §35.151(c); Tex. Gov't Code §469.003.

Full exception to the requirements of the 2010 Standards can only be made when accessibility would make construction structurally impracticable. 28 C.F.R. §35.151(a)(2). Construction would be structurally impracticable when full compliance with the requirements is impracticable due to unique characteristics of the land that make it difficult to include or construct certain accessible features. *Id*. If full compliance is not structurally practicable, the facility must provide as much access as is structurally practicable when constructing the facility. *Id.* This exception is very limited and is not often applied. *See e.g*. *Caruso v. Blockbuster-Sony Music Entm't Ctr. at Waterfront*, 193 F.3d 730, 738 (3d Cir. 1999) (a building that must be built on stilts because of its location next to water would be an acceptable use of the exception but a building located on hilly land would not be exempt from the 2010 Standards, as buildings located on a steep grade can be accessible without destroying the integrity of the building.)

Q. Is a city required to comply with Title II of the ADA when making alterations to a facility?

A. A city is required to comply with the 2010 Standards when making alterations to a facility. 28 C.F.R. §35.151(c). Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, resurfacing of circulation paths or vehicular ways, changes or rearrangement of the structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Americans with Disabilities Act Architectural Guidelines (ADAAG) §3.5. Normal maintenance, reroofing, painting or wallpapering, or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility. ADAAG §3.5. When altering an existing facility on behalf of or for use by a city, the part of the facility being altered should be made readily accessible and usable to the maximum extent possible to accommodate as many disabilities as possible. 28 C.F.R. §35.151(b). However, a city is not required to make alterations to an historical building for accessibility purposes if such alterations would threaten or destroy the historical nature of the building, but may use alternative methods to make programs accessible to the public. *Id.* §35.150(b)(3).

Q. Is a city required to modify existing facilities to make them accessible?

A. A city is not required to modify an existing facility to make it more accessible to the public. *Id.* §35.150(a)(1).

Q. Is a city required to modify a facility that the city leases to make it accessible?

A. A city that leases a city facility to a private party is obligated to ensure that the private party operates the facility in a manner that enables the city to meet its Title II obligations. *See* ADA Title II Technical Assistance Manual II-1.3000. Similarly, when a city occupies a leased facility, it must ensure that all of the programs or services conducted in the facility are accessible to individuals with disabilities. *Id.* §6.4000.

Q. Is a city required to provide auxiliary aids and services at its council meetings?

A. Title II does not require that a city provide specific auxiliary aids or services to individuals with disabilities. Rather, a city must provide appropriate auxiliary aids and services to individuals with a qualified disability to ensure effective communication. *See* ADA Title II Technical Assistance Manual II-7.1000. Some examples of auxiliary aids or services that a city can provide include qualified interpreters, note-takers, computer-aided transcription services, written materials, assistive listening systems, open and closed captioning, videotext displays, exchange of written notes, Brailled materials, large-print materials, computer terminals, and speech synthesizers. *Id.* The length and complexity of

the communication needed will determine what sort of auxiliary aids or services should be used for effective communication. *Id*.

Q. What is the "program accessibility" requirement under Title II of the ADA?

A. The "program accessibility" standard under Title II provides that a city's services, programs, or activities, when viewed in their entirety, must be readily accessible to and usable by individuals with disabilities. ADA Title II Technical Assistance Manual §II-5.1000. This means that a city may not deny the benefits of its programs, activities, and services to individuals with disabilities because its facilities are inaccessible. 28 C.F.R. §35.149.

There are many ways that a city can fulfill the program accessibility requirement. A city can alter its existing facilities to provide the needed accessibility or construct new facilities that are built with the accessibility requirements in mind. A city can also implement structural changes in how they provide services. For example, a city could move programs and services to parts of public buildings that are accessible, designate employees to help disabled people access certain services or benefits, or move certain programs or services to fully accessible buildings. When choosing a method of providing accessibility, the city should strive to find the most integrated option that allows interaction between those with and without disabilities. *See* ADA Title II Technical Assistance Manual II-5.2000.

Q. Are there limitations to the "program accessibility" requirement of Title II of the ADA?

A. A city is not necessarily required to make each of its existing facilities accessible or take any action that would threaten or destroy the historic significance of an historic property. 28 C.F.R. §35.150. Additionally, a city is not required to take any action that the city can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial or administrative burdens. *Id.* This determination can only be made after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. *Id.* If an action would result in such an alteration or such burdens, a city is required to take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity. *Id.*

Q. What is a self-evaluation?

A. A self-evaluation is a document prepared by a city that is meant to evaluate how well the city is meeting the accessibility requirements of Title II in regard to its current services, policies, and practices. *Id.* §35.105. A city is required to allow an opportunity for

interested persons and people with disabilities to comment before the evaluation is completed. *Id.* Every city was required to complete a self-evaluation by the year 1994. If the city had more than 50 employees, they were required to maintain the self-evaluation for three years and allow members of the public to view the evaluation and certain documents related to it. *Id.* If the city has already completed a self-evaluation, it is only required to evaluate those policies and practices that were not included in the original self-evaluation. *Id.*

Q. Who enforces Title II of the ADA?

A. There are eight federal agencies that are allowed to receive Title II complaints, including the United States Department of Justice. When a complaint is filed with one of the designated agencies, the agency is required to investigate the complaint and then attempt to negotiate a settlement agreement that includes a voluntary compliance agreement between the individual and the governmental entity. A voluntary compliance agreement will address each incident, specify the remedial action that must be taken to bring the entity into compliance, provide assurances that the discrimination won't continue, and provide for enforcement of the agreement by the Attorney General. If a settlement cannot be reached, the agency will refer the complaint to the Department of Justice for a decision on whether or not to proceed to litigation. *Id.* §§35.171-.173; 35.190.

If a city has 50 or more employees, at least one person must be designated to coordinate the city's compliance with Title II requirements for accessibility. A city with 50 or more employees must also develop and adopt a grievance policy and procedure to allow for people to make a complaint when they feel accessibility is lacking in some fashion. The procedure should allow for prompt and equitable resolution of any complaints. Complaints should be sent to the designated coordinator of Title II who is tasked with investigation of any complaints. *Id.* §35.107.