Reasonable Accommodation Beyond Physical Access

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Reasonable Accommodation Beyond Physical Access

I. Introduction

The Americans with Disabilities Act of 1990 (ADA) has been called the Emancipation Proclamation for persons with disabilities[3]. The purpose and goal of the Act is to provide equal access to persons with disabilities to employment opportunities, places of public accommodation, services, and products. For the over 40 million disabled Americans, the ADA is about widening doors. Not only doors to buildings that deny physical access, but also the doors of opportunity[4].

Title I of the ADA requires employers to make "reasonable accommodations" for any employee with a known disability. Title II, which applies to public entities, and Title III, which applies to private entities providing public services, require service providers to make "reasonable modifications" so that people with disabilities can participate and enjoy those services.

Since the Act's passage, much of the litigation and efforts towards achieving reasonable accommodation has concentrated on widening the doors that deny physical access. In fact, when the ADA is discussed, most attorneys today still think of the ADA in terms of barrier free physical access to buildings. However, in the last few years the courts have began to explore the full extent of the Act's reasonable accommodation and reasonable modification requirements. As the Act enters its 10th year and as we move into the new millennium the term "reasonable accommodation" will represent much more than physical access.

A. Reasonable Accommodation Contrasted With Physical Access

This section does not discuss physical access issues such as automatic doors, ramps, handrails, or other building modifications. Instead, this section explores the recent developments in how disabled persons are using the ADA to achieve full access to

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[3] For a history of the ADA, see Reams, McGovern & Shultz, Disability law in the Untied States: A Legislative History of the Americans with Disabilities Act of 1990 Public Law 101-336 (1992).

[4] Former Attorney General Richard Thornberg said of the passage of the ADA "the ADA overcomes our past failure to eliminate attitudinal, architectural and communication barriers in employment, transportation, public accommodations, public services, and telecommunications. In short, it widens all the doors . . . mandating true access for Americans with disabilities to mainstream society."

employment and public programs and services. This section will begin with an exploration of the reasonable accommodation requirements under Titles I, II, and III. The discussion will point out areas of ambiguity and debate along the way. It will then revisit some of these unsettled areas to discuss what the courts have done and where the ADA is headed in providing equal access to persons with disabilities. This section concludes with several short case studies in which these concepts are applied.

B. Reasonable Accommodation In Disability Law

The concept of reasonable accommodation is a theme found throughout all federal legislation protecting persons with disabilities. It requires more than providing physical access to buildings or providing equal access to programs and services. Reasonable accommodations are those auxiliary services, aids, or barrier removals that must be provided so long as they do not create an undue administrative or financial burden, or do not eliminate the essential requirements of the program for which access is being sought. Undue burden is evaluated in light of the nature and cost of the accommodation, the financial resources of the facility, the financial resources of the entity, and type of operation.

II. Reasonable Accommodation And The Americans With Disabilities Act

The ADA is broken into five sections covering employment, public services, public accommodations, telecommunications, and miscellaneous provisions. Private entities are mostly affected by Title I, prohibiting employment discrimination, and Title III, requiring equal access to public accommodations. State and local governments are also covered by Title I and are additionally impacted by Title II, requiring equal access to public services. Under each title, it is unlawful for entities subject to the ADA to refuse to make reasonable accommodations, such as providing auxiliary aids and services, for otherwise qualified individuals[5]. However, the definition of reasonable accommodation and its application under each title can be quite different.

[5] 42 U.S.C. § § 12102(1), 12111(8), 12112(5)(A), 12131(2), 12182(b)(2)(a)(ii)

A. Reasonable Accommodation Under Title I Of The ADA

While the focus of this discussion is on Titles II and III, a study of the reasonable accommodation provisions in Title I is essential to understanding Titles II and III. The concept of reasonable accommodation is fairly uniform among all three titles. As such, much of the case law interpreting reasonable accommodation issues under Title I, either rightly or wrongly, has been applied to similar issues in Title II and III.[6] In addition, it is instructive to understand the Title I interactive process because currently the courts are split on whether a similar process is implicit in Titles II and III.[7]

Title I applies to any employer, public or private, who has more than 15 employees. Title I makes it unlawful for any covered employer to discriminate against an otherwise qualified individual with a disability. Discrimination under Title I includes the failure to make *reasonable accommodations* for known physical or mental limitations.[8]

1. What Is Reasonable Accommodation Under Title I?

Defining reasonable accommodation is not an easy task. The ADA, in particular Title I, has incorporated the regulations and case law from the Rehabilitation Act in defining what reasonable accommodation is.

The ADA defines reasonable accommodation under Title I as "making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and job restructuring, part time or modified work schedules reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals

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[6] For a discussion of this issue see, Burgdorf, Equal Members Of The Community": The Public Accommodation Provisions Of The Americans With Disabilities Act, 64 Temple L Rev 551 (1991).

[7] Note the courts reasoning in Johnson v. Gambrinus Company/Poetzl Brewery, 116 F. 3d 1052 (5th Cir. 1997) where the court looked to Title I employment discrimination provisions supply the framework for analyzing ADA discrimination claims under the other titles.

[8] 42 U.S.C. § 12112 (5)(A) The ADA express reference to reasonable accommodation is in contrast with the Rehabilitation Act of 1973 (29 U.S.C. § 790-796). The Rehabilitation Act, a separate statutory cause of action for disability employment discrimination, does not expressly state failure to provide reasonable accommodations is discriminatory. Instead the application of reasonable accommodations to the rehabilitation act has been achieved through case law and agency regulations.

with disabilities."[9] Inherent in this definition is barrier free access to employment opportunities.

This same theme is carried through in the regulations implementing Title I. The regulations provide three explanations of how employers are to meet the reasonable accommodation requirement:

- First, employers have to make architectural or structural changes to accommodate persons with disabilities both at their workstations and at public non work areas such as lunch rooms;[10]
- Second, employers must make changes to duties and assignments to accommodate a person's disability;[11]
- Third, when determining what accommodation is reasonable, an employer should "initiate an informal, interactive process" with the employee.[12]

The same general themes of providing equal access to persons with disabilities by making structural and program changes is carried over to Titles II and III. However, the interactive process is unique to Title I.

2. How Does the Interactive Process Work?

When an employee requests an accommodation, the employer may[13] need to initial an informal, interactive process to determine the precise limitations and potential reasonable accommodations. The interactive process refers to discussion between the employer and the disabled employee regarding the employees limitations and possible accommodations. The regulations outline a four step process.

Step One: Analyze job to determine essential function
Step Two: Determine with employee how disability limits essential function

[9] 42 U.S.C. § 12111(9) (According to Senate Report 101-116, p 31, the list of reasonable accommodations is not meant to be exhaustive but to provide general guidance on the types of modifications that are required)
[10] 29 C.F.R. § 1630.2 (o)(2)(i)
[11] 29 C.F.R. § 1630.2 (o)(2)(ii)
[12] 29 C.F.R. § 1630.2 (o)(3)
[13] There is a distinct emphasis on the word may. The 9th Circuit has held that employers do not have an absolute obligation to engage in an interactive process. Failure for an employer to engage in this process does not create liability under the ADA. Barnett v. U.S. Air, Inc., 157 F.3d 744 (9th Cir. 1997).

Step Three: Identify accommodations to over come limitations; determine effectiveness and feasibility

Step Four: Consider Employee's performance and employer selects accommodation appropriate for employee and employer

The goal of the interactive process is to allow the employer and employee to reach a mutually agreed upon resolution to the employees requested accommodation.

3. The Undue Hardship Defense

While the demand upon employers to make reasonable accommodations is strict, it is not unlimited. The ADA provides that employers need not make any accommodation that would impose an undue hardship on the business.[14] An undue hardship means that there will be significant difficulty or expense to provide the accommodation.[15] The legislative history indicates that an undue hardship also includes fundamental alterations to a program or service.[16] In addition the courts have consistently ruled that administrative burdens can also constitute an undue hardship.[17] The same concepts are applied to Titles II and III under respective undue burden tests.

The act and the regulations list several factors that are to be used when determining whether an undue hardship exists. Specifically the courts are to consider: 1)nature and cost of the accommodation, 2) the financial resources of the facility, 3) the financial resources of the entity, and 4) type of operation.[18] These same factors are repeated in both the Title II and Title III arenas as well.

4. The Relationship Between Titles I, II, and III

Out of the three titles, Title I has received the most attention by the courts. The above overview of the reasonable accommodation provisions of Title I is far from being exhaustive or complete. However, many of the emerging issues in Title I and Title II are closely related to similar issues that have already been litigated under Title I. In addition,

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[14] 42 12112 (b)(5)(A). Note, however, that undue hardship is considered a defense to, not an element of reasonable accommodation. As such, most courts will place the burden upon the employer.

[15] 29 C.F.R. § 1630.2 (p)(1)

[16] Senate Comm. on Labor and Human Resources Report, The Americans With Disabilities Act of 1989, S. Rep No. 116, at 35 (1989)

[17] Dean v. Municipality of Metropolitan Seattle Metro, 708 P.2d 393 (Wa Sup Ct 1985).

[18] 42 U.S.C. § 12111 (10) and 29 C.F.R. § 1630.2 (p)(2)

all three titles borrow heavily from decisions made under the Rehabilitation Act. As such, there has been a strong tendency by the courts to borrow from Title I when addressing Title II and III issues. While it is debatable whether this practice is beneficial or consistent with legislative intent, this brief introduction to Title I should help to provide a basis for understanding the related provisions and issues emerging in Titles II and III.

B. Reasonable Modification Under Title II of the ADA[19]

Title II prohibits public entities[20] such as cities, local districts, and states from excluding a qualified individual with a disability from participation in services, programs or activities provided by the entity. The ADA defines a qualified individual as an individual with a disability who with or without *reasonable modification* meets the essential requirements for participation in the program or service. In this context reasonable modification means: [21]

- Modifications of rules, policies, or practices;
- Removal of architectural , communication, or transportation barriers; or
- Provision of auxiliary aids and services needed for a person with a disability to obtain a public service.

While each of these areas has distinct issues, in application these areas largely blend together. As such, entities seeking compliance with the Act will often need to address all three when responding to a request for a reasonable modification.

1. Modifications Of Rules, Policies, Or Practices

Public entities required to modify their rules, policies, or practices so as to allow equal access to persons with disabilities to participate in or receive the benefits of the services, programs, or activities of the entity unless such a modification would create an

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[19] Note the use of the term "reasonable modification" instead of "reasonable accommodation." The concept is essentially the same and it is not uncommon for courts to use these terms interchangeably.
[20] The term public entity is still being defined by the courts. For some time there has been considerable debate about whether Title II applies to traditional state functions such as prisons and parental rights. The issue is whether such services are provided by a public entity as defined by the Act. Just last year the Supreme Court held that state Prisons fall squarely within the statutory definition of the ADA, but limited its holding to state prisons. Pennsylvania Department of Correction v. Yestkey, 118 S.Ct.1952 (1998).
[21] 42 U.S.C. § 12131 (2)

undue burden or fundamentally alter the nature of the program.[22] This provision of the Act holds the most breadth for asserting the rights of individuals with disabilities. The most common areas for disputes under this provision are: eligibility requirements, use of aids that violate existing rules, and integrated settings.

Many government programs contain eligibility requirements. While some eligibility requirements are essential for safety or other welfare issues, many are enforced strictly for administrative convenience. It is the latter that are most susceptible to attack under the ADA.

An example would be programs that require the use of a drivers license for identification when paying a check, or for use in admittance. These programs use drivers licenses as a verifiable and reliable source for identification. However, a person with a disability who can not drive, will be unable to obtain a drivers license and will be unlawfully excluded from this service or program unless the public entity makes a reasonable accommodation in accepting some other form of identification.

Another large issue in this area is whether an individual with a disability has the right to use an auxiliary aid or service of their choice when the use of that aid or service conflicts with existing rules, policies, or practices. The most frequently cited example is the use of guide dogs in areas that prohibit animals. Absent a fundamental alteration in the program, or an undue burden on the public entity, failure to accommodate the use of that aid or service will be illegal discrimination. While most service animal issues are relatively settled, litigation on this issue for other aids and services is increasing in frequency and is taken up below under the heading Testing the Boundaries.

When providing access to programs or services, the public entity has an obligation to do so in an integrated setting. It is impermissible for an entity to use rules or policies to segregate persons with disabilities. The act contemplates that separate services are acceptable for disabled and non disabled persons where segregation will achieve equal access to opportunities.[23] However, services are to be provided in the most integrated setting appropriate.[24] Furthermore, even where separate services are allowed,

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[22] 28 C.F.R § 35.164
[23] 28 C.F.R. § 35.130 (b)(1)(iv)
[24] 28 C.F.R. § 35.130 (d)

a public entity may not deny a person with a disability the opportunity to participate in a program or service that is not separate.[25]

The comments to the regulations give these examples as to what would be appropriate: "A person who is blind may wish to decline participating a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit as his or her own pace with the museums recorded tour. In addition, it would not be a violation of this section for a public entity to offer recreation programs specially designed for children with mobility impairments. However, it would be a violation of this section if the entity then excluded these children from other recreational services for which they are qualified to participate where these services are made available to non disabled children."[26]

2. Removal of Architectural, Communication, Or Transportation Barriers

Removal of architectural barriers is the most commonly perceived form of providing a reasonable accommodation. In its simplest form the Act prevents a public entity from preventing an individual with a disability from participating in a public program or service because the facility being used is inaccessible or unusable to the person with the disability. [27] While further discussion on this issue is beyond the scope of this section, it is important for practitioners to recognize that allowing a program or service to be inaccessible is illegal discrimination under the Act.

In addition to providing barrier free access, public entities are also required to ensure that its communications with persons covered under the Act are as effective as their communications with other members of the community.[28] This means public entities must provide auxiliary aids and services when requested by individuals with disabilities to allow them equal access to public programs and services. Examples include the use of TDD/TTY services for public entities that communicate by telephone; the posting of signs to direct individuals from inaccessible areas to accessible areas; and providing information about accessible services, programs and activities. The issues

[25] 28 C.F.R. § 35.130 (b)(2)
[26] Appendix III 28 C.F.R. Part 35, comment on § 35.130(b)(2)
[27] 28 C.F.R. § 35.149

surrounding which aids and services are appropriate and which ones are required are further discussed below.

Transportation barriers are covered by Subtitle B of Title II. Subtitle B applies to all public transportation agencies and providers. The focus of Subtitle B is to ensure that public transportation provides barrier free access to transportation systems or provides transportation alternatives to persons with disabilities. Like the barrier free issues, Subtitle B is beyond the scope of this section. However, it is important to keep in mind that, while Subtitle B exclusively deals with public transportation, the reasonable modification requirements may also apply to public transportation as well.

3. Auxiliary Aids and Services

Aside from removal of barriers, the second most common requested accommodation of public entities involves the use of auxiliary aids or services. Public entities are required to provide auxiliary aids and services that are necessary to guarantee that persons with disabilities have equal opportunities to use public services, programs and activities. The definition of what constitutes an auxiliary aid and service has been elusive to courts and practitioners and subject to much confusion. The term has been divided into four groupings:[29]

- All "effective methods of making aurally delivered materials available to individuals with hearing impairments"
- All "effective methods of making visually delivered materials available to individuals with visual impairments";
- "Acquisitions or modification of equipment or devices"; and
- Any "other similar services or actions."

The Department of Justice (DOJ) has set the standard for acceptable auxiliary aids and service to be any aid or service that ensures communications with individuals with disabilities will be as effective as communications with others. However, the Departments Regulations have been criticized for being overly focused on communication disorders and neglectful of other disorders such as developmental

[28] 28 C.F.R. § 35.160(a)

disabilities and mental impairments. "The regulations and DOJ's commentary seem to ignore these conditions, and it is not clear if this was deliberate or merely an oversight. One could argue that the cat call language "other similar services and actions" is sufficient to cover these other conditions."[30]

Public entities are required to provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice. This express choice is to be given primary consideration by the public entity.[31] However some debate currently exists as to how much weight the individual's choice should be given. Unlike Title I, Title II does not contain any provisions for an interactive process for determining the accommodation to be used. This issue is explored further below under the section Testing the Boundaries.

C. Reasonable Modification Under Title III Of The ADA

Title III applies to private business or commercial facilities that engages in interstate or foreign commerce. The act lists 12 categories of services that fall under Title III. While the categories listed are meant to be exhaustive, the examples given in each category are not.[32]

Title III requires that places of public accommodation may not "discriminate on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation."[33] Title III mirrors the reasonable modification language in Title II by making it discriminatory for private entities to refuse to make *reasonable modifications* in policies, practices, or procedures necessary to afford access to individuals with disabilities.[34]

Reasonable modification under Title III means the same as under Title II. While reasonable modification involves the removal of architectural barriers, is also requires that places of public accommodation be free of discrimination by modifying its rules,

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[29] 28 C.F.R. § 35.104
[30] John Parry, Regulation, Litigation and Dispute Resolution Under the Americans with Disabilities Act: A Practitioner's Guide to Implementation, at 71 (1996).
[31] 28 C.F.R. § 35.160(b)(2)
[32] 43 U.S.C. § 12181(7)
[33] 42 U.S.C. § 12182(a)
[34] 42 U.S.C. § 12182(b)(2)(A)(ii)

policies, or practices; removing architectural, communication or transportation barriers; and providing auxiliary aids and services needed for a person with a disability to participate in a public service.[35]

1. Modification of Rules, Policies, or Practice

Public Accommodations must make reasonable modifications in policies, practices, or procedures to allow persons with disabilities access to all the goods, services and other opportunities they provide. Public accommodations are expected to examine their rules, policies, and practices and eliminate barriers to equal program access. As with Title II, the most common areas for disputes under this provision are: eligibility requirements, use of aids that violate existing rules, and integrated settings.

The Department of Justice identifies three types of eligibility screenings that are prohibited. First, it is unlawful for a place of public accommodation to establish criteria that would bar all people with disabilities from enjoying an accommodation or would exclude them based on the expressed wishes of other patrons. Second, it is unlawful for places of public accommodation to attempt to compel people to "unnecessarily identify the existence of a disability." Third is it unlawful for places of public accommodation to attempt to impose requirements that unnecessarily burden individuals with disabilities. The regulations specifically provide that is it unlawful for entities to charges individuals with disabilities to cover the cots of measures such as the provision of auxiliary aids.[36]

A place of public accommodation may, however, use eligibility criteria that "impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks and not on mere speculation, stereotypes or generalizations about individuals with disabilities."[37]

Rules or programs prohibiting the reasonable use of auxiliary aid and service are illegal under the Act. The regulations under Title III specifically address the guide dog issue mentioned in the discussion of Title II. The Title III regulations provide that "a

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[35] 28 C.F.R. 36.302

[36] 56 Fed.Reg. 35564 (July 26, 1991). 28 C.F.R. § 36.301(c). This same concept was recently applied to Title II when a Missouri federal court held that the state's fee for disabled parking placards violated the ADA. McGarry v. Director, Dep't of Rev., No. 96-4249-Cv-C-66BA (W.D. Mo. May 20, 1998).

[37] 28 C.F.R. § 36.301(b)

public accommodation *shall* modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability."[38] However, despite this express provision, the accommodation of auxiliary aids and services is as large an issue under Title III as it is under Title II. Further discussion on this issue is taken up below under the heading Testing the Boundaries.

Title III also requires that an individual with a disability be served in the most integrates setting appropriate.[39] Title III also allows a person with a disability to choose to participate less integrated programs or services.[40] Thus the Act demonstrates a preference for individual choice over an across the board integration.

2. Removal of Architectural Or Communication Barriers

Like Titles I and II, Title III requires public accommodations to remove architectural barriers. While further discussion on this issue is beyond the scope of this section, it is important for practitioners to recognize that allowing a program or service to be inaccessible is illegal discrimination under Title III of the Act.

Unlike Title II, the regulations implementing Title III do not contain a separate provision pertaining to eliminating communication barriers. Rather, the Title III regulations address communication barriers under the provision pertaining to auxiliary aids and services. The regulations provide that "a public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities."[41] The meaning of effective communication used here is the same as it is in Title II.

3. Provision of Auxiliary Aids and Services

It is unlawful for a place of public accommodation to discriminate against an individual with a disability differently. Failure to provide auxiliary aids and services is a form of unlawful discrimination unless making the aids or services available would

[38] 28 C.F.R. § 36.302(c).
[39] 42 U.S.C. § 12182 (b)(1)(A)(iii)
[40] 28 C.F.R. § 36.203
[41] 28 C.F.R. 36.303 (c)

impose an undue burden or fundamentally alter the nature of the goods or services, is a prohibited form of discrimination.[42]

The courts are currently split on whether a balancing under Title III is required. Under those jurisdictions that apply a balancing test the court balances the needs of the disabled individual with the burdens to the public accommodation in complying with the disabled individual's requested accommodation. Under those jurisdictions who reject the balancing approach, the burden to the business is treated as an extrinsic defense to the denying the accommodation under an undue burden / fundamental alteration analysis. This issue is explored below in the section titled Testing the Boundaries: Who decides What is Reasonable?

As with Title II, Title III regulations divide auxiliary aids and services into four groups:[43]

- All "effective methods of making aurally delivered materials available to individuals with hearing impairments"
- All "effective methods of making visually delivered materials available to individuals with visual impairments";
- "Acquisitions or modification of equipment or devices"; and
- Any "other similar services or actions."

The same issues that arise in the Title II context of whether non communicative disabilities are covered, arise here as well. Likewise, the issue is commonly resolved by arguing that the broad language in the fourth grouping would be inclusive of any non communicative disabilities. In addition, the regulations to Title III refer to specific categories of auxiliary aids that public accommodations need to provide:

- Telecommunication devices for the deaf – the regulations expressly provide that public accommodations who allow patrons to make phone calls, shall make available upon request a TDD.[44]

[42] 28 C.F.R. 36.302 (a)
[43] 28 C.F.R. 36.303 (b)(1-4)
[44] 28 C.F.R. 36.303 (d)

- Closed Captioning Decoders – the regulations also include a requirement that places of lodging that provide televisions in five for more guest rooms shall provide a means for decoding captions.[45]
- Alternatives – the regulations also contemplate that where providing auxiliary aid or service will result in an undue burden or fundamentally alter the service, the public accommodation still has an obligation to accommodate the disabled person up to the point where the burden or alteration begins.[46]

In addition to the undue burden / fundamental alteration limitation, public accommodations are also not required to provide devices or services that are of a personal nature such as wheelchairs, eyeglasses, or hearing aids.[47]

D. The Undue Burden and Fundamental Alteration Defense Under Titles II and III

Like the Title I provisions, the mandates under Titles II and III to provide for reasonable accommodations is not unlimited. Under Title II public entities are not required to make an accommodation that "would result in a fundamental alteration in the nature of a service, program, or activity or [result] in undue financial and administrative burdens."[48] Under Title III public accommodations need not make an accommodation that would fundamentally alter the nature of the good, services, facilities privileges, advantages, or accommodations being offered or would result in an undue burden."[49]

1. Undue Burden

Undue burden means significant difficulty or expense. When determining whether a requested modification under either title unduly burdensome the courts will look to the factors enumerated in Title I: 1)nature and cost of the accommodation, 2) the financial resources of the facility, 3) the financial resources of the entity, and 4) type of operation.[50]

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[45] 28 C.F.R. 36.303 (e)
[46] 28 C.F.R. 36.303 (f)
[47] 28 C.F.R. 36.306
[48] 28 C.F.R. § 35.150(a)(3) and 28 C.F.R. § 35.164
[49] 28 C.F.R. § 36.303 (a)
[50] 42 U.S.C. § 12111 (10) – this same set of factors is repeated in 28 C.F.R. § 36.104 for Title III, however no similar set of factors have been enumerated for Title II. Because these factors derive from § 504 of the

While a covered entity need not make unduly burdensome modifications, the Senate Report accompanying the ADA makes it clear that if providing an auxiliary aid or service would be unduly burdensome, the covered entity is still required to furnish an alternative auxiliary aid or service that would not result in a hardship to the entity.[51] Additionally, the existence of outside moneys to cover the costs of implementing the modification may mitigate the burden or hardship.

2. Fundamental Alteration.

Modifications are not considered reasonable and do not have to be made under either Title II or Title III if they would alter the fundamental nature of the covered entity's program or service. The United States Supreme court introduced the fundamental alteration concept in the context of disability discrimination in Southeastern Community College v. Davis.[52]

The burden of proving the fundamental alteration is on the service provider. However, the DOJ technical assistance manual for Title III states that even if providing a particular auxiliary aid or service would result in a fundamental alteration, it does not relieve the entity of its obligation to ensure effective communication.[53] The DOJ has advised similarly for Title II, stating that just because one particular action would result in an undue burden or alteration does not relieve a public entity from its obligation to provide overall program accessibility. In that case, a public entity would have to take other steps necessary to ensure that disabled individuals receive the benefits or services.[54]

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rehabilitation act courts have summarily applied these factors to Title II cases. Davis v. Southeastern Community College, 574 F.2d. 1158 (4th Cir. 1978).

[51] Senate Comm. on Labor and Human Resources Report, The Americans With Disabilities Act of 1989, S. Rep No. 116 at 63 (1989)

[52] 442 U.S. 397 (1979). The Davis court was addressing the issue in the context of the Rehabilitation Act. The ADA does not expressly refer to a fundamental alteration. However, because much of the ADA was meant to expand the Rehabilitation Act, the Department of Justice in its regulations, and the courts in their opinions have adopted the fundamental alteration defense into the ADA.

[53] Department of Justice Technical Assistance Manual § III - 4.36.

[54] Department of Justice Technical Assistance Manual § II -7.1.

While the Act and corresponding regulations have provided strong guidance to how disabled persons should be accommodated, many ambiguities remain. As more people with disabilities come to recognize their rights under the ADA, the boundaries of the Act will be tested and it is likely new responsibilities for public entities and service providers will emerge. Below is a summary and discussion of a few of the issues that have recently emerged.

A. Defining The Reasonableness Standard

The courts are currently split on what reasonableness means. Some courts have adopted a balancing approach similar to a tort standard. Under this view the courts inquire whether the service requested is reasonable under the circumstances. In analyzing each case, these courts weight the interests of the disabled person against the burdens imposed on the service provider.

However, other courts have taken a more strict approach. Under this view of the ADA, the first inquiry is whether the requested aid or service will reasonably address the disabled person's disability. If so, then the entity is bound to provide that aid or service unless doing so would . Under this approach, the undue burden / fundamental alteration analysis is a distinctly separate defense. While under the balancing approach, the undue burden and fundamental alteration illustrates one extreme in the balancing.

To illustrate the distinction between these approaches, take the situation where a blind person is needing the use of an assistance animal in a restaurant. The restaurant, does not wish to have the animal in the dining area. The difference among the two views is how they decide what the accommodation is.

Under the balancing approach, the Act of allowing the animal and making an exception to the rule is the accommodation. For this court the question then becomes what is the costs vs. benefits of making this exception. Under this view, courts will often take into consideration any alternatives put forth by the restaurant, such as using an escort instead of the animal. The policy driving these courts is that an individual's choice of how to compensate for their disability should be tempered by an economic concern that service providers should only be held responsible to provide the most cost effective aid or service.

Under the alternative view, the focus of the court would be on the assistance animal as the accommodation. This court will first ask whether the animal reasonably accommodates the individuals disability. If so, then the individual is allowed to use the animal and it is up to the restaurant to articulate a reason why the animal presents an unduly burdensome or fundamental alteration to the restaurant. If the restaurant is successful, then the court will allow the disabled person to choose another alternative. Normally under this approach, at no time does the restaurant have a voice in what aid or service should be allowed. The policy behind these decisions is that the disabled individuals right to choose how to compensate for their disability is stronger than the entity's right to chose the least costly method.

The view a court has no this issue is often dispositive in whether the plaintiff is successful in their ADA claim. A defendant is more likely to prevail where their concerns are considered in a balancing. Is significantly more difficult for a defendant to prove that the accommodation is unduly burdensome than it is to prove that an alternative aid may be more reasonable under the circumstances. Likewise, where a plaintiff is seeking to have a specific accommodation made in a court that values individual choice, the plaintiff is more likely to prevail than where they must argue that the benefits of a more costly accommodation outweigh the benefits of a less expensive option.

The first circuit case illustrating this difference was a 5th circuit opinion where a blind man challenged a brewery's policy of refusing to allow guide dogs into the facility.[55] Citing health and safety regulations, the brewery maintained that other accommodations that would be less burdensome could be made in lieu of the assistance animal. In response the court, looked to Title I for guidance and determined that in discrimination suits brought under the ADA the Plaintiff has the burden of proving that a modification was requested and that the requested modification was reasonable.[56] "If the plaintiff meets this burden, the defendant must make the requested modification unless the defendant pleads and meets its burden of proving that the requested modification would fundamentally alter the nature of [its service]."[57]

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[55] Johnson v. Gambrinus Company/Poetzl Brewery, 116 F. 3d 1052 (5th Cir. 1997).
[56] Johnson at 1058
[57] Id.

In Martin v. PGA Tour, Inc, the District Court of Oregon adopted the 5th circuit approach.[58] In Martin the plaintiff requested that the PGA modify its rules prohibiting golf carts because the plaintiff had a disability that prevented him from walking for prolonged periods. In assessing his claim the court first looked to see if the requested accommodation was reasonable in the sense that it covered the claimed disability. "With respect to this element the use of a golf cart is certainly not unreasonable."[59] After finding that the PGA could not prove that the use of the cart presented an undue burden or fundamental alteration the court found in favor of the plaintiff.

B. Voice – Who Decides What Is Reasonable?

While ultimately, if brought to litigation, it will be the courts who decide what is reasonable, a practical problem exists for service providers when asked by a person with a disability to accommodate that disability in a specific way. Does the service provider need to follow exactly what has been requested of them? Or does the service provider have a say in what accommodations are to be made? In essence, the issue for these parties is what amount of input, if any, does the service provider have in deciding whether the requested accommodation is reasonable. The more global issue is whether the interactive process in Title I implicitly applies to Titles II and III.

This issue, the voice issue, is closely linked to the reasonableness issue above. In fact, those courts who adopt a balancing approach usually assume that service providers will have some voice in what accommodations should be made. Conversely, those courts who reject the balancing approach may see the service provider as having no role to play whatsoever in the decision. However, such exact lines can not always be drawn. The reason is that the voice issue shifts the focus of when service providers have a voice, to how much of a voice should be given. Hence, regardless of where the courts place in the analysis the role of the service provider, there exists much uncertainty about where the limits are drawn on how much voice each of the parties have in determining whether the requested accommodation is unduly burdensome or constitutes a fundamental alteration.

[58] Martin v. PGA Tour, Inc., 994 F.Supp. 1242 (D. Or. 1998).
[59] Martin at 1248

The DOJ Comment to the Title II regulations section 35.160 state "The public entity shall honor the choice *unless it can demonstrate* that another effective means of communication exits or that use of the means chosen would not be required under § 35.164" (the undue burden provision). Application of this view is best demonstrated in a recent Massachusetts case where a pregnant[60] nursing student was denied a request to view patient records at home, an activity required for graduation. The court rejected the Plaintiff's contention that the university was required to let her view records at home because the court found that the university had offered her several reasonable modifications, including taking an incomplete and doing clinic work under her doctor's restrictions.[61]

New York courts have given the service provider a large voice in the determining whether a requested accommodation presents an undue burden. Recently a New York court held that a student's request for distance learning was not a reasonable accommodation. Noting that the college offered to accommodate the plaintiff in other ways the court stated that it "does not wish to substitute its judgment for that of experienced education administrators and professionals."[62] This reasoning closely parallels the legislative intent behind the interactive process.

This same approach is also found in Title III cases. In Washington DC, a Federal Court in a Title III case held that a review course for public accountants did not have to automatically provide sign language interpreters for all deaf students requesting them. Instead it was allowed to make a case by case determination as to what accommodations would best provide each of the students with effective communication. [63]

The District Court of Oregon has rejected the position that the service provider should have any voice in deciding whether the accommodation is reasonable.[64] (note that Green is also illustrative of the courts rejection of the balancing approach discussed above). In Green the court held that a deaf resident was allowed to keep his non-certified

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[60] Note that under normal circumstances a pregnant woman is not covered under the Act, however in this case the plaintiff was experiencing pregnancy related complications which the court found to be covered under the ADA.
[61] Darian v. University of Massachusetts at Boston, 980 F. Supp. 77 (D.Mass. 1997).
[62] Maczzczyj v. New York, 956 F. Supp. 403 (W.D. N.Y. 1997).
[63] United States v. Becker CPA Review, NO 92-2879 (D. D.C. 1993).
[64] Green v. Housing Authority Of Clackamas County, 994 F. Supp. 1253 (D. Or. 1998).

assistance animal in his apartment despite the housing authority's offer to install flashing lights. "Under Title II . . . a modification to a rule must be made unless it causes some undue burden. Congress could have empowered the public entity with an evaluate process beyond the impact to the public entity itself – and did not."[65] As such, the court found that the Act did not contemplate a process of the housing authority to voice its concerns about whether the dog was certified or whether the flashing lights were a reasonable substitute. Rather, the only concern the housing authority could voice was whether there was an undue burden or fundamental alteration that would result from the requested accommodation. "The [Congressional] intent of Title II, . . . was to balance inequities [not equities]."[66]

C. Quality of Aids and Auxiliary Services

Already we discussed under Title II how there is some ambiguity in the regulations as to whether the auxiliary aids and services provisions apply to non-communication related disabilities. However, assuming it has been established that the disability is one that is due an auxiliary aid or service under the ADA, a new issue emerges as to what the quality of that aid or service should be.

This issue has been most recently litigated in the context of interpreters. Both Title II and III require an interpreter that is provided to a person with a disability to be "qualified". The Act's regulations provides that a "qualified interpreter" is one "who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary."[67]

Several state courts have interpreted this language to require that an interpreter be certified and taken from the Registry of Interpreters for the Deaf, Inc.[68] However, a recent 9th Circuit opinion has held that certification is not necessary for the interpreter to be qualified under the Act.[69] The court held that "the DOJ recognized the concerns of many commentator that, absent a clear definition of the phrase, 'qualified interpreter'

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[65] Green at 1253
[66] Id.
[67] 28 C.F.R. § 35.104
[68] DeLong v. Brumbaugh, 703 F. Supp. 399 (W.D. Pa. 1989); Clarkston v. Coughlin, 145 F.R.D. 339 (S.D. N.Y. 1993).

would be interpreted to mean any available interpreter. The definition promulgated by the DOJ 'focuses on the Actual ability of the interpreter in a particular interpreting context to facilitate effective communication between the public entity and the individual with disabilities.' 28 C.F.R. Part 35, App. A."[70]

IV. Case Studies

The following hypothetical cases are meant to illustrate and apply the concepts discussed above.

A. The Traffic Stop

Larry is a hearing impaired gentleman in this late 60s. In addition to his deafness, Larry has also began to show signs of Parkinson's disease. Late in the evening on December 16, Larry was pulled over. Due to the holidays, the police in Larry's town were particularly susceptible to drunk driving. The police officer had seen Larry driving at inconsistent speeds and was swerving from side to side.

When the officer approached the vehicle he asked Larry to step outside. Once outside of his vehicle, he requested that the officer provide an interpreter because he was deaf. The officer refused, and instead produced a pad of paper and wrote "this should do, I pulled you over because you were swerving, have you been drinking?" Due to his Parkinson's and his nervousness from being pulled over Larry's hand shook as he tried to write. On the paper he scrawled out that he wanted an interpreter, however Larry's hand writing was illegible. Noticing Larry's swaying and his being visibly nervous, the office decided to arrest Larry for driving while intoxicated. Once they got to the police station an interpreter was provided and Larry was able to explain his situation. He was later released that night without any charges.

Larry sues the city under Title II of the ADA (and other common law causes of action) for failing to provide him with a reasonable accommodation. Assume Larry had not been drinking, what result? Does it matter if Larry had been drinking?

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[69] Duffy v. Riveland, 98 F. 3d 447 (9th Cir. 1996).
[70] Id. at 455.

B. The Grand Canyon

Jill and Tom were vacationing in the Grand Canyon. Jill is blind and requires the use of a guide dog (Jake). Tom, her husband is not blind and it is common for Tom to assist Jill in situations where Jake can not go or where it would be easier to have Tom help.

While on a day hike through a part of the national park that encompasses the Grand Canyon with Jake, Tom and Jill are approached by a park ranger. The ranger informs them that it is unlawful for them to have Jake in the park because they have had problems with domesticated animals chasing wildlife. Tom informs the Ranger that Jill is blind and that Jake is a guide dog. None the less, the ranger instructs them to turn around and to return Jake to their vehicle. In addition, the ranger admonishes Tom and Jill because is dangerous for a blind person to be out on the trail because there are often steep drop-offs to the side of the trail in parts without handrails.

At this Tom becomes angry and begins to lecture the ranger on the rights of the disabled and the virtues of the ADA. The ranger and Tom get into a verbal disagreement which results in the Ranger writing Tom and Jill a ticket for illegally having a domesticated animal in the park.

Will Jill and Tom have to pay the fine? Does it matter that Jill said nothing during the encounter? Should it? What if instead of a trail, Jill wanted Tom's assistance in using one of the public restrooms in the park and the Ranger refused to allow Tom to go with her.