



THE AMERICANS WITH DISABILITIES ACT
DISCRIMINATION IN PUBLIC SERVICES
TITLE II

February, 2002

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**TITLE II OF THE AMERICANS WITH DISABILITIES ACT
DISCRIMINATION IN PUBLIC SERVICES**

1. INTRODUCTION: TITLE II OF THE AMERICANS WITH DISABILITIES ACT, SUBTITLE A, 42 U.S.C. ' 12131 *ET. SEQ.*

1. Scope of discussion

1. discrimination by public entities on the basis of disability, enforced by the Department of Justice, 28 C.F.R. Part 35. See also, Department of Justice, Title II Technical Assistance Manual Covering State and Local Government Programs and Services
2. separate requirements for public transportation under subtitle B of Title II, enforced by the Department of Transportation, 49 C.F.R. Part 37.

2. Purpose of Title II

1. extends the anti-discrimination requirements of Section 504 of the Rehabilitation Act to all public entities, regardless of whether they receive federal financial assistance.
2. prohibits (a) discrimination against a "qualified individual with a disability;" and (b) exclusion of such individual from participation in or denial of the benefits of services, programs or activities.
3. applies the rights, procedures and remedies of Section 505 of the Rehabilitation Act.
4. models protections for individuals with disabilities after civil rights protections for other protected classes.
5. does not preempt rights, remedies or procedures in other federal laws or other state laws or common law (tort claims) that provide greater or equal protection. 42 U.S.C. § 12201(b).

2. WHO IS PROTECTED AGAINST DISCRIMINATION: QUALIFIED INDIVIDUAL WITH A DISABILITY

1. **Definition of "disability"** -- 3prong definition that tracks the Rehabilitation Act definition. 28 C.F.R. § 35.104.

1. a physical or mental impairment that substantially limits one or more major life activity of the individual;
2. a record of such an impairment; or
3. being regarded as having such an impairment.

2. Definition of "physical or mental impairment"

1. physiological disorder or condition that affects any of the body systems, as set out in the regulations.
2. mental or psychological disorders.
3. regulations list impairments as including, but not limited to, contagious and non-contagious diseases and conditions such as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (symptomatic and asymptomatic), tuberculosis, drug addiction and alcoholism.

3. Definition of "major life activities" and "substantial limitation"

1. caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working; reproduction under Bragdon v. Abbott, 524 U.S. 624 (1998).
2. "substantial limitation" takes into consideration degree of limitation and duration of impairment; restricted as to the condition, manner or duration under which the major life activity can be performed in comparison to most people.
3. Yeskey v. Commonwealth of Pennsylvania, 76 F. Supp.2d 572 (M.D. Pa. 1999), rigorous exercise is not a major life activity; not as significant or

important as activities listed in the definition.

4. contrary to legislative history and EEOC and Department of Justice guidance, **must** consider the effect of mitigating measures, such as auxiliary aids, medications or compensating behaviors that improve or control the condition. Sutton v. United Airlines, 527 U.S. 471 (1999); and Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

4. Definition of "qualified individual with a disability"

1. individual with a disability who meets the essential eligibility requirements for the receipt of services or the participation in programs or activities, with or without --
 1. reasonable modifications to rules, policies, or practices;
 2. the removal of architectural, communication, or transportation barriers; or
 3. the provision of auxiliary aids and services --items designed to provide effective communication to those with hearing, speech and vision impairments. Examples listed in regulations.
2. an individual who poses a direct threat to health or safety of others is not "qualified"
 1. "direct threat" is a significant risk to the health or safety of others that cannot be eliminated or reduced to an acceptable level by a modification of policies or procedures or by provision of auxiliary aids.
 2. determination made by an individualized assessment of (1) nature, duration and severity of the risk; (2) probability that the potential injury will occur; and (3) whether reasonable modifications will mitigate the risk.

5. Case law

1. Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 122 S.Ct. 681 (2002), factory worker with carpal tunnel syndrome and tendinitis was not

substantially limited in the major life activity of performing manual tasks. Impairment must prevent or severely restrict an individual from doing activities that are of central importance to most people's daily lives and impact must be permanent or long-term. Manual tasks do not include occupation-specific tasks, but rather tasks such as household chores, bathing and brushing teeth, because those are central to most people's daily lives. Evidence that plaintiff could brush teeth, wash face, bathe, garden, fix breakfast, do laundry and clean house demonstrated that impairment did not severely restrict performance of manual tasks.

1. Court appears to adopt Social Security disability standard
 2. If Court ultimately rules that "working" is not a major life activity, no workplace-related activity will be relevant to disability inquiry.
2. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), pilots with myopic vision that was corrected with glasses, but who were denied employment because they could not meet defendants' job requirement for uncorrected vision, did not satisfy definition of "individual with a disability."
1. individual is not "substantially limited" if the physical or mental impairment is corrected by medication or other measures;
 2. determination must be individualized and cannot rely on general characteristics of a particular condition;
 3. can establish coverage if corrective measure leaves the individual substantially limited or, under the "regarded as" prong, if the measure "cures" the individual, if the entity/ employer treats the individual as substantially limited based on stereotypic assumptions. Court did not address "record of" prong.
 4. disqualification based on failure to satisfy employment criteria that relate to physical characteristics or medical conditions does

not mean the employer regards the individual as disabled; employment criteria that exclude persons with certain conditions or characteristics that either are not impairments or not substantially limiting impairments do not violate the ADA.

5. to prove substantial limitation in "work" must show unable to work in a broad class of jobs, not just single job like a global pilot.
3. Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999), mechanic whose high blood pressure was controlled by medication is not substantially limited in any major life activity; not "regarded as" limited in major life activity of work, even though employer terminated him from job because his blood pressure exceeded federal requirements to obtain commercial driver's license, because he could perform all mechanic jobs other than those requiring the license.
4. Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999), driver's ability to compensate for monocular vision through modified behaviors (subconscious adjustments) must be considered in determining whether condition substantially limited particular driver.
5. Bragdon v. Abbott, 524 U.S. 624 (1998), *on remand*, 163 F.3d 87 (1st Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999), an individual with HIV infection is covered under the ADA, even if the infection has not reached the so-called symptomatic stage; the virus is an impairment because it severely and constantly damages the hemic and lymphatic systems upon infection and substantially limits the major life activity of reproduction. Coverage must be determined on an individualized basis, no *per se* disabilities; administrative agency's interpretation entitled to Chevron deference, and Rehabilitation Act standard sets the minimum protection under the ADA. (Title III case challenging dentist's refusal to perform procedure on a woman with HIV disease.)
6. Post- Sutton:
 1. EEOC Instructions for Field Offices:
Analyzing ADA Charges After Supreme Court

Decisions Addressing "Disability" and
"Qualified," (July 27, 1999)

1. if mitigating measures are used, examine whether measure fully or partially controls the symptoms or limitations of the impairment and whether measure itself causes any limitations.
 2. if mitigating measures are used, examine whether individual had a record of a disability prior to using such measures successfully and whether entity/employer was aware of the record or history.
 1. according to EEOC, employer does not need to be aware of the record for coverage purposes, but there must be evidence that employer acted on the basis of the record or history to prove discrimination.
 3. if first two prongs not satisfied, determine whether adverse action was based on belief that individual was substantially limited based on fears, stereotype or attitude about particular condition.
2. Dadian v. Village of Wilmette, 269 F.3d 831 (7th Cir. 2001), woman with osteoporosis that caused a femur fracture, total knee replacement, compression fracture of her vertebrae, degenerative disease of the joints, and balance problems was substantially limited in ability to walk; walked very slowly and carefully but still subject to falls and injury.
 3. Betts v. Rector and Visitors of the University of West Virginia, 18 Fed. Appx.114, 2001 WL 1023115 (4th Cir. 2000), plaintiff with a learning disability, who was denied admission to medical school based on poor performance resulting from his disability, was regarded as disabled; university followed the recommendation of its Learning Needs and Evaluation Center to provide the student with an accommodation for tests that it deemed required under the ADA and treated student as individual with a

disability; but student was not substantially limited in major life activity of learning; history of academic achievement and learning abilities demonstrates that he was not restricted in learning as compared to the average person in the general population and had developed coping mechanisms to mitigate learning impairment;

4. Davis v. University of North Carolina, 263 F.3d 95 (4th Cir. 2001), student with dissociative identity disorder who was removed from a teacher certification program was not regarded as substantially limited in major life activity of work; at most university perceived student as being unable to perform a single job - teaching - or a narrower category of teaching jobs that required unsupervised contact with children. Also not regarded as substantially limited in major life activity of learning because university was willing to let student enroll in a master's program without obtaining teacher certification.
5. Swanson v. University of Cincinnati, 268 F.3d 307 (6th Cir. 2001), medical resident terminated from a surgical residency because of poor performance related to depression was not substantially limited in sleep, communication or concentration; medication mitigated the effect so that he was not significantly restricted in comparison to the average person. Resident was not substantially limited in work because he worked throughout his period of depression and obtained and performed well in another surgical residency.
6. Gorman v. Easley, 257 F.3d 738 (8th Cir. 2001), *cert. granted sub nom.*, Barnes v. Gorman, 122 S.Ct. 865 (2002), paraplegic with no control over legs or torso, who requires a specially designed wheelchair to keep him upright, is an individual with a disability; the wheelchair provides some mobility but is not a device that corrects his disability.
7. Doe v. County of Centre, Pa., 242 F.3d 437 (3rd Cir. 2001), child's HIV constitutes

disability because it substantially limits his major life activities of digestion, walking and talking. Child receives nourishment through a feeding tube and has difficulty speaking and expressing himself as a result of HIV infection.

8. Krecka v. City of Chicago, 203 F.3d 507 (7th Cir. 2000) (Title I), police officer with depression who was treated with Prozac did not have current disability because he had no symptoms when taking medication; not “regarded as” disabled because he was permitted to retain job and, thus, not substantially limited in major life activity; Court agreed that plaintiff was subjected to unjustified action based on his disability but found no violation because he was not covered under Act.
9. McKibben v. Hamilton County, Ohio, 215 F.3d 1327 (6th Cir. 2000), corrections officer who was terminated because he failed to participate in a weight loss program was not “regarded as” substantially limited in work; no evidence that defendants regarded his weight as limiting his ability to perform a class of jobs or broad range of jobs in different categories.
10. Muller v. Costello, 187 F.3d 298 (2nd Cir. 1999), corrections officer not disabled because inability to work as a corrections officer did not constitute inability to work in a class of jobs, and breathing was not substantially limited because medication controlled his asthma outside the work site. (Implicitly overruled by Garrett).
11. Bartlett v. N.Y.S. Bd. of Law Examiners, 2001WL 930792 (S.D.N.Y. 2001), *on remand from* 226 F.3d 69 (2nd Cir. 2000), law school graduate with dyslexia is substantially limited in major life activity of reading as compared to manner and conditions under which most people read; unlike “most” people, plaintiff has extreme difficulty or cannot read and write quickly and automatically, recognize words and letters automatically, develop a sight vocabulary and form letters without consciously thinking about

appearance. Coping strategies used to assist in reading did not mitigate limitations because, while increasing decoding accuracy, they had the negative effect of causing fatigue which limited the amount of time she could read, affected comprehension and decreased an already slow reading rate. Successful outcomes in school do not undermine finding of disability because the manner in which plaintiff achieved those outcomes demonstrates that success resulted from creativity in finding methods to avoid reading and hard work. Major life activity of working is substantially limited by an impairment that prevents plaintiff from passing bar exam needed to practice law, because the varied jobs using legal training is a "class of jobs;" failure to accommodate impairment rather than innate knowledge of the law caused failure to pass bar.

12. Herschaft v. New York Board of Elections, 2001 WL 940923 (E.D.N.Y.), prospective candidate for public office with schizophrenia is not substantially limited in major life activity of caring for self, working or learning; inability to care for self occurs only when individual suffers breakdown, which has occurred sporadically and is less likely to occur while under care of physician and taking medications. Employment as a law librarian and completion of advanced education degrees demonstrates individual not substantially limited in learning or working.
13. Simms v. City of New York, 160 F. Supp.2d 398 (E.D.N.Y. 2001), Firefighter with diabetes who was placed on permanent light duty while taking insulin was regarded as substantially limited in work; precluded from full duty service and denied a position as a supervisor in the training department, which are only available to full duty firefighters.
14. Minott v. Port Authority of New York and New Jersey, 116 F. Supp.2d 513 (S.D.N.Y. 2000), pregnancy is not a disability per se; complications from pregnancy may be disability under extremely rare circumstances, but no evidence that

plaintiff's miscarriage constituted a disability.

15. Garcia v. S.U.N.Y. Health Sciences Center at Brooklyn, 2000 WL 1469551 (E.D.N.Y.), *aff'd*, 2001 WL 1159970 (2nd Cir.) medical student who took Ritalin to treat his attention deficit disorder was individual with a disability; even with mitigating measure of medication, he was substantially limited in learning.
 16. Weixel v. Bd. of Education of the City of New York, 2000 WL 1100395 (S.D.N.Y.), student with chronic fatigue syndrome was not individual with disability; no evidence that impairment substantially limited her ability to learn or significantly interfered with her studies in eighth grade.
 17. Katzowitz v. Long Island Railroad, 58 F. Supp.2d 34 (E.D.N.Y. 1999), individual's vision impairment did not substantially limit his ability to see - had not sought rehabilitation for problem, was able to walk in public without assistance and engaged in numerous sports and household activities.
7. Pre-Sutton: summary finding of "individual with a disability" with little analysis of effect on major life activities (unlike the pre-Sutton coverage issue in Title I employment cases).
1. Adelman v. Dunmire, 6 AD Cases 1190 (E.D. Pa. 1997), individual suffering from arthritis, degenerative disc disease with acute muscle spasms who is unable to perform repeated and sedentary work on a regular basis or walk stairs or long distances meets definition.
 2. Trovato v. City of Manchester, 992 F. Supp. 493 (D. N.H.1997), individuals with muscular dystrophy that substantially limits their ability to walk meet definition.
 3. Weaver v. New Mexico Human Services Dept., 942 P.2d 70 (N. Mex. Sup. Ct. 1997), individuals with disabilities who receive state general assistance benefits are regarded by State as substantially limited in ability to work.

8. Pre-Sutton: more detailed analysis in certain cases.
 1. Bingham v. Oregon School Activities Ass'n, 37 F. Supp.2d 1189 (D. Or. 1999), *injunction vacated as moot by Bingham v. Ediger*, 20 Fed. Appx. 720, 2001 WL 1217701 (9th Cir.), high school student who had been diagnosed with attention deficit disorder since sixth grade and had academic problems even though treated with Ritalin was substantially limited in the major life activity of learning.
 2. Price v. National Bd. of Medical Examiners, 966 F. Supp. 419 (S.D. W. Va. 1997), three medical students with learning disabilities do not meet definition, because they do not suffer from an impairment that substantially limits life activity of learning in comparison with most people.
 3. Darian v. Univ. of Massachusetts, 980 F. Supp. 77 (D. Mass. 1997), nursing student who suffered severe pelvic bone pain, uterine contractions and pain, and back pain which limited her ability to participate in her educational program, walk, sit, sleep, learn and perform manual tasks meets definition of disability, even though conditions resulted from pregnancy.
 4. Hernandez v. City of Hartford, 959 F. Supp. 125 (D. Conn. 1997), premature labor, as opposed to normal pregnancy, is a physical impairment and genuine issues of fact regarding whether condition substantially limited ability to work.
9. finding of "qualified individual with a disability" is also often summary because the essential eligibility requirements for many public services or activities are minimal.
 1. Pennsylvania Dept. of Corrections v. Yeskey, 522 U.S. 1086 (1998), prisoners are not excluded from protection; lack of specificity in law reflects breadth not ambiguity; eligibility for services does not require voluntariness, so law can apply to individuals who are held against their will.

2. Crawford v. Ind. Dept. of Corrections, 115 F.3d 481 (7th Cir. 1997), prisoners cannot be excluded from ADA protection for purposes of prison services on the basis of their incarcerated status. Purpose of the ADA is to eliminate discrimination based on disability. Prisoners with disabilities have as much interest in receiving the services non-disabled prisoners receive as individuals with disabilities outside prison have in receiving services available to non-incarcerated, non-disabled individuals.
 3. Raines v. State of Fla., 983 F. Supp. 1362 (N.D. Fla. 1997), inmates with disabilities who cannot engage in work activities are qualified to receive the maximum amount of incentive gain time, because the statute that established the program did not require inmates to be able to participate in work activities; regulations implementing the program cannot define "qualified individuals" as only those who can work, when that definition denies meaningful access to the program to which they are entitled to participate.
 4. Schonfeld v. City of Carlsbad, 978 F. Supp. 1329 (S.D. Cal. 1997), as city residents with mobility impairments, plaintiffs meet the essential eligibility requirements for receipt of city services and participation in programs and activities.
10. In other cases, eligibility is central to service, benefit or activity.
1. Albertsons Inc. v. Kirkingburg, 527 U.S. 555 (1999), DOT regulations regarding visual acuity established qualification standard that was not modified by an experimental waiver program for drivers with monocular vision.
 2. Doe v. County of Centre, Pa., 242 F.3d 437 (3rd Cir. 2001), HIV positive child did not pose a significant threat of transmission to all other non-infected foster children

requiring placement because risk of a pre-pubescent girl or boy engaging in high risk sexual behavior with infected child is remote as is the risk of transmission through physical contact; no risk of transmission would exist with the placement of a foster child with disabilities who is unable to engage in sexual or physical contact.

3. Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725 (9th Cir. 1999), determination of whether methadone treatment program posed a threat to the community must be analyzed under "qualified individual" provision; must determine whether individuals obtaining treatment pose a significant risk of a serious nature.
4. Doe v. University of Maryland Medical System Corp., 50 F.3d 1261 (4th Cir. 1995), neurosurgery resident who was terminated from his residency program because of his HIV infection was not a "qualified individual with a disability," because he posed a significant risk of harm to patients that could not be eliminated by a reasonable accommodation. Court deferred to university's determination that restrictions on types of surgery performed and adherence to universal precautions did not eliminate risk.
5. Kirbens v. Wyoming State Board of Medicine, 992 P.2d 1056 (Wyo. Sup. Ct. 1999), doctor with bipolar disorder not qualified because he posed a direct threat to his patients.
6. Doe v. Rowe, 156 F. Supp.2d 35 (D. Maine 2001), individuals with mental illness who have been denied the right to vote because placed under guardianship are qualified; individuals understand the nature and effect of voting.
7. Salcido v. Woodbury County, Iowa, 119 F. Supp.2d 900 (N.D. Iowa 2000), plaintiff with dementia who was committed involuntarily to mental health facility was qualified to have county pay for placement; county's exclusion of dementia from reimbursable services in its

Mental Health Services Management Plan did not make plaintiff "unqualified;" the state's involuntary commitment statute established who was eligible for services, not the county's plan.

8. Briggs v. Walker, 88 F. Supp.2d 1196 (D. Kan. 2000), essential qualification requirement for obtaining driver's instruction permit was demonstration via medical certification that applicant, who was wheelchair bound, could operate the vehicle safely.
9. Pickering v. City of Atlanta, 75 F. Supp.2d 1374 (N.D. Ga. 1999), *aff'd without opinion*, 235 F.3d 1344 (11th Cir. 2000), correction officer who could not expose self to risk of physical trauma, because she took medication that thinned blood, was not qualified because inmate supervision and ability to be exposed to risk of physical trauma were essential functions of position; no accommodation was available to make her qualified because no position that did not involve inmate supervision was vacant and employer was not required to keep her on light duty indefinitely.
10. Bingham v. Oregon School Activities Ass'n, 37 F. Supp.2d 1189 (D. Or. 1999), *injunction vacated as moot by Bingham v. Ediger*, 20 Fed. Appx. 720, 2001 WL 1217701 (9th Cir.), student with learning disability that resulted in his repeating one grade was "qualified" to participate in interscholastic sports even though he could not comply with the eight-semester limit rule; rule was not essential because students with learning disabilities could obtain waiver for age and grade rules that served same purpose; Dennin v. Connecticut Interscholastic Athletic Conference, 913 F. Supp. 663 (D. Conn. 1996), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996), nineteen-year old student with Downs Syndrome was qualified to participate in interscholastic swimming even though he did not meet the age requirement, because a waiver of the age requirement was a reasonable accommodation that did not fundamentally alter the program. *But see Pottgen v. Missouri High School Activities*

Ass'n, 40 F.3d 926 (8th Cir. 1994); and Sandison v. Michigan High School Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995) (plaintiffs cannot meet the essential requirement of age, and waiver of age requirement would fundamentally alter program.); Aughe v. Shalala, 885 F. Supp. 1428 (W.D. Wash. 1995)(AFDC age limit for completing high school to qualify as a dependent was an essential qualification that could not be waived or modified without fundamentally altering and imposing an undue cost on the program.)

11. Greist v. Norristown State Hospital, 1997 WL 661097 (E.D. Pa.), *aff'd without opinion*, 156 F.3d 1224 (3rd Cir. 1998), *cert. denied*, 525 U.S. 1057 (1998), individual with mental illness who was involuntarily committed to hospital because of criminal activity was not qualified to be released and serve in an integrated community-based setting since he poses "clear and present danger" to others.
12. Bullock v. Gomez, 929 F. Supp. 1299 (C.D. Cal. 1996), issue of whether inmate and wife, both of whom are HIV-positive, are qualified to participate in conjugal visit program cannot be resolved on a summary judgment motion; health concerns regarding transmission of communicable diseases and whether that risk can be reasonably accommodated by requiring the prison to make a medical determination about a visitor's health are factual issues.

6. Individuals who are statutorily excluded from protection

1. individuals who currently engage in the illegal use of drugs, except such individuals cannot be denied health services or services provided in connection with drug rehabilitation. Individual with a current alcohol problem is an "individual with a disability" as well as an individual who has a past drug problem, is participating in a supervised treatment program or is erroneously regarded as currently engaging in the illegal use of drugs. 42 U.S.C. § 12210; 28 C.F.R. § 35.131.
2. individuals with sexual behavior disorders,

compulsive gambling, kleptomania or pyromania. 42 U.S.C. § 12211; 28 C.F.R. § 35.104.

7. **Individuals and entities who face discrimination because of their relationship or association with a disabled individual have a claim under the ADA. 28 C.F.R. § 35.130(g).**

1. Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37 (2nd Cir. 1997), substance abuse treatment program that was denied a building permit to renovate a building in a new location because of its association with alcohol and drug dependent clients states a claim.
2. Niece v. Fitzner, 922 F. Supp 1208 (E.D. Mich. 1996), prisoner who was the fiancé of a deaf woman states a claim for the denial of equal phone communications based on relationship with an individual with a disability.

3. **WHO AND WHAT IS SUBJECT TO TITLE II: ALL PROGRAMS, SERVICES AND ACTIVITIES PROVIDED BY A PUBLIC ENTITY**

1. **Definition of "public entity"** - any State or local government; any department, agency, special purpose district or other instrumentality of a State or local government. 42 U.S.C. § 12131.
 1. Types of activities generally covered under Title II, but beyond the reach of Section 504 because they may not receive federal financial assistance: courts, licensing, legislative facilities and proceedings.
 2. Activities the public entity carries out directly or through contractual relationships.
 1. Johnson v. City of Saline, 151 F.3d 564 (6th Cir. 1998), contracting to operate city cable services is covered under Title II.
 2. Association for Disabled Americans v. City of Orlando, 153 F. Supp.2d 1310 (M.D. Fla. 2001), City subject to suit challenging accessibility of programs at City's theater and sports arena; city leases facilities to various presenters and promoters.
 3. James v. Peter Pan Transit Management, Inc.,

1999 WL 735173 (E.D.N.C.), public transit authority may be liable under Title II for discrimination by private company that provides bus service under contract.

4. Deck v. City of Toledo, 56 F. Supp.2d 886 (N.D. Ohio 1999), *summary judgment granted in part, denied in part*, 76 F. Supp.2d 816 (N.D. Ohio 1999), failure to oversee contractor's curb cut construction covered.
5. Reeves v. Queen City Transp., 10 F. Supp.2d 1181 (D. Colo. 1998), Title II claim against State Public Utility Commission for issuing certificate of public necessity to transportation service that discriminated against individuals with disabilities dismissed; the transportation service is not an activity or program of the PUC and does not become such through certification, and the discriminatory action did not derive from a PUC policy or requirement.
6. Johanson v. Huizenga Holdings Inc., 963 F. Supp. 1175 (S.D. Fla. 1997), city and county can be sued for the discriminatory conduct of its contractual partners that are subject to Title III, which authorizes suit in anticipation of a violation of Title III's new construction provision, even though Title II does not confer same protection.
3. Officials of public entity acting in **individual** capacities are not subject to suit. Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (*en banc*), *cert. granted*, 528 U.S. 1146 (2000), *cert. dismissed*, 529 U.S. 1001 (2000); Pathways Psychosocial v. Town of Leonardtown, Md., 133 F. Supp.2d 772 (D. Md. 2001); Shariff v. Artuz, 2000 WL 1219381 (S.D.N.Y.); Nucifora v. Bridgeport Bd. of Education, 2000 WL 887650 (D. Conn.); Yeskey v. Commonwealth of Pennsylvania, 76 F. Supp.2d 572 (M.D. Pa. 1999); Montez v. Romer, 32 F. Supp.2d 1235 (D. Col. 1999); Campos v. San Francisco State Univ., 1999 WL 1201809 (N.D. Cal); Neiberger v. Hawkins, 70 F. Supp.2d 1177 (D. Colo. 1999), *aff'd on other grounds*, 246 F.3d 682 (10th Cir. 2001), *dismissed on remand*, 150 F. Supp.2d 1118 (D. Colo. 2001), *cert. denied*, 122 S.Ct. 346 (2001); Wesley v. Vaughn, 1999 WL 1065209 (E.D. Pa.), *on remand*, 2001 WL 210285 (E.D. Pa.); Badillo-Santiago v.

Garcia, 70 F. Supp.2d 84 (D. P.R.1999), *dismissed* by Badillo-Santiago v. Andreu-Garcia, 167 F. Supp.2d 194 (D. P.R. 2001); *but see* Niece v. Fitzner, 922 F. Supp. 1208 (E.D. Mich. 1996) (official sued in individual and official capacities permitted because nothing in ADA either permits or prohibits).

4. Officials of public entity may be subject to suit in **official** capacity. Randolph v. Rodgers, 253 F.3d 342 (8th Cir. 2001) (underlying federal statute relied upon in an Ex parte Young claim need not provide explicit statutory authority to sue a state official in official capacity); Armstrong v. Wilson, 124 F. 3d 1019 (9th Cir. 1997), *cert. denied*, 424 U.S. 937 (1998); Davis v. California Health and Human Services Agency, No. C 00-2532 SBA (N.D. Cal. Dec. 21, 2001) (official capacity suit is a suit against the entity of which the official is an agent and is appropriate means to vindicate federal rights); Navedo v. Maloney, 172 F. Supp.2d 276 (D. Mass. 2001); Doe v. Rowe, 156 F. Supp.2d 35 (D. Maine 2001); Berthelot v. Stadler, 2000 WL 1568224 (E.D. La.) (officials dismissed in individual capacity but retained in official); Thomas v. Nakatani, 128 F. Supp.2d 684 (D. Hawai'i 2000) (same); Montez v. Romer, 32 F. Supp.2d 1235 (D. Col. 1999) (same); Campos v. San Francisco State Univ., 1999 WL 1201809 (N.D. Cal.) (same); Doe v. Marshall, 882 F. Supp. 1504 (E.D. Pa. 1995) (suit against college professor in official capacity is sufficient to demonstrate suit against public entity); *but see* Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001); Anthony v. City of New York, 2001 WL 741743 (S.D.N.Y.) (post-Garrett decision but relied on pre-Garrett case law that found no reason to permit suits against official where Eleventh Amendment immunity existed); Hucks v. Artuz, 2001 WL 210238 (S.D.N.Y.) (no justification for permitting claim against individual in official capacity where Eleventh Amendment immunity does not bar suing state directly (pre-Garrett decision)); Lewis v. New Mexico Dept. of Health, 94 F. Supp.2d 1217 (D.N.M. 2000), *aff'd on other grounds*, 261 F.3d 970 (10th Cir. 2001) (official sued in official capacity not subject to suit because definition of "public entity" does not include individuals.)

5. Any government entity that falls within definition is subject to suit, not just the local government itself. Smith-Berch, Inc. v. Baltimore County, Md., 68 F. Supp.2d 602 (D. Md. 1999), *summary judgment granted*, 115 F. Supp.2d 520 (D. Md. 2000).
6. State National Guard units are not subject to suit under the ADA; military units are not covered under discrimination statutes. Gordon v. Illinois Army National Guard, 215 F.3d 1329, 2000 WL 286091 (7th Cir.)
7. Federal government is not subject to suit under Title II. Sarvis v. United States, 234 F.3d 1262 (2nd Cir. 2000); Cellular Phone Taskforce v. FCC, 217 F.3d 72 (2nd Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001); Haynes v. Apfel, 2001 WL 950244 (D. Kan.) (Social Security Administration).

2. Examples of activities or policies

1. **city's emergency reporting system on streets:** Civic Ass'n for the Deaf of New York City v. Giuliani, 915 F. Supp. 622 (S.D.N.Y. 1996) and 970 F. Supp. 352 (S.D.N.Y. 1997).
2. **voting:** Lightbourn v. Garza, 928 F. Supp. 711 (W.D. Tex. 1996), *rev'd on other grounds*, 118 F.3d 421 (5th Cir. 1997).
3. **court facilities and proceedings:** Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001); Shotz v. Cates, 256 F.3d 1077 (11th Cir. 2001); Soto v. City of Newark, 72 F. Supp.2d 489 (D.N.J. 1999) (wedding ceremony); and Adelman v. Dunmire, 6 AD Cases 1190 (E.D. Pa.1997).
4. **quarantine requirements:** Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996).
5. **zoning:** Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725 (9th Cir. 1999); Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37 (2nd Cir. 1997); Tsombanidis v. City of West Haven, Connecticut, 129 F. Supp.2d 136 (D. Conn. 2001) and 180 F. Supp.2d 262 (ruling on merits); MX Group, Inc. v. City of Covington, 106 F. Supp.2d 914 (D. Ky. 2000); Discovery House, Inc. v. Consolidated City

of Indianapolis, 43 F. Supp.2d 997 (N.D. Ind. 1999); Trovato v. City of Manchester, 992 F. Supp. 493 (D. N.H. 1997); Oak Ridge Care Center v. Racine County, Wisc., 896 F. Supp. 867 (E.D. Wis. 1995); *but see* Kessler Inst. for Rehabilitation, Inc. v. Mayor and Council of Essex Fells, 876 F. Supp. 641 (D.N.J. 1995); Robinson v. City of Friendswood, 890 F. Supp. 616 (S.D. Tex. 1995); Moyer v. Lower Oxford Township, 1993 WL 5489 (E.D. Pa.); and Burnham v. City of Rohnert Park, 1992 WL 672965 (N.D. Cal.).

6. **state and county prison activities:** Pennsylvania Dept. of Corrections v. Yeskey, 522 U.S.1086 (1998), state prisons fall squarely within definition of a public entity, and they provide many services and activities that benefit prisoners. See also, Crawford v. Indiana Dept. of Corrections, 115 F.3d 481 (7th Cir. 1997); Clark v. State of California, 123 F.3d 1267 (9th Cir. 1997), *cert denied*, 118 S.Ct. 2340 (1998); Armstrong v. Wilson, 124 F.3d 1019 (9th Cir. 1997); Raines v. State of Florida, 983 F. Supp. 1362 (N.D. Fla. 1997); Love v. Westville Correctional Center, 103 F.3d 558 (7th Cir. 1996) (assumed); Saunders v. Horn, 960 F. Supp. 893 (E.D. Pa. 1997); Fennell v. Simmons, 951 F. Supp. 706 (N.D. Ohio 1997); Bullock v. Gomez, 929 F. Supp. 1299 (C.D. Cal. 1996); Niece v. Fitzner, 941 F. Supp. 1497 (E.D. Mich. 1996); detention and correctional facilities are specifically covered in the ADA Accessibility Guidelines for Buildings and Facilities, 36 C.F.R. Part 1191; Yeskey overturns Pierce v. King, 131 F.3d 136 (4th Cir. 1997); Amos v. Maryland Dept. Of Public Safety, 126 F.3d 589 (4th Cir. 1997), *cert. granted, judgment vac'd and rem'd*, 118 S.Ct. 2339 (1998); Callaway v. Smith County, 991 F. Supp. 801 (E.D. Tex. 1998); White v. Colorado, 82 F.3d 364 (10th Cir. 1996); Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 772 (1996).
7. **health care program:** Anderson v. Dept. of Public Welfare, 1 F. Supp.2d 456 (E.D. Pa. 1998); and Burns-Vidlak v. Chandler, 939 F. Supp. 765 (D. Hawaii 1996).
8. **welfare and general assistance:** Does 1-5 v. Chandler, 83 F.3d 1150 (9th Cir. 1996); and Civil No. 95-00498 HG slip op. (D. Hawaii Jan. 26, 1996); and Weaver v. New Mexico Human Services

Dept., 942 P.2d 70 (N. Mex. Sup. Ct. 1997).

9. **social services and child protective services:** Adoption of Gregory, 434 Mass. 117, 747 N.E.2d 120 (Mass. 2001), services required to enable parent to participate in the unification process are covered under Title II, but proceedings to terminate parental rights are not “services, programs or activities;” and In re Anthony P., 101 Cal. Rept.2d 423 (Cal. App. 4th Dist. 2000).
10. **police activities:** Lee v. City of Los Angeles, 250 F.3d 668 (9th Cir. 2001); Hainze v. Richards, 207 F.3d 795 (5th Cir. 2000), *cert. denied*, 531 U.S. 959 (2000), Title II does not apply to police officer’s on-the-street response to reported disturbances, even if calls involve individuals with mental disabilities, prior to the officer’s securing the scene and ensuring no threat to safety; Gohier v. Enright, 186 F.3d 1216 (10th Cir. 1999); Gorman v. Bartch, 152 F.3d 907 (8th Cir. 1998), transporting an arrested individual is an activity covered under the ADA, relying on Yeskey; Anthony v. City of New York, 2001 WL 741743 (S.D.N.Y.), response to 911 call and seizure of person for psychiatric evaluation; Calloway v. Glassboro Dept. of Police, 89 F. Supp.2d 543 (D.N.J. 2000), investigative questioning in police station distinguished from questioning in the field; Lewis v. Truitt, 960 F. Supp. 175 (S.D. Ind. 1997), coverage if police knew or should have known person disabled and arrested because of legal activity related to disability; *but see* Rosen v. Montgomery County, MD., 121 F.3d 154 (4th Cir. 1997), arrest is not an activity within the ambit of the ADA, but even if police were required to provide auxiliary aids to deaf motorist, they could not be required to do so before arrival at the station house; and Patrice v. Murphy, 43 F. Supp.2d 1156 (W.D. Wash. 1999), arrest is not a service, program or activity that person can be excluded from or denied benefit of, except to the extent person arrested because of conduct related to his disability.
11. **professional licensing and testing:** Hason v. Medical Board of California, 2002 WL 206414 (9th Cir.); Bartlett v. N.Y.S. Bd. of Law Examiners, 156 F.3d 321 (2nd Cir. 1998), *judgment vacated and remanded on other grounds* 527 U.S. 1031 (1999); and Ware v. Wyoming Bd. of Law Examiners, 973 F.

Supp. 1339 (D. Wyo. 1997), *aff'd*, 161 F.3d 19 (10th Cir. 1998).

12. **educational program at state university:** Darian v. Univ. of Massachusetts, 980 F. Supp. 77 (D. Mass. 1997).
13. **employment:** Bledsoe v. Palm Beach County Soil and Water Conservation District, 133 F.3d 816 (11th Cir. 1998), *cert. denied*, 119 S.Ct. 72 (1998); Holmes v. Texas A & M Univ., 145 F.3d 681 (5th Cir. 1998) (Title II applied); Castellano v. City of New York, 142 F.3d 58 (2nd Cir. 1998) (Title II applied); Doe v. Univ. of Maryland Medical Sys. Corp., 50 F.3d 1261 (4th Cir. 1995) (Title II applied); Simms v. City of New York, 160 F. Supp.2d 398 (E.D.N.Y. 2001); Downs v. Massachusetts Bay Transportation Authority, 13 F. Supp.2d 130 (D. Mass. 1998); Magee v. Nassau County Medical Center, 27 F. Supp.2d 154 (E.D.N.Y. 1998); Saylor v. Ridge, 989 F. Supp. 680 (E.D. Pa.1998); Dominquez v. City of Council Bluffs, Iowa, 974 F. Supp. 732 (S.D. Iowa 1997); Bracciale v. City of Philadelphia, 1997 WL 672263 (E.D. Pa. 1997); Wagner v. Texas A & M Univ., 939 F. Supp. 1297 (S.D. Tex. 1996); *but see* Mirka v. City of Langley, 2001 WL 868056 (9th Cir.) (volunteer position); Holm v. Washington State Penitentiary, 19 Fed. Appx. 704, 2001 WL 1153229 (9th Cir.); Denton v. State of Arizona, 2001 WL 700598 (9th Cir.), *cert. denied*, 122 S. Ct. 672 (2001); Zimmerman v. State of Oregon Dept. of Justice, 170 F.3d 1169 (9th Cir. 1999) (plain language of Title II excludes coverage of employment, which is an "input," not an "output, of a public agency), *petition for rehearing en banc denied*, 183 F.3d 1161 (9th Cir. 1999), *cert. denied*, 531 U.S. 1189 (2001); Decker v. City of Houston, 970 F. Supp. 575 (S.D. Tex. 1997), *aff'd*, 159 F.3d 1355 (5th Cir. 1998); Koslow v. Commonwealth of Pennsylvania, 158 F. Supp.2d 539 (E.D. Pa. 2001); Currie v. Group Insurance Commission, 147 F. Supp.2d 30 (D. Mass. 2001); Matteson v. Ohio State Univ., 2000 WL 1456988 (S.D. Ohio); Clark v. City of Chicago, 2000 WL 875422 (N.D. Ill.); Kvorjak v. Maine, 2000 WL 1224759 (D. Maine), *aff'd*, 259 F.3d 48 (1st Cir. 2001); and Patterson v. Illinois Dept. of Corrections, 35 F. Supp.2d 1103 (C.D. Ill. 1999).
14. **airport facilities:** Coalition of Montanans

Concerned With Disabilities, Inc. v. Gallatin Airport Authority, 957 F. Supp. 1166 (D. Mont. 1997).

15. **State lottery operations:** Tyler v. Kansas Lottery, 14 F. Supp.2d 1220 (D. Kan. 1998).
16. **State insurance plan:** Rogers v. Dept. of Health and Environmental Control, 174 F.3d 431 (4th Cir. 1999).
17. **State interscholastic sports standards:** Bingham v. Oregon School Activities Ass'n, 37 F. Supp.2d 1189 (D. Or. 1999), *aff'd in part, vacated in part*, 20 Fed. Appx. 720, 2001 WL 1217701 (9th Cir.).
18. **endorsement allowing for public funding:** Pathways Psychosocial v. Town of Leonardtown, 133 F. Supp.2d 772 (D. Md. 2001).

4. WHAT PUBLIC ENTITIES ARE PROHIBITED FROM DOING: GENERAL PROHIBITIONS -- 28 C.F.R. § 35.130.

1. Actions taken with the intent or effect of discriminating on the basis of disability.

1. Title II prohibits intentional discrimination as well as actions that disproportionately impact individuals with disabilities. Alexander v. Sandoval, 532 U.S. 275 (2001), (no private right of action for disparate impact discrimination under Title VI), does not limit the reach of Title II to intentional discrimination.
 1. Ability Center of Greater Toledo v. City of Sandusky, 133 F. Supp.2d 589 (N.D. Ohio 2001), *reconsideration denied*, 2001 WL 1739166 (failure to remove architectural barriers), distinguishing Sandoval, Title II statutory language, 42 U.S.C. §§ 12131 (prohibition against discrimination), 12132 (definition of "qualified individual with a disability), and 12133 (remedies), demonstrates congressional intent to prohibit disparate impact discrimination and regulations implement the statutory directive. Rights and remedies under Rehabilitation Act incorporated under Title II, and Supreme Court in Alexander v. Choate, 469 U.S. 287 (1985), stated that Rehabilitation Act addressed both intentional

and disparate impact discrimination. Legislative history reveals intent to invalidate all forms of discrimination on basis of disability.

2. Frederick L. v. Department of Public Welfare, 157 F. Supp.2d 509 (E.D. Pa. 2001), regulation that requires provision of services in most integrated setting implements statutory language intended to remedy discrimination, such as the isolation of individuals because of mental disability. Title II and Section 504, unlike Title VI, prohibit disparate impact discrimination.
3. Access Living of Metropolitan Chicago v. Chicago Transit Authority, 2001 WL 492473 (N.D. Ill.), proof of intentional discrimination not required to make out a prima facie case of discrimination under Title II and the Rehabilitation Act. Sandoval does not bar action, but simply establishes that proof of intentional discrimination required for an award of compensatory damages.

2. Denying services or benefits

1. Rashad v. Doughty, 4 Fed. Appx.558, 2001 WL 68708 (10th Cir.), failure to treat prisoner's post-traumatic stress syndrome does not violate Title II because lack of care was not based on disability; denial of services, including medical care, provided to other prisoners does state a claim as well as failure to provide medical care based on disability.
2. Shirey v. City of Alexandria School Bd., 229 F.3d 1143 (4th Cir. 2000), school board's failure to have a plan for evacuating students with disabilities from school buildings in an emergency denied students access to a program - safe evacuation from building - in violation of Title II; minor errors in executing an evacuation plan that was subsequently devised did not constitute discrimination.
3. Birmingham v. Omaha School Dist., 220 F.3d 850 (8th Cir. 2000), to prevail in Title II and Section 504 claims based on educational services for children with disabilities, plaintiff must demonstrate that

school officials acted in bad faith or with gross misjudgment, relying on Hoekstra v. Indep. School Dist. No. 283, 103 F.3d 624 (8th Cir. 1996); school's decision to graduate student, while carried out in violation of IDEA's procedural requirements, was in her best interest and, thus, not in violation of Title II or Section 504.

4. Link, Inc. v. City of Hays, Kansas, 997 P.2d 697 (Kan. Sup.Ct. 2000), court upheld writ of mandamus directing city to enforce ADA in new construction, as required under state statute that requires building inspectors to determine ADA compliance in issuing permits.
5. Rodriguez v. City of New York, 197 F.3d 611 (2nd Cir. 1999), *cert. denied*, 531 U.S. 864 (2000), failure to provide individuals with mental disabilities safety-monitoring services as a separate task within personal-care services under Medicaid program does not violate Title II or Section 504; no discrimination because safety monitoring is not a separate benefit provided to any Medicaid recipient, and the ADA does not guarantee a particular level of health benefits. Court refused to consider whether separately tasking safety-monitoring is a reasonable modification needed to enable persons with mental disabilities to participate in personal-care services.
6. Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999), right to "secrecy of the ballot" under State constitution is satisfied by the State's practice of providing vision-impaired voters an assistant to mark ballot; refusal to implement methods for voting without assistant does not violate Title II.
7. Baird v. Rose, 192 F.3d 462 (4th Cir. 1999), to prevail under Title II, unlike Section 504 of Rehabilitation Act, plaintiff need not prove that discrimination was the "sole" reason for the adverse action, only a motivating reason; student stated a claim by demonstrating that school excluded her from school performance because of her depression, even if her absenteeism also played a role in the decision.
8. Lincoln Cercpac v. Health and Hospitals Corp., 147 F.3d 165 (2nd Cir. 1998), transfer of specialized

services for individuals with developmental disabilities to another location does not violate Title II; plaintiffs not denied equal access to any health service provided to non-disabled, and Acts do not guarantee a particular level of medical care for persons with disabilities or assure maintenance of services previously provided.

9. Slager v. Duncan, 1998 WL 558764 (4th Cir.), no evidence that installation of speed humps on the street in which a person with a spinal condition resides denies access to transportation that is available to non-disabled person. Absence of provision regarding speed humps in DOJ Technical Assistance Manual is persuasive evidence that speed humps are not deemed a primary transportation barrier.
10. Davis v. Francis Howell Sch. Dist., 138 F.3d 754 (8th Cir. 1998) and DeBord v. Board of Education, 126 F.3d 1102 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1514 (1998), refusal to administer medication because prescription exceeded the recommended daily dosage listed in the Physician's Desk Reference did not deny student benefit of education program in violation of Title II; policy to limit medication was not based on disability but rather concerns about potential harm to student and liability.
11. Castellano v. City of New York, 142 F.3d 58 (2nd Cir. 1998), city's pension plan for police and firefighters that provides supplemental benefits for those who retire "for service" after working 20 years does not violate Title I or II, even though some disability retirees are excluded. Disabled individuals who have worked 20 years can retire for service or disability and are thereby equally eligible for supplemental benefits, whereas no individual (disabled or non-disabled) who has not worked 20 years is eligible for supplemental benefits. Court relied on EEOC Notice about disability service retirement plans that permitted employers to offer a disability retirement plan that provides lower benefits than service retirement plan because they are two separate benefits that serve different purposes. Discrimination if a person with a disability is denied access to a plan or its benefits that is available to others; i.e. requiring disability

retiree to take disability benefit instead of other benefit to which entitled, making disabled individual work more years to get service retirement plan or unequal cost-of-living increases.

12. Innovative Health Systems v. City of White Plains, 117 F.3d 37 (2nd Cir. 1997), grant of preliminary injunction upheld because plaintiffs likely to prevail on claim that city denied building permit to substance abuse treatment program because it did not want individuals with alcohol and drug problems treated in its downtown area. Evidence of discrimination: intended use conformed to zoning district uses, similar counseling services located in same building, city overrode its building commissioner's finding that use conformed, and community opposition based on animus toward alcohol and drug-dependent individuals.
13. Love v. Westville Correctional Center, 103 F.3d 558 (7th Cir. 1996), prison inmate who was quadriplegic and was housed in infirmary unit was denied access to prison services, including substance abuse, education, religious and transition programs, in violation of Title II.
14. Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996), 120-day quarantine requirement for dogs, cats and other animals coming into the state is a policy or procedure that denies visually-impaired persons meaningful access to state services, programs and activities because of their disability. Modifications to the rule for guide dog owners do not provide meaningful access, because guide dogs cannot come into physical contact with other humans or dogs.
15. Does 1-5 v. Chandler, 83 F.3d 1150 (9th Cir. 1996), state's General Assistance program that provided unlimited benefits to individuals with children, but capped benefits for individuals with disabilities at one-year, did not violate Title II. Individuals with disabilities denied unlimited benefits because did not have children, not because of disability. State can establish two programs serving the needy with different benefits without violating the ADA.
16. Tsombanidis v. City of West Haven, 180 F. Supp.2d 262 (D. Conn. 2001), city intentionally

discriminated against group recovery home by denying special use permit to locate in single-family dwelling zone and engaging in unprecedented enforcement of zoning code violations; actions also had discriminatory effect by preventing individuals in recovery from alcohol and drug dependence the ability to live in a single-family neighborhood. Fire district's enforcement of provisions governing boarding houses to group homes, which required prohibitively expensive modifications to dwelling and installation of sprinkler system, alarms and firewall, had a discriminatory effect on the basis of disability.

17. Project Life, Inc. v. Glendening, 139 F. Supp.2d 703 (D. Md. 2001), State's refusal to enter lease with drug treatment program for the rental of a berth for a ship that would provide services to women in recovery from drug dependence violated Title II; state officials acquiesced to elected officials' opposition to having program's prospective clients in "their backyard."
18. Doe v. Rowe, 156 F. Supp.2d 35 (D. Maine 2001), denial of right to vote for persons with mental illness placed under guardianship violates Title II.
19. MX Group, Inc. v. City of Covington, 106 F. Supp.2d 914 (D. Ky. 2000), ordinance that imposes blanket exclusion of methadone treatment programs from city is facially invalid.
20. Salcido v. Woodbury County, Iowa, 119 F. Supp.2d 900 (N.D. Iowa 2000), county's exclusion of individuals with dementia from its Mental Health Services Management Plan and, thus, refusal to pay for residential services in a state mental facility to which plaintiff was involuntarily committed, violated Title II; no justification for defining "mental illness" for purposes of reimbursement differently than the term is defined in the involuntary commitment statute, and county is prohibited from excluding persons with specific disability from its reimbursement plan. Court rejects county's contention that no discrimination exists if all persons with dementia are excluded from coverage; Olmstead stands for principle that discrimination is actionable even if it is only between members of a protected class.

21. Smith-Berch, Inc. v. Baltimore County, Md., 115 F. Supp.2d 520 (D. Md. 2000), hearing requirement imposed solely on methadone treatment programs violated Title II; requirement imposed disproportionate burden on individuals with disabilities and was not necessary to county's zoning scheme.
22. Galvin v. Cook, 2000 WL 1520231 (D. Or.), inmate's claim that prison failed to provide adequate medical treatment is not covered under ADA or Rehabilitation Act, but rather under the Eighth Amendment.
23. Owens v. Chester County, 2000 WL 116069 (E.D. Pa.), ADA requires prison to make inmate's crutches available to him when appropriate; court refused to dismiss inmate's claim that prison violated his right to participate in services, including getting meals and using phones, by denying use of crutches.
24. Micek v. City of Chicago, 1999 WL 966970 (N.D. Ill.), Title II does not prohibit city from providing insurance policy that excludes coverage for hearing aids, while providing coverage for other medical equipment, or coverage for speech therapy for permanent, chronic conditions but provides therapy for comparable conditions for non-disabled individuals.
25. Hamlyn v. Rock Island County Metro. Mass Transit, 986 F. Supp. 1126 (C.D. Ill. 1997), blanket exclusion of disabled individuals with AIDS from the reduced fare program, as evidenced in the application form, violates Title II.
26. Raines v. State of Fla., 983 F. Supp. 1362 (N.D. Fla. 1997), regulation that renders inmates with disabilities ineligible to receive maximum amount of incentive gain time because they are not available to work violates Title II.
27. Civic Ass'n of the Deaf of New York City v. Giuliani, 915 F. Supp. 622 (S.D.N.Y. 1996) and 970 F. Supp. 352 (S.D.N.Y. 1997), removing street alarm boxes without replacing them with an alternative notification system denies hearing-impaired ability to report emergencies from the street. Accessible public phones are not available on the street and requiring individuals

to use home or office TDD's denies ability to report from street. City's plan to use one-button emergency response system in pilot area does not provide access to the maximum extent feasible in violation of Title II, but reduction in number of alarm boxes is permitted because alarm system is still "readily accessible."

28. Clark v. State of California, 1996 WL 628221 (N.D. Cal.), plaintiff, developmentally disabled prisoner with low I.Q. who could not read or write stated claim under Title II, because he was denied medication because of his disability, denied placement in a program for prisoners with mental retardation, and was more likely than non-disabled prisoner to be placed in isolation for violation of prison rules because of inability to comply.

3. Providing unequal opportunity to participate in or benefit from activities, services, or benefit

1. Doe v. County of Centre, Pa., 242 F.3d 437 (3rd Cir. 2001), County's blanket policy requiring disclosure of HIV condition of foster parents' child to parents or guardians of non-infected foster children prior to placement in the home not justified under direct threat exception; no individualized determination of risk made and significant risk would not exist with the placement of some children.
2. Rogers v. Dept. of Health and Environmental Control, 174 F.3d 431 (4th Cir. 1999), provision of more generous long term disability benefits for individuals with physical disorders than for those with mental disorders does not violate Title II, because benefits programs are not required to provide precisely the same benefits to all classes of disabled individuals; safe-harbor provisions in § 501(c) does not require insurance plan sponsor or administrator to justify separate classification of mental disability with actuarial data.
3. Randolph v. Rodgers, 170 F.3d 850 (8th Cir. 1999), *rehearing en banc denied*, 253 F.3d 342 (8th Cir. 2001), inmate with profound hearing loss denied meaningful access to prison disciplinary proceedings when requests for interpreter denied; must determine whether provision of interpreter was a reasonable accommodation in prison context.

(On remand, Court refused to dismiss claim for prospective injunctive relief against prison officials in official capacity, and decision upheld on appeal, 253 F.3d 342 (8th Cir. 2001).

4. Currie v. Group Insurance Commission, 147 F. Supp.2d 30 (D. Mass. 2001), long-term disability insurance plan that cut off benefits after one year for persons with mental illness who had been treated on an out-patient basis but continued benefits beyond one year for those with mental illness who had been hospitalized did not violate ADA; classification was rationally related to purpose of promoting a sustainable plan and extensive consultations about viability of expanding mental health coverage demonstrate that final decision was in accordance with practical underwriting experience.
5. Wesley v. Vaughn, 2000 WL 1308798 (E.D. Pa.), *summary judgment denied in part, granted in part*, 2001 WL 210285 (E.D. Pa.), prison practice of locking shower doors with inmates inside has disparate impact on individuals with asthma by creating health risk that is not imposed on non-asthmatic individuals, and, thus, inmate states Title II claim.
6. Soto v. City of Newark, 72 F. Supp.2d 489 (D.N.J. 1999), municipal court's refusal to provide an interpreter for the wedding ceremony of a hearing-impaired couple denied equal opportunity to benefit from service, because couple could not hear the vows or understand the judge.
7. McNally v. Prison Health Services, 46 F. Supp.2d 49 (D. Me. 1999), summary judgment denied to county jail where evidence demonstrated that it implemented medication policy for HIV infected detainees which denied them immediate access to prescribed medications, while providing detainees with other medical conditions medication upon request.
8. Conway v. Standard Insurance Co., 23 F. Supp.2d 1199 (E.D. Wash. 1998), state employer's disability insurance policy that provides more limited benefits for individuals with mental impairments than those with physical impairments does not violate Title II.

9. Weaver v. New Mexico Human Services Dept., 942 P.2d 70 (N. Mex. Sup. Ct. 1997), limiting duration of general assistance benefits to individuals with disabilities violates Title II because disability is the criterion used to determine which recipients' benefits would be time- limited and those that would not be. State general assistance program is a single program, not three distinct programs, and law requires equivalent benefits for individuals with and without disabilities within a single program.
10. Does 1-5 v. Chandler, Civil No. 95-00498 HG, slip op. (D. Hawaii Jan. 26, 1996), state's General Assistance program that limited duration of benefits for individuals with alcohol and drug disabilities to six months, but provided benefits for one-year to those with other disabilities, violated Title II.

4. Providing separate or segregated services unless necessary to ensure equal opportunity -- discriminate based on severity of disability

1. Williams v. Wasserman, 164 F. Supp.2d 591 (D. Md. 2001), under Olmstead, individuals with traumatic brain injuries and developmental disabilities are discriminated against on the basis of disability if they remain unjustifiably institutionalized despite eligibility for community-based treatment.
2. Hahn ex rel. Barta v. Linn County, IA, 130 F. Supp.2d 1036 (N.D. Iowa 2001), continued provision of auxiliary aids to persons with disabilities by a program serving only disabled individuals, while discontinuing the single effective communication modality for a client with autism, raised claim for discrimination based on severity of disability.
3. Cramer v. Chiles, 33 F. Supp.2d 1342 (S.D. Fla. 1999), unlawful to operate Medicaid program in a manner that results in the segregation of individuals with disabilities; under funding the Home and Community-based waiver program forced individuals into institutional care and denied meaningful choice in living arrangement.
4. Cable v. Department of Developmental Services, 973 F. Supp. 937 (C.D. Cal. 1997), Title II prohibits

discrimination on the basis of severity of a person's disability; permitting discrimination among individuals with disabilities conflicts with the purpose of the ADA.

5. Messier v. Southbury Training School, 1999 WL 20910 (D. Conn.); 916 F. Supp. 133 (D. Conn. 1996), failure to consider severely disabled residents for community placement based on the degree of their disability provides claim under Title II.

5. **Denying participation in regular program, even if reasonable belief that person cannot benefit from it**

6. **Failing to reasonably modify programs, practices or procedures or provide auxiliary aids necessary to avoid discrimination based on disability**

1. PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001), failure to waive "walking rule" violated reasonable modification requirement under Title III; waiver would not fundamentally alter game since it would not alter an essential aspect of golf game and would not give golfer with disability an advantage over others. In dicta, Court discussed modification analysis, noting that three questions must be considered: whether requested modification is reasonable; whether it is necessary for disabled individual; and whether it would fundamentally alter nature of activity at issue. Facts of case will dictate which question must be answered first as each has no greater priority than others.
2. Olmstead v. L.C. by Zimring, 527 U.S. 581 (1999), in context of placing persons with disabilities in community based settings, reasonable modification requirement met if State demonstrates it has a comprehensive, effectively working plan for placing qualified individuals in less restrict settings and a waiting list that moves at a reasonable pace not controlled by State's efforts to keep institutions fully populated. Fundamental alteration standard (not defined in Title II or III) can be met by a showing that, in the allocation of available resources, immediate relief for individuals seeking placement in community would be inequitable given State's responsibility to care for a large and diverse population of individuals with mental

disabilities. State must have leeway to maintain a range of services and administer services in an even-handed way.

3. Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001), reversal of grant of summary judgment in favor of county and court administrator where evidence demonstrated that Court officials denied individual with severe hearing impairment auxiliary aid - videotext display - that was necessary to participate in court proceeding. County did not give due consideration to individual's requested auxiliary aid and did not investigate its availability, even though it was informed that the accommodations provided - an assistive listening device and assignment to courtroom designed for hearing-impaired individuals - did not enable him to participate equally in the proceeding.
4. Dadian v. Village of Wilmette, 269 F.3d 831 (7th Cir. 2001), upheld jury verdict against village for failing to reasonably modify zoning standard by denying permit for a curb cut for a front driveway; modification would not impose administrative costs or conflict with the purpose of the zoning ordinance but would aid home owner who had difficulty walking and twisting and turning.
5. Wright v. Giuliani, 230 F.3d 543 (2nd Cir. 2000), disability statutes require that reasonable accommodations be made to ensure meaningful access to services that are provided, rather than the provision of substantively different services, no matter how great the need for those services; preliminary injunction denied to individuals with HIV who challenged city's failure to provide emergency housing that accommodated their disability.
6. Armstrong v. Davis, 215 F.3d 1332 (9th Cir. 2000), in prison setting, standard for determining whether proposed accommodation complies with ADA is not undue burden standard, but rather constitutional standard of reasonableness, set forth in Turner v. Safley, 482 U.S. 78 (1994); prison system's proposed Disability Placement Plan for housing inmates with disabilities in appropriate facilities and screening process for identifying those with disabilities satisfied ADA

because plaintiffs could not demonstrate that they were unreasonable. Court must comply with the Prison Litigation Reform Act in issuing injunctive relief in ADA case.

7. Hainze v. Richards, 207 F.3d 795 (5th Cir. 2000), *cert. denied*, 531 U.S. 959 (2000), Title II does not require police officer to use less than reasonable force to defend self against person advancing with a knife, even when police had been told that person was mentally ill; after scene secure, police did have an obligation to reasonably accommodate person in handling and transporting him to mental health facility.
8. Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725 (9th Cir. 1999), district court erred in imposing reasonable modification requirement in a zoning discrimination case where challenged zoning ordinance was facially discriminatory; modification to a facially discriminatory ordinance would require removal of the discriminatory provision, which would fundamentally alter the program.
9. Wong v. Regents of the Univ. of California, 192 F.3d 807 (9th Cir. 1999), summary judgment for university reversed where evidence indicated that it denied medical student with learning disability an accommodation it had previously provided that had enabled him to perform satisfactorily and had not lowered academic standards.
10. Zukle v. Regents of the Univ. of Calif., 166 F.3d 1041 (9th Cir. 1999), university provided medical student with learning disability reasonable accommodation by offering double time to take exams, note-taking services and audio cassettes, permission to retake courses and proceed on a decelerated pace; not required to permit student to discontinue one clinical program or cut hospital hours to permit studying.
11. Memmer v. Marin County Courts, 169 F.3d 630 (9th Cir. 1999), failure to provide litigant with visual impairment a reading assistant during pre-trial phase did not violate accommodation obligation because pre-trial proceeding did not involve activities for which plaintiff needed assistance; refusal to provide particular assistant was not unreasonable.

12. Forest City Daly Housing, Inc. v. Town of North Hempstead, 175 F.3d 144 (2nd Cir. 1999), town not required to issue a building permit that would enable assisted living facility to locate in a particular zone because no residential uses are permitted in that zone. Modifications required to provide equal opportunity to those afforded persons without disabilities.
13. Doe v. Pfrommer, 148 F.3d 73 (2nd Cir. 1998), state vocational educational services program did not violate accommodation obligation by refusing to provide tailored vocational services; such modifications would not serve the purpose of providing services that non-disabled receive and neither ADA nor Rehabilitation Act establish an obligation to meet a disabled person's particular needs vis-a-vis the needs of other individuals with disabilities.
14. DeBord v. Board of Education, 126 F.3d 1102 (8th Cir. 1997), offer to modify school schedule to permit student to receive medication at home or have parents administer medication at school was a reasonable accommodation; administering medication in excess of the dose permitted under school policy would impose undue burden to verify safety.
15. Lightbourn v. Garza, 118 F.3d 421 (5th Cir. 1997), Secretary of State had no obligation to solicit and approve voting equipment that ensures complete secrecy of ballot for visually impaired voters absent evidence that Secretary refused to approve the use of such equipment; Secretary has no obligation to make all state voting locations accessible to mobility-impaired voters, because Secretary's duty under state law to ensure uniformity of voting practices does not impose obligation to make locations comply with ADA requirements.
16. Weinrich v. Los Angeles County MTA, 114 F.3d 976 (9th Cir. 1997), transit authority not required to modify medical recertification requirement of its Reduced Fare Program for individual who could not afford to get medical update. Individual denied benefit not on the basis of his disability, but because of financial circumstances.
17. Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996),

case remanded to district court for determination of whether plaintiffs' proposed alternatives to the state's quarantine policy are reasonable modification. Court must determine whether alternatives are reasonable rather than defer to state's assertion that the legislature considered alternatives and rejected them.

18. Wisconsin ex rel. Briskets v. City of Madison, 248 Wis.2d 297 (Ct. of Appeals 2001), waiver of distance requirement for community living arrangement for adolescent boys in juvenile justice system not required under accommodation obligation; youth did not need to reside in community living arrangement because of juvenile justice status, not disability, and, thus, not entitled to a waiver.
19. Tsombanidis v. City of West Haven, 180 F. Supp.2d 262 (D. Conn. 2001), city's denial of special use exception to group recovery home to locate in single-family neighborhood violated modification obligation; accommodation was reasonable because group home operated like a single-family residence and individuals needed to live in single-family district removed from areas in which alcohol and drug could be easily accessed; accommodation was necessary for plaintiffs' recovery and, without it, they would be excluded from single-family residence districts; and accommodation did not fundamentally alter zoning scheme or neighborhood because no evidence of that group recovery home would impose greater burden on city services than other dwellings of similar size or that residents posed safety threat.
20. Herschaft v. New York Board of Elections, 2001 WL 940923 (E.D.N.Y.), time extension for filing nominating petition for independent candidate not reasonable; would require Board to violate a state statute requiring signatures to be gathered and submitted within a certain time frame. Even if time frame were not mandated by law, extension would also fundamentally alter election process because it would require two different schedules for independent candidates. See also, A.v. New York Board of Elections, 99 F. Supp.2d 258 (E.D.N.Y. 2000), *aff'd in part, rev'd in part*, 234 F.3d 1262 (2nd Cir. 2000), *cert. denied*, 531 U.S. 1078 (2001).

21. Wisconsin Correctional Service v. City of Milwaukee, 173 F. Supp.2d 842 (E.D. Wisc. 2001), zoning board's refusal to consider reasonable modifications to its four standard decision-making criteria when deciding whether to grant a special use permit to provider of mental health services violated Title II. Zoning Board had authority to consider modifications even if not authorized to do so because federal law supercedes state law.
22. Henrietta D. v. Giuliani, 2000 WL 1617379 (E.D.N.Y.), *appeal dismissed*, 246 F.3d 176 (2nd Cir. 2001), city agency established to ensure that individuals with HIV had access to public assistance programs failed to provide modifications necessary to achieve meaningful access to those programs; modifications, including intensive case management and lower case manager-to-client ratios, (which were required in the law that established the agency), would not impose undue burden. Plaintiffs not seeking additional or better benefits than non-disabled individuals, just meaningful access to benefits already provided.
23. Garcia v. State Univ. of New York Health Sciences Center at Brooklyn, 2000 WL 1469551 (E.D.N.Y.), *aff'd on other grounds*, 2001 WL 1159970 (2nd Cir.), medical school satisfied reasonable modification requirement by readmitting medical student on condition that he pass all first year courses before being promoted to second year; plaintiff could not satisfy Second Circuit's "academic deference rule," which requires showing that school's proposed accommodation was unreasonable and a substantial departure from academic norms to invalidate.
24. Charlie H. v. Whitman, 83 F. Supp.2d 476 (D.N.J. 2000), ADA claim for accommodations to enable children with disabilities to participate fully in the state's foster care program dismissed because plaintiffs did not allege that necessary services existed; plaintiff also failed to allege that children with disabilities were treated differently than foster children without disabilities.
25. Spurlock v. Simmons, 88 F. Supp.2d 1189 (D. Kan. 2000), prison was not obligated to provide inmate who was deaf and mute unlimited access to a

telephone, as provided to inmates without disabilities, because no evidence that such access to the TDD phone could be reasonably accommodated.

26. Bingham v. Oregon School Activities Ass'n, 37 F. Supp.2d 1189 (D. Or. 1999), *vacated in part by Bingham v. Ediger*, 20 Fed. Appx. 720, 2001 WL 1217701 (9th Cir.), failure to waive rule that excluded learning disabled student who had attended high school for more than eight semesters from interscholastic sports violated reasonable accommodation provision; other similar rules could be waived on the basis of learning disability, and student's size did not present threat to those he would compete against.
27. Schmidt v. Odell, 64 F. Supp.2d 1014 (D. Kan. 1999), summary judgment denied because evidence indicated county jail denied inmate with double amputation accommodation by refusing to transfer him to a jail that was wheelchair accessible or to provide a shower chair. ADA reflects contemporary standards of decency for individuals with disabilities and provides guidance in evaluating Eighth Amendment violations.
28. Kirbens v. Wyoming State Board of Medicine, 992 P.2d 1056 (Wyo. Sup. Ct. 1999), board not required to permit doctor to voluntarily relinquish his license while obtaining treatment instead of revoking license.
29. Soto v. City of Newark, 72 F. Supp.2d 489 (D.N.J. 1999), municipal court's refusal to provide an interpreter for the wedding ceremony of a hearing-impaired couple violated reasonable accommodation requirement; interpreter provided for other court services.
30. Green v. Housing Authority of Clackamas County, 994 F. Supp. 1253 (D.Or. 1998), failure to waive no-pet rule for boy with hearing impairment and require removal of assistance dog because it had not been trained by a certified trainer of assistance animals violates Title II. Waiving rule would not impose an undue burden or fundamentally alter nature of the program, which is the only basis for not granting an accommodation.
31. Darian v. Univ. of Massachusetts, 980 F. Supp. 77

(D. Mass. 1997), nursing program offered reasonable accommodation by permitting student to conduct clinical work under terms prescribed by student's doctor and to take an incomplete for the clinical part of the course that could not be completed; all other requested accommodations were unreasonable or not feasible.

32. Ware v. Wyoming Bd. of Law Examiners, 973 F. Supp. 1339 (D. Wyo. 1997), *aff'd*, 161 F.3d 19 (10th Cir. 1998), reasonable accommodation obligation was not violated where Board provided the accommodations that were specifically recommended by the individual's treating physician. Requesting specific information from the individual's physician did not violate ADA because law requires tailoring accommodation to specific needs.
33. Trovato v. City of Manchester, 992 F. Supp. 493 (D. N.H. 1997), city's failure to grant zoning variance to mobility-impaired individuals to build a small parking space near front entrance of home violated Title II, Rehabilitation Act and Fair Housing Act.
34. Niece v. Fitzner, 922 F. Supp. 1208 (E.D. Mich. 1996), prison required to accommodate the deaf fiancé of a prisoner by providing prisoner a TDD to enable fiancé to participate in the service offered to those who are not inmates; i.e. allowing them to get calls from inmates and visiting inmates in person.
35. Bryant v. Madiqan, 84 F.3d 246 (7th Cir. 1996), failure to provide guardrails on the bed of a paraplegic, whose condition caused leg spasms that resulted in his falling out of bed and breaking his leg, did not deny accommodation. Sleeping in one's cell is not a "program or activity," so prison has no obligation to provide modification.

7. Imposing eligibility criteria that screen out or tend to screen out disabled, unless requirements are necessary for the provision of the service, program or activity

1. Boqovich v. Sandoval, 189 F.3d 999 (9th Cir. 1999), prisoners may bring Title II claim challenging consideration of substance abuse histories in parole decisions without first seeking writ of

habeas corpus, because successful decision would not imply invalidity of continued confinement.

2. Hunsaker v. Contra Costa County, 149 F.3d 1041 (9th Cir. 1998), requiring applicants for general assistance to take a screening test to determine need for alcohol and drug treatment does not violate rights of individuals in treatment or recovery for alcoholism and drug dependence; while these individuals are disparately impacted by the test, they are not denied "meaningful access" to the general assistance program, which is the standard for disparate impact cases.
3. Doe v. Stincer, 990 F. Supp. 1427 (S.D. Fla.1997), state law that denies individuals with mental and emotional disorders access to medical records while permitting all other individuals access violates Title II, because exemption is not necessary to protect the well-being and treatment of the individual or to safely operate the record access program.
4. Burns-Vidlak v. Chandler, 939 F. Supp. 765 (D. Hawaii 1996), State's health plan, QUEST, which revamped benefits for recipients of Medicaid, AFDC, and general assistance but categorically excluded blind and disabled individuals regardless of their income, violated Title II. Overt denials of equal treatment prohibited, and exclusion of these individuals not necessary to protect financial viability of program, where state could have included them with or without reducing benefits across the board as an accommodation. Allowing individuals to participate in Medicaid program that imposed stricter income and asset limits was not as effective as the QUEST program.
5. Does 1-5 v. Chandler, Civil No. 95-00498 HG, slip op. (D. Hawaii Jan. 26, 1996).

8. **Making unnecessary inquiries into the existence of a disability**

9. **Discriminating in licensing, certification or regulatory matters**

1. Edwards v. Illinois Board of Admissions to the Bar, 261 F.3d 723 (7th Cir. 2001), federal court lacked jurisdiction under Rooker-Feldman doctrine over claim that bar admission committee violated ADA by requiring disclosure of all mental health

records as a condition of admission to the Bar and a precondition of certification to the Bar. Committee's decision denying admission to the Bar based in part on applicant's mental health condition was appealed to Illinois Supreme Court, which denied review. Injury to applicant in form of mandated disclosure of mental health records and subsequent denial of admission either resulted from or was inextricably intertwined with a state court judgment, so as to bar review.

2. Theriault v. Flynn, 162 F.3d 46 (1st Cir. 1998), requiring individual with cerebral palsy to take a road test to renew his driver's license does not violate Title II where physical manifestations of his disability on the day of application suggested that the individual may no longer be able to drive safely. Even though defendant considered the symptoms or appearance of disability in imposing the additional requirement, it was not required to demonstrate that the requirement was necessary to implement its licensing program.
3. Coolbaugh v. State of La., 136 F.3d 430 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 58 (1998), requiring individual with quadriplegia, who possessed driver's license in another state, to pass a road test to get a driver's license does not violate Title II, even though individuals without disabilities who are licensed in another state are not required to do so; individual, although licensed in another state, had not driven there, and state requirement motivated by desire to protect public safety. (Overruled on other grounds by Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001).
4. Briggs v. Walker, 88 F. Supp.2d 1196 (D. Kan. 2000), requirement that individual with a visible disability - mobility impairment - submit a medical certification evaluating her ability to drive safely as a condition of obtaining driver's instruction permit does not violate Title II; certification provides a reasonable method to individually assess safety risk and does not deny meaningful access to an instruction permit.
5. Bailey v. Anderson, 79 F. Supp.2d 1254 (D. Kan. 1999), annual progress report requirement to obtain driver's license not discriminatory because driver used bioptic telescope; report was

necessary to ensure that driver was qualified and met requirements of licensing program.

6. Adams v. Monroe Cty. Dept. of Social Services, 21 F. Supp.2d 235 (W.D.N.Y. 1998), agency did not violate Title II by considering a foster care applicant's blindness in determining whether the individual would be able to care for the particular children who needed placement.
7. Clark v. Virginia Board of Examiners, 880 F. Supp. 430 (E.D. Va. 1995), Virginia bar application's question as to whether individual had been treated or counseled for any mental, emotional or nervous disorder within the last five years violated Title II by imposing an additional eligibility criteria on individual with a disability that was not necessary to its licensing function. Not necessary because Board failed to make individualized finding that disclosure of information would effectively guard against a mentally ill person posing a direct threat to public and failed to show correlation between counseling and employment dysfunction.

10. Failing to administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

1. L.C. by Zimring v. Olmstead, 527 U.S. 581 (1999), *remanded to district court*, 198 F.3d 1259 (11th Cir. 1999), confining two patients to state mental institution rather than placing in an integrated community-based program, as recommended by treating physicians, violates integration requirement. States are required to provide community-based treatment when treatment professionals determine such placement is appropriate, the affected persons do not oppose such treatment and placement can be reasonably accommodated taking into account the resources available to the State and the needs of others with mental disabilities. Reasonable modification requirement met if State demonstrates it has a comprehensive, effectively working plan for placing qualified individuals in less restrictive settings and a waiting list that moves at a reasonable pace not controlled by State's efforts to keep institutions fully populated. Rejects view that Title II only prohibits denial of community placement if such service is denied to

individuals without disabilities; differential treatment between those with and without disabilities is not required to prove violation of integration standard.

2. Helen L. v. DiDario, 46 F.3d 325 (3rd Cir.), *cert. denied*, 516 U.S. 813 (1995), failure to provide personal care services through state's attendant care program, which would have allowed plaintiff to receive care at home rather than in a segregated nursing home setting, violates Title II. Fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner does not justify separate or different services.
3. Lewis v. New Mexico Dep't. of Health, 94 F. Supp.2d 1217 (D.N.M. 2000), *affirmed on other grounds*, 261 F.3d 970 (10th Cir. 2001) failure to provide individuals with physical or developmental disabilities home and community based services under the state's Medicaid waiver violates integration mandate; cost analysis necessary to determine the appropriate remedy under Olmstead. (Title II claim voluntarily dismissed prior to decision on appeal.)
4. Williams v. Wasserman, 164 F. Supp.2d 591 (D. Md. 2001), applying Olmstead standard, State's progress in placing individuals with traumatic brain injury and development disabilities in community-based services has been acceptable; given the need to maintain a minimum number of hospital beds and fund other persons requiring community treatment and the three to five year delay in recognizing significant cost savings from downsizing institutions, an immediate shift of resources to fund community placements would have fundamentally altered State's provision of services .
5. Pathways Psychosocial v. Town of Leonardtown, 133 F. Supp.2d 772 (D. Md. 2001), out-patient mental health services not subject to segregation; evidence demonstrated that town did not exclude all mental health services from downtown.
6. Kathleen S. v. Dept. of Public Welfare of the Com. of Pa., 10 F. Supp.2d 460 and 476 (E.D. Pa. 1998), denial of community-based placement to three classes of individuals with mental illness

violates Title II's integration requirement. Court established accelerated time frame for placement of individuals in community settings and imposed reporting requirements regarding placement and services provided. Court refused to grant stay of accelerated placement pending appeal to Third Circuit: State did not establish likelihood of success on merits, irreparable harm or promotion of public interest.

7. Cable v. Department of Developmental Services, 973 F. Supp. 937 (C.D. Cal. 1997).
8. Messier v. Southbury Training School, 1999 WL 20910 (D. Conn.), 916 F. Supp. 133 (D. Conn. 1996).

11. Imposing surcharge to cover the costs of measures, such as auxiliary aids or program accessibility, that are required to provide nondiscriminatory treatment.

1. Hedgepeth v. Tennessee, 215 F.3d 608 (6th Cir. 2000), assessment for parking placard is a tax, not regulatory fee, because revenue goes into funds that benefit the general public; Tax Injunction Act bars federal court jurisdiction.
2. Neinast v. State of Texas, 217 F.3d 275 (5th Cir. 2000), *rehearing en banc denied*, 228 F.3d 411 (5th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001), surcharge provision exceeds scope of Congress's power to abrogate immunity because banning fees does not remedy past discrimination in access to transportation and does not serve as a prophylactic step to prevent state from intentionally discouraging individuals with disabilities from enjoying access.
3. Hexom v. Oregon Dep't of Transportation, 177 F.3d 1134 (9th Cir. 1999), fee for parking placard was not designed to raise revenue, but to pay for the cost of a special program; Tax Injunction Act does not preclude federal court jurisdiction.
4. Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001), surcharge provision unconstitutional because placard charge meets rational basis scrutiny and is not congruent and

proportional to the injury being remedied; general legislative findings of discrimination not sufficient to abrogate State's immunity.

5. Dare v. State of California, 191 F.3d 1167 (9th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3566 (Feb. 24, 2000), State's \$6.00 fee for parking placard is an unlawful surcharge because the placard is required to provide access to parking, and the fee is not comparable to fees imposed on non-disabled persons for equivalent services; Title II is constitutional because it was designed to eliminate irrational discrimination identified by Congress, including state-sponsored discrimination, and surcharge regulation is not arbitrary, capricious or contrary to Title II.
6. Marcus v. Kansas Dept. of Revenue, 170 F.3d 1305 (10th Cir. 1999), federal court action to challenge surcharge for parking placard is not barred by the Tax Injunction Act because fee covers administrative costs of the program and, accordingly, is a regulatory fee not a tax.
7. McGarry v. Director, Dept. of Revenue, 7 F. Supp.2d 1022 (W.D. Mo. 1998), imposition of \$2.00 fee for the purchase of a removable parking placard violates prohibition against surcharge to cover costs of measures that are necessary to provide nondiscriminatory treatment under the ADA; placards are not an optional supplement to driver's licenses, which do not carry an extra cost, because licenses plates are not as effective in providing access in all situations and to all individuals. See also Thrope v. State of Ohio, 19 F. Supp.2d 816 (S.D. Ohio 1998) and Duprey v. Connecticut DMV, 28 F. Supp.2d 702 (D.Conn. 1998).

12. Excluding or denying equal services to an individual because of his/her known relationship or association with an individual with a disability.

1. Innovative Health Systems v. City of White Plains, 117 F.3d 37 (2nd Cir. 1997).
2. Niece v. Fitzner, 922 F. Supp 1208 (E.D. Mich. 1996).

13. Failing to maintain equipment and features of facilities that are required to provide ready access (see discussion below, Point VI); isolated or temporary interruption in services or access due to maintenance or repairs is not a violation, if repairs are made

promptly and failures are not repeated and persistent.
28 C.F.R. § 35.133.

14. **Retaliating against or coercing an individual who has asserted rights under the ADA or assisted others in exercising rights.** 42 U.S.C. § 12203(a); 28 C.F.R. § 35.134.

1. Muller v. Costello, 187 F.3d 298 (2nd Cir. 1999), retaliation claim upheld, even though plaintiff was not disabled, because he possessed a good faith, reasonable belief that he was disabled and was exercising his legal rights against what he perceived as unlawful discrimination. (Overruled on other grounds by Garrett).
2. Silk v. City of Chicago, 194 F.3d 788 (7th Cir. 1999), police officer with sleep apnea who was given accommodation of permanent day shift did not state claim for retaliation. No evidence of retaliation in City's enforcement of rule that forbade secondary employment that was inconsistent with limited duty status or in negative performance rating, which was not significantly lower than rating prior to obtaining accommodation and did not result in injury or adverse employment action.
3. Baird v. Rose, 192 F.3d 462 (4th Cir. 1999), retaliation claim may not be brought against school teacher in individual capacity.
4. Cable v. Department of Developmental Services, 973 F. Supp. 937 (C.D. Cal. 1997), chief of medical staff states a retaliation claim because he was suspended without pay, relieved of certain responsibilities and impeded in his work after he complained that hospital was discriminating on the basis of the severity of patients' disability in its selection of persons for community placement and was not providing services in the most appropriate integrated setting.
5. Niece v. Fitzner, 922 F. Supp. 1208 (E.D. Mich. 1996), prisoner who was transferred to a different facility after complaining to the Department of Justice about the lack of access to a TDD and participating in an investigation stated a retaliation claim; hearing-impaired fiancé of prisoner also stated a retaliation claim for the prison's refusal to permit her to use a special

drinking cup and straw during visits (as an accommodation to her ataxia) after she participated in the DOJ investigation.

5. PUBLIC EMPLOYMENT -- 28 C.F.R. § 35.140.

1. Specific prohibition against discrimination in employment under any service, program or activity conducted by a public entity.

1. overlap with Title I of the ADA which prohibits discrimination in employment.
2. goes beyond Title I by prohibiting employment discrimination by all public employers, regardless of number of employees. Under Title I, employers with less than 15 employees are not subject to the ADA. See, Bledsoe v. Palm Beach County Soil and Water Conservation District, 133 F.3d 816 (11th Cir. 1998), cert. denied, 119 S.Ct. (1998).
3. Most reported cases against public employers have been brought under Title I.

2. Applicable standards to ensure consistency

1. Title I requirements, as established by the Equal Employment Opportunity Commission (EEOC) in 29 C.F.R. Part 1630, apply to employment by any public entity that is also subject to Title I.
2. Section 504 requirements, as established by the Department of Justice regulations in 28 C.F.R. Part 41, apply to employment by any public entity not subject to Title I.
3. standards are generally the same because Title I standards are based on those developed under Section 504.

3. Exhaustion of administrative remedies

1. Title II does not require exhaustion of administrative remedies prior to filing action in court, but Title I does.
2. Courts have held that plaintiffs need not exhaust administrative remedies when filing employment discrimination claim under Title II.

1. Bledsoe v. Palm Beach County Soil and Water Conservation District, 133 F.3d 816 (11th Cir. 1998), *cert. denied*, 119 S.Ct. (1998).
 2. Dominquez v. City of Council Bluffs, Iowa, 974 F. Supp. 732 (S.D. Iowa 1997), no need to exhaust administrative remedies because procedural requirements are modeled after § 504 of the Rehabilitation Act; appropriate statute of limitations, absent explicit period in federal civil rights statute, is time period in personal injury statutes; Winfrey v. City of Chicago, 957 F. Supp. 1014 (N.D. Ill. 1997), *summary judgment granted*, 2000 WL 804693 (N.D. Ill.); *aff'd*, 259 F.3d 610 (7th Cir. 2001); Wagner v. Texas A & M Univ., 939 F. Supp. 1297 (S.D. Tex. 1996); and Bracciale v. City of Philadelphia, 1997 WL 672263 (E.D. Pa. 1997) (same on exhaustion).
 3. Silk v. City of Chicago, 1996 WL 312074 (N.D. Ill), *summary judgment granted*, 1997 WL 790598, *aff'd*, 194 F.3d 788 (7th Cir. 1999), only substantive requirements of Title I, not procedural requirements, apply to employment cases under Title II. Title II regulations, 28 C.F.R. § 35.140, refer to the part of the EEOC regulations that do not require exhaustion or contain any procedural requirements, rather than the separate EEOC regulations that set forth the administrative complaint process, 29 C.F.R. 1641. Thus, claim that was not timely under Title I statute of limitations for filing an administrative action was timely under Title II.
 4. See also, Nucifora v. Bridgeport Bd. of Education, 2000 WL 194693 (D. Conn.); Worthington v. City of New Haven, 1999 WL 958627 (D. Conn.); Dertz v. City of Chicago, 912 F. Supp. 319 (N.D. Ill. 1995); Peterson v. Univ. of Wisconsin Bd. of Regents, 818 F. Supp. 1276 (W.D. Wis. 1993); and Ethridge v. State of Alabama, 847 F. Supp. 903 (S.D. Ala. 1993).
3. Statute of limitations for filing Title II employment discrimination claim not tolled by

pendency of administrative grievance procedures, which did not have to be pursued prior to filing a civil action.

Holmes v. Texas A & M Univ., 145 F.3d 681 (5th Cir. 1998).

4. **Collective Bargaining Agreement Requirement to Arbitrate ADA Claims**

1. Wright v. Universal Maritime Service, 522 U.S. 1146 (1998), collective bargaining agreement must contain a "clear and unmistakable" waiver of employee's statutory right to a judicial forum for claims of employment discrimination to require arbitration of such claims. CBA arbitration clause, which provided for arbitration of "matters under dispute" and did not contain a specific antidiscrimination provision, does not satisfy standard. Court left open the question of whether a clear and unmistakable waiver would be enforceable.

5. **General Standards**

1. Coverage

1. definition of "individual with a disability" same as in Title II.

1. See Sutton and Murphy.

2. Worthington v. City of New Haven, 1999WL 958627 (D. Conn.), individual's whose knee, arm and leg impairments required her to use cane and caused great difficulty in standing for long periods and reaching met definition.

3. Andrews v. State of Ohio, 104 F.3d 803 (6th Cir. 1997), state troopers who cannot satisfy weight and cardio-respiratory requirements do not state claim under perceived impairment prong, because they do not have an impairment that results from a physiological disorder. (ADA and Rehabilitation Act case.)

4. Burke v. Commonwealth of Va., 938 F. Supp. 320 (E.D. Va. 1996), *aff'd*, 114 F.3d 1175 (4th Cir. 1997), individual

with Attention Deficit and Hyperactive Disorder, who was disqualified from correctional officer position but offered other jobs, is not disabled, because condition does not substantially limit the major life activity of work. If work is the major life activity that is affected, individual must be excluded from range of jobs, not just a particular one. Individual also not qualified because he could not read or comprehend written and oral instructions, essential functions of job.

5. Silk v. City of Chicago, 1996 WL 312074 (N.D. Ill.), *summary judgment granted*, 1997 WL 790598, *aff'd*, 194 F.3d 788 (7th Cir. 1999), police officer with sleep apnea that required accommodation in work schedule was disabled. Sleep apnea affected major life activity of breathing, and work schedule severely aggravated his condition so as to affect his long term health. Fact that major life activity of work was not affected was irrelevant, because condition did affect breathing.

2. definition of "qualified individual with a disability": an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. Consideration shall be given to the functions that the employer deems essential, and if employer has prepared a written description before advertising or interviewing for the job, the description is evidence of the essential functions. 42 U.S.C. § 12111(8).

1. Albertsons, Inc. v. Kirkingburg, 119 S.Ct. 2162 (1999), employer can require individual with monocular vision to satisfy an applicable Department of Transportation vision standard as part of job qualification, even if the standard can be waived under an experimental program to permit such individuals to drive commercial vehicles.

2. Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999), *remanded to district court*, 195 F.3d 803 (5th Cir. 1999) (Title I case), individual who has made representations regarding extent of disability to Social Security Administration to obtain disability benefits is not judicially estopped from raising claim under ADA as a “qualified individual,” and no strong presumption exists to affect success of or right to bring ADA claim, because there is no inherent inconsistency between being qualified for SSDI benefits and being qualified under the ADA. Individual, however, must be able to explain any inconsistent statements in the disability benefit application regarding inability to work and the ADA assertion of qualified for the position. See also:
 1. EEOC Instructions For Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing “Disability” and “Qualified.”
 2. Johnson v. State of Oregon, 141 F.3d 1361 (9th Cir. 1998), prior representations on disability benefit applications are evidence in evaluating an ADA claim, but do not automatically bar a claim because of different definitions of disability under the ADA and various disability policies. Courts have discretion to apply judicial estoppel and should apply when facts demonstrate that “representations are so inconsistent that they amount to an affront to the court.” See cases discussed therein. (Title I).
 3. Talavera v. School Bd. of Palm Beach Cty., 129 F.3d 1214 (11th Cir. 1997), school board employee with back impairment is not judicially estopped from proving

she's "qualified" because she applied for and received social security disability benefits after employer refused to accommodate her disability. ADA plaintiff is estopped from denying truth of any statements made in obtaining disability benefits, but must examine whether such representations create inconsistency with ADA position. See cases discussed therein. (Title I claim).

3. Echazabal v. Chevron U.S.A. Inc., 213 F.3d 1098, *opinion amended by* 226 F.3d 1063 (9th Cir. 2000), *cert. granted*, 122 S.Ct. 456 (2001), (Title I case) "direct threat" defense in qualification standard cannot be used to exclude workers with a disability who pose a threat only to themselves; rejects EEOC regulation that applies direct threat standard to the person with a disability as well as others in the workplace.
4. Winfrey v. City of Chicago, 259 F.3d 610 (7th Cir. 2001), laborer who was legally blind could not perform the essential functions of a ward clerk position, specifically those clerical tasks that could not be computerized. Laborer identified no accommodation that would allow him to perform those functions.
5. Pickering v. City of Atlanta, 75 F. Supp.2d 1374 (N.D. Ga. 1999), *aff'd without opinion*, 235 F.3d 1344 (11th Cir. 2000), correction's officer not "qualified" because could not engage in any inmate supervision that exposed her to risk of physical trauma, which was an essential function of job, and no other positions involved less inmate interaction existed for which she was "qualified."
6. Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999), police officers who sought reassignment as reasonable accommodation satisfy "qualified" definition because

they were able to perform essential functions of job to which they sought reassignment.

7. Castellano v. City of New York, 142 F.3d 58 (2nd Cir. 1998), for purposes of challenging discrimination in post-employment fringe benefits, retired employees are "qualified," even though they no longer work for the city and/or cannot perform former jobs. "Essential functions" requirement not implicated in challenge to post-employment fringe benefits and purpose of requirement met if employee qualified while employed.

2. Reasonable accommodation

1. public entities must make "reasonable accommodation" to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the public entity can show that the accommodation would impose an undue hardship on the operation of its program. 42 U.S.C. § 12112(b)(5)(A).
2. "reasonable accommodation" is any change or adjustment to the job or work environment that permits the individual to participate in the job application process, meet the essential functions of the job, or enjoy the benefits of work equal to those without disabilities. Accommodations include:
 1. acquiring or modifying equipment or devices;
 2. job restructuring;
 3. part-time or modified work schedules;
 4. reassignment to vacant positions;
 5. providing readers or interpreters;
 6. making workplace accessible and usable;
 7. adjustment or modification of examinations, training materials or policies. 42 U.S.C. § 12111(9).

3. "Undue hardship" means significant difficulty or expense relative to the operation of the public program. 42 U.S.C. § 12111(10).
4. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA (effective March 1, 1999).
5. Case law
 1. Barnett v. U.S. Air Inc., 228 F.3d 1105 (9th Cir. 2000) (*en banc* 8-3), *cert. granted*, 532 U.S. 970 (2001) (Title I case), permitting employee with back injury to retain mailroom job, thereby excluding job from seniority-based job bidding system, is a reasonable accommodation absent proof of undue hardship. Seniority system, that was not collectively bargained-for right, is not per se bar to reassignment as an accommodation, but should be considered as one factor in deciding whether proposed accommodation poses undue hardship.
 2. Winfrey v. City of Chicago, 259 F.3d 610 (7th Cir. 2001), city's failure to place laborer who was blind in a dispatcher position did not violate reasonable accommodation obligation because placement would have violated seniority rights under collective bargaining agreement; Seventh Circuit holds that employer is not obligated to violate provisions of collective bargaining agreement to reassign an individual with a disability pursuant to the ADA.
 3. Pickering v. City of Atlanta, 75 F. Supp.2d 1374 (N.D. Ga. 1999), *aff'd without opinion*, 235 F.3d 1344 (11th Cir. 2000), department of corrections not required to create permanent light duty position for corrections officer who had been on light duty for over two years to avoid inmate interaction and risk of physical trauma.
 4. Jackan v. New York State Dep't of Labor,

205 F.3d 562 (2nd Cir. 2000), *cert. denied*, 531 U.S. 931 (2000), employee who cannot perform the functions of current position can require employer to transfer him to a vacant desk position as a reasonable accommodation; but plaintiff has the burden of demonstrating that a vacant position exists. (Title I and Section 504 of the Rehabilitation Act.)

5. Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999), police officers who were no longer qualified for position were entitled to reassignment to vacant career service positions, not just consideration for those positions, as an accommodation; reassignment would not impose undue hardship.
6. Holbrook v. City of Alpharetta, 112 F.3d 1522 (11th Cir. 1997), collection of crime evidence at the scene of a crime is an essential function of detective work, and city is not required under reasonable accommodation requirement to continue reshuffling case assignments so that detective with vision disorder will not have to perform this essential function. (Rehabilitation Act and Title I case.)
7. Worthington v. City of New Haven, 1999 WL 958627 (D. Conn.), city violated accommodations requirement by refusing to provide ergonomic chair and waist level shelves and to modify job to limit standing and reaching; accommodation not unreasonable because employer must absorb more than de minimis cost; employee satisfied her responsibility by repeatedly requesting accommodation and need not identify specific type of accommodation.
6. State's 11th Amendment immunity from suit on reasonable accommodation claim upheld under Title I, but not under Section 504. Nihiser v. Ohio EPA, 269 F.3d 626 (6th Cir. 2001).
3. Preemployment medical examinations and inquiries

1. public entities may ask about applicant's ability to perform job-related functions but cannot ask about disability or severity of disability. 42 U.S.C. § 12112(c)(2).
2. following a conditional offer of employment, public entity may conduct a medical examination or make inquiries about medical history, if (1) all entering employees are required to take same examination or answer medical question and (2) results of the examination are not used to discriminate on the basis of disability and (3) medical information must be kept confidential and maintained in separate medical files. 42 U.S.C. § 12112(c)(3).
3. a test to detect the illegal use of drugs is not a medical examination and can be conducted at any time. 42 U.S.C. § 12114(d).
4. Medical examinations of employees are not permissible unless public entity shows that examination is job-related and consistent with business necessity. 42 U.S.C. 12112(c)(4).
5. Hostile Work Environment
 1. Silk v. City of Chicago, 194 F.3d 788 (7th Cir. 1999), assumes, without deciding, that a hostile work environment claim exists under ADA. Police officer who experienced harassment, including one threat and demeaning comments related to his disability, after being given accommodation of permanent day-shift work did not state claim; alleged harassment was not sufficiently severe or pervasive as to alter the conditions of employment and create an abusive working environment.

6. PROGRAM ACCESSIBILITY -- 28 C.F.R. §§ 35.149 - 35.150

1. General standard

1. A public entity may not deny the benefits of its programs, activities and services to individuals with disabilities because its facilities are inaccessible or not usable. 28 C.F.R. § 35.149.

2. A public entity's services, programs or activities, when viewed in their entirety, must be readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.150.
 1. standard applies to all existing facilities of the public entity, but public entity is not necessarily required to make each existing facility accessible.
3. Public entity not required to take action that it can demonstrate would result in a fundamental alteration of the service, program or activity or impose undue financial and administrative burdens.
 1. public entity has burden of proof on issue;
 2. decision must be made by the head of entity or designee and reasons put in writing; and
 3. must take other action to ensure individual with disability receives benefits or services.
 1. Pascuiti v. New York Yankees, U.S. v. New York City, 87 F. Supp.2d 221 (S.D.N.Y. 1999), determination of whether modifications to Yankee Stadium would impose undue burden must take into consideration City's entire Parks Department budget, while balancing cost of modifications against potential harm to other department programs.
2. **Ways to achieve program accessibility -- 28 C.F.R. § 35.150(b)(1).**
 1. redesigning equipment;
 2. reassigning services to accessible buildings;
 3. assignment of aids to beneficiaries;
 4. home visits;
 5. delivery of services at alternate accessible sites;
 6. alteration of existing facilities and construction of new facilities

1. not required to make structural changes in existing facilities where other methods are effective in making program accessible. Standard differs from the Title III (public accommodations) standard of "readily achievable barrier removal." Public entities do not have to remove barriers from facility, even if removal is readily achievable: they have to make "programs" accessible.
2. In selecting method must give priority to one that offers program in the most integrated setting appropriate.

3. Structural changes in facilities to achieve program accessibility

1. changes must be made as expeditiously as possible but no later than January 26, 1995 (within three years of effective date of Title II.)
2. if structural changes required, public entity that employs 50 or more employees must develop a transition plan by July 26, 1992 setting out the necessary steps to complete the changes.
3. interested persons shall have an opportunity to submit comments about the plan.
4. transition plan must (a) identify physical obstacles in public entity's facilities that limit program accessibility; (b) describe in detail the methods that will be used to make facility accessible; (c) specify the schedule for compliance, and, if plan takes longer than one year, the steps that will be taken each year; and (d) identify official responsible for implementation.
5. plans for providing curb ramps where pedestrian walkways cross curbs must be included in the transition plan, with priority to walkways serving state and local government facilities, transportation, places of public accommodation and residences of individuals with disabilities.
 1. Ability Center of Greater Toledo v. City of Sandusky, 133 F. Supp.2d 589 (N.D. Ohio 2001), *reconsideration denied*, 2001 WL 1739166, failure to install curb cuts when repairing or altering sidewalks violates Title II, even if nearby ramps are available;

failure to construct ramps in compliance with ADAAG guidelines to allegedly prevent ice formation does not meet infeasibility exception.

2. Deck v. City of Toledo, 56 F. Supp.2d 886 (N.D. Ohio 1999), *summary judgment granted in part, denied in part*, 76 F. Supp.2d 816 (N.D. Ohio 1999), failure to oversee curb ramp construction resulting in noncompliant ramps and inaccessible sidewalks and buildings violated Title II. Statute of limitations does not bar challenge because City's action constituted continuing violation.
3. Simpson v. City of Charleston, 22 F. Supp.2d 550 (S.D. W.Va. 1998), city has duty to identify physical obstacles in its facilities, including curb ramps that serve places of public accommodation.
4. Kinney v. Yerusalim, 9 F.3d 1067 (3rd Cir. 1993), priority to installation of curb cuts, which must be completed by January 26, 1995.

4. New construction and alterations

1. All new facilities or parts of facilities whose design, construction or alteration is commenced after January 26, 1992 must be readily accessible and usable.
2. Readily accessible and usable means the facility must be designed, constructed or altered in strict compliance with design standards, set out in either the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 C.F.R. Part 101.19.6) or with the Americans With Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (Appendix A to the Title III final rule, 28 C.F.R. Part 36.)

1. Association for Disabled Persons v. City of Orlando, 153 F. Supp.2d 1310 (M.D. Fla. 2001), obligation to make arena and performance theater fully accessible based on alterations made after effective date of ADA not triggered. Alterations made to both facilities did affect usability; but all alterations to theater, including additional wheelchair accessible seating and restrooms,

made facility more accessible and, thus satisfied obligation, to extent it existed (even though facilities not compliant with UFAS or ADAAG standards); dispersal of accessible seating in arena was not technically feasible and, thus, clustering of those seats permissible. Both facilities comply with less rigorous accessibility standard for existing facilities; individuals with disabilities have no difficulty entering the facilities and are not prevented from participating in or watching programs presented.

5. Case law

1. Shotz v. Cates, 256 F.3d 1077 (11th Cir. 2001), court proceedings are not readily accessible if wheelchair ramps and bathrooms impede ability of person with mobility impairment to attend trial; ability of disabled person to attend trial in some fashion does not obviate violation, as Title II violation is not limited to situations in which person is totally excluded from courthouse.
2. Ramirez v. District of Columbia, 10 A.D. Cases 738 (D.D.C. 2000), accessible bathroom is a minimum requirement of a program under ADA and Section 504; assigning aid to carry student to bathroom is unacceptable method of compliance, and bathroom construction must comply with regulatory standards.
3. Levy v. Mote, 104 F. Supp.2d 538 (D. Md. 2000), University of Maryland did not violate Title II when one of its many facilities rented to outside entities for meetings was not wheel-chair accessible; other accessible meeting sites were available, making "service accessible when viewed in its entirety," and entity was notified prior to renting the facility that it was not accessible
4. New York Ex Rel. Spitzer v. County of Delaware, 82 F. Supp.2d 12 (N.D.N.Y. 2000) and New York Ex Rel. Spitzer v. County of Schoharie, 82 F. Supp.2d 19 (N.D.N.Y. 2000), preliminary injunction requiring county officials to make polling places accessible in accordance with the ADA Accessibility Guidelines for Buildings and Facilities by the March 2000 primary election to the extent

feasible; feasible modifications include creating sufficient parking places with proper signage, installing door handles that can be manipulated, installing temporary ramps with proper slope and surface, locating new polling place that complies more closely with guidelines. Independent organization appointed to monitor compliance with order.

5. Cooper v. Weltner, 1999 WL 1000503 (D. Kan.), correctional facility constructed before effective date of ADA required to comply with the ADAAG standards and should have made minor modifications to shower facilities prior to January 26, 1995.
6. Mathews v. Jefferson, 29 F. Supp.2d 525 (W.D. Ark. 1998), courthouse could not require person to be carried as an alternative to structural modifications; carrying is ineffective and unacceptable method of achieving program accessibility.
7. Anderson v. Dept. of Public Welfare, 1 F. Supp.2d 456 (E.D. Pa. 1998), Medicaid managed care program is not accessible to individuals with mobility impairments, but determination is based on whether the program in its entirety is accessible, not whether each care provider's facility is accessible. Facilities built or modified after effective date of ADA must be readily accessible and usable; facilities built before the effective date with a practice of fifteen or more employees must either ensure that office is accessible or arrange to have services provided in an alternative, accessible location of provider's choice; and existing facilities with a practice of fewer than fifteen employees may refer to another accessible provider to extent cannot accommodate individual without making significant alterations. Facility is not treated as "new" because the managed care program commenced after effective date of ADA.
8. Tyler v. Kansas Lottery, 14 F. Supp.2d 1220 (D. Kan. 1998), lottery operation in the town in which plaintiff would participate satisfies program accessibility requirements because 27 out of 34 lottery retailers were accessible. Site selection provisions of 28 C.F.R. § 35.130(b)(4) does not prohibit state from contracting with an inaccessible retailer if program viewed in its

entirety is accessible. Only "new facilities" must satisfy minimum accessibility standards regardless of program accessibility, and an otherwise existing facility is not treated as a new facility because the contract to sell lottery tickets was granted or renewed after January 26, 1992.

9. Coalition of Montanans Concerned With Disabilities, Inc. v. Gallatin Airport Authority, 957 F. Supp. 1166 (D. Mont. 1997), airport that is adding a restaurant to its facility must install an elevator to provide access for individuals with disabilities rather than use platform lift, relying upon the ADAAG. Restaurant is a primary function of the terminal, so alteration triggered the "path of travel requirement" which requires an elevator, unless the cost exceeds 20% of the total project cost.
10. Schonfeld v. City of Carlsbad, 978 F. Supp. 1329 (S. D. Cal. 1997), city's facilities, when viewed in entirety, do not deny access to individuals with mobility impairments and structural changes made after the required statutory date do not give rise to a controversy. City has also complied with ADA's requirement to install curb ramps by constructing curb ramps to provide access on highly trafficked routes, allocating funds and scheduling future ramp construction, and addressing particular intersections identified by plaintiffs and those falling within ADA's priorities.
11. Moore v. Marshall County, 6 AD Cases 1380 (N.D. Miss. 1997), school district denied summary judgment on compliance with ADA's accessibility requirements, because school district provided no evidence of inspection of buildings other than Administration Building and Administration Building did not have wheelchair accessible restrooms or designated accessible parking places and its second floor was not wheelchair accessible.
12. Miller v. City of Johnson City, 5 A.D. Cases 995 (E.D. Tenn. 1996), city did not violate Title II even though its transition plan was developed late and did not comply with regulatory requirements, because plaintiff was not excluded from participation in or denied benefits of public

entity's programs, activities and services. City's plan to install curb ramps by October 1996, while beyond the January 26, 1995 deadline, did not violate Title II because completing more quickly would impose an undue burden.

13. Tyler v. City of Manhattan, 857 F. Supp. 800 (D. Kan. 1994), city violated Title II by (a) excluding wheelchair user from certain recreational activities by not removing physical barriers and (b) denying equal access to restroom facilities at the Municipal Court by requiring him to request a key to use the only accessible bathroom. The fact that the Court is located in a leased building does not absolve city from ensuring accessibility.

7. COMMUNICATIONS -- 28 C.F.R. §§ 35.160 - 35.164.

1. General requirements -- 28 C.F.R. § 35.160.

1. Public entity must ensure that communications with applicants, participants and members of society are as effective as communications with others; i.e. medical services, court proceedings, public service announcements, tax bills and other public documents.
 1. Soto v. City of Newark, 1999 WL 987385 (D.N.J.), municipal court's refusal to provide an interpreter for the wedding of hearing-impaired couple denied effective means of communication.
 2. Anderson v. Dept. of Public Welfare, 1 F. Supp.2d 456 (E.D. Pa. 1998), question of fact whether providing verbal assistance rather than provider directories in an alternative format and audiotape handbooks rather than braille or large format handbooks are sufficiently effective forms of communication for individuals with vision impairments.
 3. Civic Ass'n of the Deaf of New York City v. Giuliani, 915 F. Supp. 622 (S.D.N.Y. 1996), removal of street alarm boxes would not provide emergency communication to hearing impaired that is as effective as communication with others.
 4. Civic Ass'n of the Deaf of New York City v.

Giuliani, 970 F. Supp. 352 (S.D.N.Y. 1997), in pilot program to test alternative emergency system, replacement of alarm boxes with one-button rather than two-button emergency response system constitutes alteration of existing equipment that violates requirement to make equipment accessible to maximum extent feasible. City must install two-button system because no evidence of undue burden.

2. to ensure equal access, must make auxiliary aids and services available. Type of aid or service will vary with the length and complexity of the communication.

1. hearing-impairment aids include qualified interpreters, note takers, computer-aided transcription services, written materials, telephone amplifier sets, open and closed captioning, TDD's, videotext displays.

1. Chisolm v. McManimon, 275 F.3d 315 (3rd Cir. 2001), reversal of summary judgment granted to county jail; factual issue as to whether refusal to provide an ASL interpreter for intake procedures and extradition hearing and to promptly provide a TDD violated Title II; factual issue as to whether jail's refusal to provide requested auxiliary aids based on security concerns were justified and whether alternative means of communication were effective such that requested aid need not be provided. Jail not exempt from providing auxiliary aids based on short duration of incarceration.

2. Duffy v. Riveland, 98 F.3d 447 (9th Cir. 1996), regulations do not require interpreter to be certified by Registry of Interpreters for the Deaf, but qualifications of person assigned by prison to interpret at a disciplinary and classification hearings must be evaluated to determine whether she was a "qualified interpreter;" need for qualified interpreter, as opposed to the use of written communications, during hearings was question of fact.

3. Hahn ex rel. Barta v. Linn County, IA, 130 F. Supp.2d 1036 (N.D. Iowa 2001), discontinuation of communication modality that enabled person with autism to participate in programs raised claim of failure to provide auxiliary aids needed to ensure equal access.
2. vision-impairment aids include qualified readers, taped texts, audio recordings, Brailled materials, and large print materials.
 3. speech impairment aids include TDD's, computer terminals, speech synthesizers, and communication boards.
3. must give primary consideration to the aid requested by the individual with a disability; i.e. must honor request unless an equally effective means of communication is available or the aid would fundamentally alter program or result in undue financial or administrative burden.
 1. Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001), in reversing grant of summary judgment in favor of county and court administrator, evidence demonstrates that requested auxiliary aid - videotext display - could have been provided had Court officials given due consideration to request and investigated availability.
2. **TDD's or equally effective telecommunications systems must be used to communicate with individuals with impaired hearing or speech. 28 C.F.R. § 35.161.**
 3. **Telephone emergency services, including 911, must provide "direct access" to individuals who use TDD's and other computer modems. 28 C.F.R. § 35.162.**
 1. direct access means that emergency telephone services can directly receive calls rather than rely on relay services or third parties.
 2. operators must be trained to recognize TDD or computer modem calls that may be "silent" calls.
 3. Ferguson v. City of Phoenix, 931 F. Supp. 688 (D.

Ariz. 1996), city's 911 service violated Title II because, even though direct access was provided to individuals with hearing impairments, it required caller to use additional space bar to emit audible tone. Requiring audible tone did not provide same access because some TDD's do not emit tone. Court found that Department of Justice's Technical Assistance Manual prohibited this practice for emergency calls and adopted that standard as reasonable.

4. **Information and signage about the existence and location of accessible services and activities must be provided to all interested persons.** Signage must be provided at all inaccessible entrances to facilities directing individuals to accessible entrance or location of information about accessible services. 28 C.F.R. § 35.163.

5. Undue Burden -- 28 C.F.R. § 35.164.

1. Public entity does not have to take action that would result in a fundamental alteration in the service or activity or impose an undue financial or administrative burden.
 1. Public entity has burden of proof on issue and decision must be made by the head of entity or designee;
 2. reasons put in writing; and
 3. must take other action to ensure individual with disability receives benefits or services.
2. Ferguson v. City of Phoenix, 931 F. Supp. 688 (D. Ariz. 1996), whether the cost of training operators to respond to emergency calls without getting audible tone, purchasing additional equipment and retrofitting office space imposes undue financial burden is an issue of fact.
3. Civic Ass'n of the Deaf of New York City v. Giuliani, 915 F. Supp. 622 (S.D.N.Y. 1996), and 970 F. Supp. 352 (S.D.N.Y. 1997) city did not prove that the cost of repairing and maintaining street alarm boxes and the cost of diverting emergency services for false alarms constitute undue burden. Undue burden standard is high and should enable disabled individual to participate in all but the most unusual cases. But in subsequent review of pilot plan, city did demonstrate that restoring deactivated alarm boxes in pilot area would be undue burden because cost of putting in new equipment would be high, and reinstalling old, hard to maintain equipment would be burdensome.

8. ADMINISTRATIVE REQUIREMENTS -- 28 C.F.R. §§ 35.105 - 35.107.

1. Self-Evaluation

1. General requirements
 1. By January 26, 1993 (within one year of effective date of Title II), a public entity must evaluate its current services, policies and practices that do not or may not meet the requirements of Title II and develop a

transition plan to make the necessary modifications to comply. Only policies and practices that are **inconsistent** with Title II need to be included in evaluation. See DOJ Technical Assistance Manual for activities that need to be carefully examined.

2. interested parties are permitted to participate in the evaluation by submitting comments.
3. public entities with 50 or more employees must maintain on file for three years (a) the list of people consulted; (b) a description of the areas examined and problems identified; and (c) a description of the modifications made.
4. public entities that complied with the self-evaluation requirement of Section 504 must evaluate only those policies and practices that were not included in the previous self-evaluation.

2. Case law

1. Memmer v. Marin County Courts, 169 F.3d 630 (9th Cir. 1999), deviation from accommodation procedure outlined in self-evaluation plan does not violate the ADA.
2. Lightbourn v. Garza, 118 F.3d 421 (5th Cir. 1997), Secretary of State not required to conduct self-evaluation of program accessibility of polling sites and ballots throughout state; only required to conduct evaluation of own department.
3. Ability Center of Greater Toledo v. City of Sandusky, 133 F. Supp.2d 589 (N.D. Ohio 2001), *reconsideration denied*, 2001 WL 1739166, no private right of action to enforce self-evaluation and transition plan requirements.
4. Deck v. City of Toledo, 76 F. Supp.2d 816 (N.D. Ohio 1999), no private right of action to enforce the self-evaluation and transition plan requirements; failure to have procedures to ensure compliance with ADA does not constitute a violation of the Act.

5. Mathews v. Jefferson, 29 F. Supp.2d 525 (W.D. Ark. 1998), money damages not available for failure to formulate or comply with transition plan; failure evidence of discrimination.
6. Simpson v. City of Charleston, 22 F. Supp.2d 550 (S.D. W.Va. 1998), city has duty to prepare a transition plan that includes streets and curb ramps, subject to an order to show cause why it should not be required to do plan.
7. Tyler v. Kansas Lottery, 14 F. Supp.2d 1220 (D. Kan. 1998), request for injunctive relief to direct a self-evaluation plan not granted because, while plan not completed as to all lottery retailers, plaintiff has not connected a concrete threat of discrimination to the failure to satisfactorily complete plan.
8. Schonfeld v. City of Carlsbad, 978 F. Supp. 1329 (S.D. Cal. 1997), city satisfied the self-evaluation requirement by conducting evaluation in a timely manner, soliciting input from variety of sources, and identifying the required improvements and a schedule for completion.
9. Adelman v. Dunmire, 6 AD Cases 1192 (E.D. Pa. 1997), state court performed the required self-evaluation of court-related functions, and plaintiff was not injured by the completion of evaluation 33-days beyond the statutory date.
10. Tyler v. City of Manhattan, 857 F. Supp. 800 (D. Kan. 1994), city failed to comply with self-evaluation requirement or to adopt a schedule for installing curb ramps in compliance with 28 C.F.R. § 35.150(d)(2).

2. Notice of Title II provisions -- 28 C.F.R. § 35.106.

1. public entity is required to provide information about the provisions of Title II and law's applicability to its services, programs and activities.

3. Responsible employee and grievance procedure -- 28

C.F.R. § 35.107.

1. public entity with 50 employees or more must designate one employee to coordinate efforts to comply with Title II and develop a grievance procedure to promptly resolve complaints of violations.
2. Adelman v. Dunmire, 6 AD Cases 1190 (E.D. Pa. 1997), state court appointed an ADA coordinator, implemented a grievance procedure and provides notice on all court forms that individuals with disabilities may obtain assistance through the ADA coordinator. Injunctive relief is not necessary because court complied with all administrative requirements and no evidence that plaintiff's needs were not accommodated.

9. ENFORCEMENT

1. Title II enforcement provision -- 42 U.S.C. § 12133.

1. Remedies and procedures set forth in Section 505 of the Rehabilitation Act, 29 U.S.C. 794a, apply to Title II violations.
2. Section 794a(a)(2) of the Rehabilitation Act does not set out remedies, but rather confers the remedies and procedures permitted under Title VI of the Civil Rights Act of 1964 (prohibits discrimination on the basis of race, religion, national origin or sex in federally financed activities). See Remedies Discussion, Pt. X.

2. Procedural Options

1. file an administrative complaint with an appropriate federal agency
2. file a lawsuit in federal district court or state court. See, Weaver v. New Mexico Human Services Dept., 942 P.2d 70 (N. Mex. Sup. Ct. 1997) and cases cited therein regarding state court jurisdiction.

3. Administrative complaint process -- 28 C.F.R. §§ 35.170 - 35.171.

1. 180-day statute of limitations from the date of discrimination

2. complaint may be filed with either (a) any federal agency that provides funding to the public entity that is the subject of the complaint; (b) the federal agency designated in Part G, 28 C.F.R. § 35.190, to investigate Title II complaints in specific subject areas; or (c) the Department of Justice.
 3. if more than one agency has responsibility because the complaint concerns more than one department or agency of a public entity, complaint should be filed with the Department of Justice, which will then refer to the appropriate agency.
 4. employment complaints can be filed with the EEOC if the state or local government is also subject to Title I.
- 4. Resolution of complaints -- 28 C.F.R. §§ 35.173-35.174.**
1. designated agency shall investigate complaint, attempt formal resolution, and, absent resolution, issue a Letter of Findings.
 2. Letter of Findings shall include (a) statement of facts and conclusions of law; (b) description of remedy for each violation; and (c) notice of right to sue at any time and voluntary compliance process.
 3. agency shall try to secure voluntary compliance through a negotiated agreement that can be enforced by the Attorney General. If the public entity refuses to negotiate or negotiations are not successful, the matter is referred to the Attorney General.
- 5. Exhaustion of administrative remedies is not required. 28 C.F.R. § 35.172(b).**
1. Boqovich v. Sandoval, 189 F.3d 999 (9th Cir. 1999), no exhaustion requirement; Parkinson v. Goord, 116 F. Supp.2d 390 (W.D. N.Y. 2000); and Shariff v. Artuz, 2000 WL 1219381 (S.D.N.Y.) and cases cited therein.
 2. Cable v. Department of Developmental Services, 973 F. Supp. 7 (C.D. Cal. 1997), plaintiff's claim for retaliation based on his objections to Title II violations is subject to Title II procedural requirements; plaintiff need not exhaust

administrative remedies prior to bringing action.

3. See Public Employment *infra* at V.C.
4. Babicz v. School Bd. of Broward Cty., 135 F.3d 1420 (11th Cir. 1998), *cert. denied*, 119 S.Ct. 53 (1998), when alleging federal claims regarding the denial of publicly financed special education under Section 504 or the ADA, plaintiff must first exhaust administrative remedies under the Individuals with Disabilities Education Act (IDEA); cannot circumvent IDEA to obtain compensatory relief that is not available under IDEA; and Mapp v. William Penn School District, 2000 WL 1358484 (E.D. Pa.).

6. Waiver of federal cause of action

1. Shirey v. City of Alexandria School Bd., 229 F.3d 1143, 2000 WL 1198054 (4th Cir.), resolution of discrimination complaint through an agreement between the parties after mediation before the Office of Civil Rights did not waive plaintiff's right to file claim in court alleging discrimination in the action addressed in the agreement; agreement must include a knowing and intelligent waiver of plaintiff's right to file claim in court.

7. Statute of limitations for civil action

1. Neither ADA nor Rehabilitation Act contain a limitations period. Most circuits have applied the state's limitation period for personal injury actions. Lewis v. Fayette County Detention Center, 2000 WL 556132 (6th Cir.); Everett v. Cobb County School District, 138 F.3d 1407 (11th Cir. 1998); Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 771 (1997); Baker v. Board of Regents of State of Kansas, 991 F.2d 628 (10th Cir. 1993) (Rehabilitation Act); Morse v. Univ. of Vermont, 973 F.2d 122 (2nd Cir. 1992) (Rehabilitation Act); Hickey v. Irving Indep. Sch. Dist., 976 F.2d 980 (5th Cir. 1993) (limitation period in state statute that was modeled after the Rehabilitation Act applied rather than personal injury statute of limitations); Deck v. City of Toledo, 56 F. Supp.2d 886 (N.D. Ohio 1999); *but see*, Wolsky v. Medical College of Hampton Roads, 1 F.3d 222 (4th Cir. 1993), (limitation period in state disability

statute modeled after Rehabilitation Act applied rather than period for personal injury actions).

10. REMEDIES

1. General standard

1. State is not immune under the Eleventh Amendment from an action in State or Federal Court for a violation of Act. 28 C.F.R. § 35.178; Conflict in the circuits as to whether Congress had authority to abrogate sovereign immunity under Title II.
2. Congress exceeded authority to abrogate State's immunity under Title I. Court dismissed grant of certiorari on whether abrogation of immunity under Title II was constitutional, noting that Title II has different remedial provisions than Title I. Board of Trustees v. Garrett, 531 U.S. 356 (2001).
 1. Title I not congruent and proportional to the injury to be prevented or remedied and the means adopted to achieve that end. Congress's § 5 authority to enforce equal protection provision of Fourteenth Amendment is limited to invalidating State activities that are unconstitutional, and, under Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), only irrational discrimination is unconstitutional if classification is based on disability. Legislative history does not suggest a pattern of unconstitutional behavior by States in employment; examples of isolation and segregation were activities of local government, not State, and list of discriminatory incidents amounted to anecdotal accounts of disparate treatment that don't constitute constitutional violations under rational basis scrutiny.
 2. Three Title I provisions are disproportionate by proscribing conduct that is not irrational discrimination.
 1. requirement that employers make existing facilities readily accessible to and usable by individuals with disabilities; rational for employer to conserve resources and only hire employees who

can use existing facilities.

2. undue burden standard as defense to reasonable accommodation obligation exceeds constitutional standard; many reasonable responses would not satisfy undue burden standard and burden of proof placed on employer.
 3. invalidation of standards, criteria and methods of administration that have a discriminatory effect regardless of rational basis, even though disparate impact does not support finding of unconstitutional discrimination.
3. Remaining avenues of federal enforcement against States: Title I prescribes standards that remain applicable to the States and can be enforced by the United States for money damages and by private plaintiffs for injunctive relief under Ex parte Young.
3. Congress's authority to abrogate immunity under Title II.
 1. Upholding constitutionality
 1. Post Garrett:
 1. Hanson v. Medical Board of California, 2002 WL 206414 (9th Cir.) and Wroncy v. Oregon Department of Transportation, 2001 WL 474550 (9th Cir.) (Garrett does not overrule previous 9th Circuit decisions, Dare v. California, 191 F.3d 1167 (9th Cir. 1999), *cert. denied*, 525 U.S. 819 (2001) and Clark v. California, 123 F.3d 1267 (9th Cir. 1997), which found valid abrogation under Title II. See also, Patricia N. v. Lemahieu, 141 F. Supp.2d 1243 (D. Haw. 2001); and Becker v. Oregon, 170 F. Supp.2d. 1061 (D. Ore. 2001).
 2. Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn, 2001 WL 1159970 (2nd Cir.), while Title II in its

entirety exceeds Congress's § 5 authority (identifying the reasonable modification requirements identified in Garrett), can structure a remedial scheme so that Title II monetary suits against States will comport with a valid abrogation of immunity. Title II monetary suit against State may be maintained if violation was motivated by either discriminatory animus or ill will (not enough to show a knowing violation of Title II). Proof of animus or ill will can be established under burden-shifting technique adopted in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) or motivating factor analysis adopted in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); both standards ferret out irrational prejudice, but make it less difficult to prove discrimination than the standard rational basis test (disprove existence of any legitimate reason), and place ultimate burden of proof on plaintiff. Plaintiff's claim dismissed because no allegation of discriminatory animus or ill will. See also Hamilton v. City College of the City Univ. of New York, 173 F. Supp.2d 181 (S.D.N.Y. 2001).

3. Popovich v. Cuyahoga County Court, 276 F.3d 808 (6th Cir. 2002) (*en banc* 7-6), action challenging court's refusal to provide requested auxiliary aid for child custody hearing and retaliation for enforcing rights barred by Eleventh Amendment to extent it relies on congressional enforcement of equal protection provision; not barred to extent it relies on enforcement of due process clause. Title II, unlike Title I, encompasses due process type claims that require balancing of interests not rational

basis analysis. Right to participate in child custody hearing involves a due process right, and Congress is within its express authority under § 5 to require states to accommodate parent's disability and not retaliate; enforcing due process right rather than expanding it. Dissent argues that regardless of the right being protected, must still identify a history of state transgression of the specific right in question and demonstrate congruence and proportionality. No evidence of a pattern of due process violations in area of custody hearings, and Title II over broad proscription.

4. Bowers v. NCAA, 171 F. Supp.2d 389 (D.N.J. 2001), adopting theory in Garcia, Title II does not exceed Congress' § 5 authority insofar as it only invalidates conduct that is unconstitutional. Money damages are available against State for intentional discrimination; for disparate impact cases, injunctive relief alone is available.
 5. Project Life, Inc. v. Glendening, 139 F. Supp.2d 703 (D. Md. 2001), relying on Amos v. Md. Dept. of Public Safety, 178 F.3d 212 (4th Cir. 1999), *rehearing en banc*, *judgment vacated* (1999); *case dismissed* 205 F.3d 687 (2000), holding that Title II valid abrogation.
 6. Navedo v. Maloney, 172 F. Supp.2d 276 (D. Mass. 2001), valid abrogation of immunity based on preponderance of case law in favor of validity and Supreme Court's refusal to invalidate Title II in Garrett.
2. Pre-Garrett: Court of Appeals Title II cases surviving Garrett

1. Amos v. Md. Dept. of Public Safety, 178 F.3d 212 (4th Cir. 1999), *rehearing en banc, judgment vacated* (1999); *case dismissed* 205 F.3d 687 (2000); Clark v. State of California, 123 F.3d 1267 (9th Cir. 1997); and Crawford v. Indiana Dept. of Corrections, 115 F.3d 481 (7th Cir. 1997).

2. Rejecting constitutionality
 1. Post-Garrett
 1. Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001), in action by prisoners with mental illness alleging deficient mental health services, overruled Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 58 (1998), that had upheld abrogation; immunity not validly abrogated by ADA or Section 504. No pattern of unconstitutional discrimination by the States; evidence of facially neutral practices that have disparate impact don't violate the constitution. Title II and Section 504 not congruent or proportional because affirmative obligation to make reasonable modifications far exceeds constitutional boundaries. Declines to reach question of waiver of immunity under Section 504 through acceptance of federal funds.

 2. Thompson v. State of Colorado, 258 F.3d 1241 (10th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3464 (Jan. 7, 2002), in action challenging surcharge for handicapped parking placards, Title II did not validly abrogate immunity. Fourteenth Amendment violation against disabled exists if irrational distinctions between disabled and non-disabled,

invidious state action and, in limited situations such as voting rights and prison conditions, failure to make accommodations to disabled. Title II requires accommodations that go beyond what is required under equal protection or due process clauses. Congress did not identify a pattern of unconstitutional discrimination by the states against disabled; local officials responsible for most violations which primarily involved failure to make accommodations. Without foundation of unconstitutional discrimination, Title II cannot be considered preventative or remedial legislation that is congruent and proportional to any constitutional violation. See also, Neiberger v. Hawkins, 150 F. Supp.2d 1118 (D. Colo. 2001).

3. Prater v. Department of Corrections, 11 Fed. Appx. 668, 2001 WL 370476 (8th Cir.), Title II did not validly abrogate immunity relying on pre-Garrett decision in Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (*en banc*), *cert. granted*, 528 U.S. 1146 (2000), *cert. dismissed*, 120 S.Ct. 1265 (2000).
4. Key v. Grayson, 163 F. Supp.2d 697 (E.D. Mich. 2001) (prisoner denied services based on hearing impairment); Frederick L. v. Department of Public Welfare, 157 F. Supp.2d 509 (E.D. Pa. 2001) (community-based services for individuals with mental illness; assert constitutional right under due process clause because involuntarily committed to institution, but rational basis standard applied. Evidence of pattern of unconstitutional discrimination by States not sufficient and modification requirement goes beyond

constitutional requirement); Williamson v. Georgia Dept. of Human Resources, 150 F. Supp.2d 1375 (S.D. Ga. 2001) (Title II employment action); Badillo-Santiago v. Andreu-Garcia, 150 F. Supp.2d 1375 (D.P.R. 2001) (accommodation for individual with hearing impairments in court proceeding); Lieberman v. Delaware, 2001 WL 1000936 (D. Del.) (applying Lavia v. Pennsylvania Department of Corrections, 224 F.3d 190 (3rd Cir. 2000) Title I case to Title II); and Doe v. Division of Youth and Family Services, 148 F. Supp.2d 462 (D.N.J. 2001) (practices of child welfare agency relating to custody of newborn by mother with HIV).

2. Pre-Garrett:

1. Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001), blind prisoner's claim for accommodation under Title II in form of a free tape player for audio books and private prison cell barred; Congress has authority under § 5 only to require States to disregard a person's disability, not accommodate it, and to prohibit irrational, not rational, discrimination on the basis of disability; rational for state to require two-person cell and payment for equipment; Stanley v. Litscher, 213 F.3d 340 (7th Cir. 2000); Reese v. State of Michigan, 234 F.3d 1269 (6th Cir. 2000), *cert. denied*, 121 S.Ct. 1231 (2001); Lavia v. Pennsylvania Dep't of Corrections, 224 F.3d 190 (3rd Cir. 2000) (Title I; lack of evidence of unconstitutional state discrimination); Stevens v. Illinois Dep't of Transportation, 210 F.3d 732 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001) (Title I); Erickson v. Bd. of Governors of State Colleges and Universities

for Northeastern Illinois Univ., 207 F.3d 945 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001) (Title I); Hermes v. State of Nebraska, 230 F.3d 1363, 2000 WL 1060492 (8th Cir.); Sanderson v. Iowa Comm. of Veterans Affairs, 230 F.3d 1363, 2000 WL 1060497 (8th Cir.); Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (*en banc*), *cert. granted*, 528 U.S. 1146 (2000), *cert. dismissed*, 120 S.Ct. 1265 (2000), (legislative history does not document widespread discrimination on the part of the state and Title II does more than enforce rational relationship standard); Brown v. N.C. Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001) (surcharge provision unconstitutional); Wesley v. Vaughn, 1999 WL 1065209 (E.D. Pa.), *on remand*, 2000 WL 1308798 (E.D. Pa.), *summary judgment granted in part, denied in part*, 2001 WL 210285 (E.D. Pa.) (Title II unconstitutional in context of prison's practice of locking shower room door with inmate inside); Nihiser v. Ohio EPA, 979 F. Supp. 1168 (S.D. Ohio 1997), *aff'd in part, rev'd in part*, 269 F.3d 626 (6th Cir. 2001); and Moyer v. Conti, 2000 WL 1478791 (E.D. Pa. 2000).

3. Rehabilitation Act: Constitutionality of abrogation of Eleventh Amendment immunity
 1. Nihiser v. Ohio Environmental Protection Agency, 269 F.3d 626 (6th Cir. 2001), State's participation in a federal program waives Eleventh Amendment immunity where express statutory language provides for a waiver or overwhelming implications from text demonstrates waiver. 42 U.S.C. § 2000d-7 is the most express language of waiver.
 2. Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn, 2001 WL 1159970 (2nd

Cir. 2001), State did not knowingly waive immunity by accepting federal funds. A waiver of immunity requires an intentional relinquishment of a known right or privilege; since the prevailing legal standard at the time funds were accepted was that immunity had been abrogated under the ADA, State could not have understood that it was abandoning immunity, as it had already been lost. Distinguishes Jim C. as erroneously focusing on whether Congress expressed its intention to condition waiver on receipt of funds and whether funds were received, rather than whether State actually believed it was relinquishing immunity in accepting the funds.

3. Garrett v. University of Alabama at Birmingham Board of Trustees, 261 F.3d 1242 (11th Cir. 2001), *aff'd in part, vacated and remanded in part*, 276 F.3d 1227 (11th Cir. 2001), Congress did not validly abrogate immunity under Section 504, but remand to district court to consider whether voluntary waiver by receipt of federal financial assistance conditioned upon such waiver.
4. Kvorjak v. State of Maine, 259 F.3d 48 (1st Cir. 2001), claim for failure to accommodate in employment remains viable under Section 504 even though claim for money damages cannot be brought under Titles I and II.
5. Douglas v. California Dept. of Youth Authority, 271 F.3d 812 (9th Cir. 2001), State waived immunity by accepting federal funds for employment program.
6. Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000) (*en banc* 6-4), *cert. denied sub nom.*, Arkansas Dept. of Education v. Jim C., 121 S.Ct. 2591 (2001), State agency or department that accepts or distributes federal funds waives its immunity; State can shield chosen agencies from compliance with Section 504 by not accepting federal funds for such agencies. Section 504

waiver does not exceed Congress' spending power by imposing overly broad and coercive conditions on federal funds; sacrifice of all federal education funds (12% of state's annual budget) would be politically painful but it does not compel the State's choice. See also, Grey v. Wilburn, 270 F.3d 607 (8th Cir. 2001).

7. Stanley v. Litscher, 213 F.3d 340 (7th Cir. 2000), unlike Title II, Rehabilitation Act is a condition on the receipt of federal funds, and legislation under the spending power is not affected by Kimel (abrogation under Section 5 of Fourteenth Amendment).
8. Clark v. State of California, 123 F.3d 1267 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), in Section 504 challenge, state waives Eleventh Amendment immunity by accepting federal funds where the funding statute manifests clear intent to condition participation in programs funded under Act on State's consent to waive constitutional immunity. Rehabilitation Act Amendments of 1996, 42 U.S.C. § 2000d-7, is an unambiguous waiver of state's Eleventh Amendment immunity under Lane v. Pena, 518 U.S.187 (1996).
9. Bowers v. NCAA, 171 F. Supp.2d 389 (D.N.J. 2001), rejecting Garcia, State knowingly waived immunity by accepting federal funds, even though Title II was presumed to waive immunity as well. State knew in surrendering immunity as a condition of receiving federal funds, it gave up insurance against alterations in law of sovereign immunity. Waiver was not coerced as federal funds constituted less than one percent of state's higher education budget.
10. Koslow v. Commonwealth of Pennsylvania, 158 F. Supp.2d 539 (E.D. Pa. 2001), *motion for consideration on other grounds denied*, 12 A.D. Cases 799 (E.D. Pa. 2001), following Garrett, Section

504 not validly abrogated under Section 5 of Fourteenth Amendment because no specific unconstitutional conduct by states identified by Congress. State did not waive by accepting federal funds; 42 U.S.C. § 2000d-7 is not an expressed waiver of immunity and no nexus between the purpose of the federal funds and the Rehabilitation Act.

11. Frederick L. v. Department of Public Welfare, 157 F. Supp.2d 509 (E.D. Pa. 2001), State waived immunity by accepting federal funds; Section 2000d-7 unambiguously expresses Congress' intent to condition grant of Section 504 funds on consent to suit. No need to establish nexus between purpose of funds and condition imposed. Waiver in not unduly coercive.
 12. Lieberman v. Delaware, 2001 WL 1000936 (D. Del. 2001), states waive immunity in exchange for federal funds.
 13. Key v. Grayson, 163 F. Supp.2d 697 (E.D. Mich. 2001) (same).
4. "Arm of the state"
1. Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), Eleventh Amendment immunity does not extend to units of local government; thus, actions of local government cannot be considered when determining whether Title I was congruent and proportional to a pattern of unconstitutional behavior.
 2. Chisolm v. McManimon, 275 F.3d 315 (3rd Cir. 2001), county court that was merged into state-based court system, not an "arm of the state" because county remained liable for claims against court; state law required county to provide interpretive services; and court was autonomous with respect to the conduct at issue in case - provision of interpretive service.

3. Gorman v. Easley, 257 F.3d 738 (8th Cir. 2001), *cert. granted sub nom.*, Barnes v. Gorman, 122 S.Ct. 865 (2002), Kansas City Board of Police, while appointed in part by the governor, is not an "arm of the state;" City, not State, is responsible for its financial liabilities, including money judgements, and Board is not subject to State's direction or control.
4. Parker v. Anne Arundel County, Md., 2001WL 282695 (D. Md.), in Title I case against county fire department, County is not an "arm of the state;" state treasury would not be impacted by a judgment in the case; county has autonomy in areas of personnel decisions, daily operations and budgetary matters, even though it must adhere to state fire codes; county fire department is involved in local rather than statewide concerns; and state law does not treat fire departments as a state entity.
5. Bowers v. NCAA, 171 F. Supp.2d 389 (D.N.J. 2001), University of Memphis is arm of State because state law required all university revenue to flow into state fiscal accounts.
4. federal case law determines what remedies are available because neither Rehabilitation Act, 29 U.S.C. 794a(a)(2), nor Title VI, 42 U.S.C. §2000d *et seq.*, set out remedies.
5. Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992), in a case brought under Title IX of the Education Amendments of 1972 and relying extensively on case law developed under Title VI, the Supreme Court held that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Court held monetary damages are available to enforce Title IX.
6. Attorney fees: Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and

Human Resources, 532 U.S. 598 (2001), to be a prevailing party in ADA litigation, party must secure either a judgment on the merits or court-ordered consent decree; fees may not be awarded, on catalyst theory, simply because lawsuit brought the desired result through voluntary change in defendant's conduct.

2. Monetary relief under Title II

1. Courts of Appeal have interpreted Section 504 to allow monetary damages, particularly after the Supreme Court's decision in Franklin.
 1. W.B. v. Matula, 67 F.3d 484 (3rd Cir. 1995), plaintiff sued for compensatory and punitive damages against school for its persistent refusal to evaluate, classify and provide necessary educational services. Court held that monetary damages are available, but did not rule specifically on scope of monetary damages.
 2. Pandazides v. Va. Bd. of Educ., 13 F.3d 823 (4th Cir. 1994), teacher sought compensatory and punitive damages for refusal to provide accommodation in taking teacher qualifying examination. Court held that full panoply of rights are available under Section 504 after Franklin.
2. compensatory damages: available for Title II violations to the extent **intentional** discrimination has been alleged and proven
 1. Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001), proof of intentional discrimination required under Alexander v. Sandoval, 531 U.S. 1049 (2001) (Title VI case); intentional discrimination established if public entity acts with deliberate indifference to protected federal right; no need to prove discriminatory animus. Deliberate indifference established by showing public entity's knowledge that harm to a federally protected right is substantially likely and failure to act upon that likelihood.
 2. Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn, 2001 WL 1159970 (2nd Cir.), affirmed

that money damages against non-state governmental entities can be obtained upon proof of deliberate indifference to federally protected rights. See Bartlett v. New York State Board of Law Examiners, 156 F.3d 321, *vacated on other grounds*, 527 U.S. 1031 (1999).

3. Cassidy v. Indiana Dept. of Corrections, 199 F.3d 374 (7th Cir. 2000), prisoner's damage claim for mental and emotional injury arising from denial of access to prison activities barred by Prison Reform Litigation Act, which prohibits actions for mental or emotional injury suffered while incarcerated without a showing of physical injury.
4. Ferguson v. City of Phoenix, 157 F. 3d 668 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 2049 (1999), compensatory damages under Title II and Section 504 available only upon a showing of discriminatory intent. Rejects position that Franklin permits compensatory damages for conduct other than intentional. No evidence of discriminatory animus or deliberate indifference to the strong likelihood that conduct was violating federal right; failure to provide accessible 9-1-1 system resulted from bureaucratic inertia and lack of understanding about the DOJ Technical Assistance Manual's requirements. See also, Midgett v. Tri-County Transportation Dist. of Oregon, 254 F.3d 846 (9th Cir. 2001); and Memmer v. Marin County Courts, 169 F.3d 630 (9th Cir. 1999).
5. Johnson v. City of Saline, 151 F.3d 564 (6th Cir. 1998), compensatory damages recoverable to extent permitted under Section 504 and Title VI; refused to dismiss claim for compensatory damages for city's refusal to locate city's cable station in an accessible location and its termination of contract with individual who had a mobility impairment to operate the cable station.
6. Tyler v. City of Manhattan, 118 F.3d 1400 (10th Cir. 1997), compensatory damages are not recoverable because plaintiff did not state claim for intentional discrimination; refused to address issue raised by *amicus*

Department of Justice that plaintiff is entitled to compensatory damages without alleging intentional discrimination.

7. Love v. Westville Correctional Center, 103 F.3d 558 (7th Cir. 1996), jury award of \$31,000 in damages to prison inmate for intentional denial of access to prison services upheld.
8. Bartlett v. New York State Bd. of Law Examiners, 2001 WL 930792 (S.D.N.Y.), compensatory damages awarded for the cost of the three bar exams plaintiff took without receiving a requested accommodation. Court declined to consider Eleventh Amendment issue because Garrett applied only to Title I case and Garcia v. S.U.N.Y. v. Health Sciences Center of Brooklyn was pending in the Second Circuit at time of decision.
9. Constance v. S.U.N.Y. Health Science Center at Syracuse, 166 F. Supp.2d 663 (N.D.N.Y. 2001), hospital's failure to ensure that requested interpreter appear at hospital to assist patient did not constitute deliberate indifference to federally protected rights. Totality of circumstances indicates that hospital attempted to have employees assist patient with communication.
10. Tsombanidis v. City of West Haven, 180 F. Supp.2d 262 (D. Conn. 2001), owner of group recovery home awarded compensatory damages for emotional pain and suffering resulting from discriminatory conduct by city's zoning officials; advocacy group awarded damages for the time executive director spent dealing with city's discriminatory conduct that required diversion of resources from other matters. No damage award against fire district for failure to modify application of fire safety code because no proof of intentional discrimination.
11. Ability Center of Greater Toledo v. City of Sandusky, 133 F. Supp.2d 589 (N.D. Ohio 2001), *reconsideration denied*, 2001 WL 1739166, claim for compensatory and punitive damages for failure to install curb cuts denied where no evidence that City acted with

intent to discriminate.

12. Salcido v. Woodbury County, Iowa, 119 F. Supp.2d 900 (N.D. Iowa 2000), county required to reimburse state for cost of care for individual with dementia facility who had been committed involuntarily to state mental health facility.
13. Worthington v. City of New Haven, 1999 WL 958627 (D. Conn.), plaintiff entitled to \$150,000 for pain, humiliation, emotional distress and financial hardship resulting from city's failure to provide reasonable accommodation over a three-year period, plus pre- and post-judgment interest.
14. Thrope v. State of Ohio, 19 F. Supp.2d 816 (S.D. Ohio 1998), State must reimburse plaintiffs for payment of illegal surcharge to obtain parking placard.
15. Niece v. Fitzner, 922 F. Supp. 1208 (E.D. Mich. 1996), compensatory damages for mental anguish and humiliation resulting from alleged intentional discrimination by prison are available under Title II. Court raised the question, but did not resolve in motion to dismiss, whether intentional discrimination must be proved to recover compensatory damages.
16. Burns-Vidlak v. Chandler, 939 F. Supp. 765 (D. Hawaii. 1996), plaintiffs entitled to compensatory damages for exclusion from health care plan.
17. Tafoya v. Bobroff, 865 F. Supp. 742 (D.N.M. 1994), plaintiff not entitled to compensatory damages because did not allege and could not prove intentional discrimination by school district in its hiring process.
18. *But see*, Burke v. Commonwealth of Va., 938 F. Supp. 320 (E.D. Va. 1996), Title II only permits injunctive relief.

3. punitive damages

1. traditional view that punitive damages are not available against a public entity cast in

doubt by Franklin. Supreme Court will decide this issue next term.

2. Gorman v. Easley, 257 F.3d 738 (8th Cir. 2001), *cert. granted sub nom.*, Barnes v. Gorman, 122 S.Ct. 865 (2002), punitive damages are available under Title II and Section 504, since remedies available under Title VI apply. Congress created an implied cause of action under Title VI in 1964 and prevailing standard was that all remedies were available unless expressly limited. Under Franklin, Congress assumed the availability of punitive damages upon enactment of Title VI and did not subsequently amend Title VI to limit those remedies, including when it extended Title VI remedies to Section 504 and Title II. Concludes that 6th Circuit Moreno decision misapplied Franklin by not examining the remedies that existed at the time of enactment of Title VI. Punitive damages are appropriate if conduct was motivated by evil motive or intent or reckless or callous indifference to a federally protected right.
3. Doe v. County of Centre, Pa., 242 F.3d 437 (3rd Cir. 2001), punitive damages not available against municipalities under Title II or Section 504; neither statute demonstrates Congress' intent to override settled common law immunity from punitive damages and rationale for not awarding punitive damages under § 1983 (City of Newport v. Fact Concerts, Inc.) also apply under disability statutes: sanctions against municipality, as opposed to offending official, unlikely to deter future discriminatory actions or provide effective retribution, and remedy could threaten financial integrity of local government.
4. Moreno v. Consolidated Rail Corp., 99 F.3d 782 (6th Cir. 1996), *en banc* Court (11-2) reversed three judge panel's decision and held that punitive damages are **not** available under Section 504. Court found that Congress did not demonstrate any desire to change established understanding that punitive damages were not available under Section 504 in subsequently passed legislation. The

Civil Rights Act of 1991, which provided capped compensatory and punitive damages for intentional violations of Title VII, Section 501 of the Rehabilitation Act and Title I of the ADA (all employment provisions), did not upset the status quo of no punitives under Section 504. Court also found that punitive damages are not "appropriate" under Section 504, because Congress has chosen other ways to punish those who violate Section 504 and punitive damages goes beyond what is necessary to enforce Section 504. Johnson v. City of Saline, 151 F.3d 564 (6th Cir. 1998) followed Moreno.

5. Campos v. San Francisco State Univ., 1999 WL 1201809 (N.D. Cal.) request for punitive damages based on intentional refusal to make college programs and facilities accessible not dismissed.
6. Saylor v. Ridge, 989 F. Supp. 680 (E.D. Pa. 1998), Court refused to strike punitive damage claim for alleged employment discrimination under Title II and §504 of the Rehabilitation Act because no express indication that Congress intended to prohibit the recovery of punitive damages under either Act and majority of courts have ruled in recent cases that punitive damages are permitted under §504.
7. Burns-Vidlak v. Chandler, 980 F. Supp.1144 (D. Haw. 1997), punitive damages available under §504 (and by reference Title II). "appropriate relief" under Franklin includes punitive damages; Congress has not given clear direction that punitive damages may not be awarded in §504 cases and such damages are appropriate remedy to fight discrimination. See cases cited therein.
8. Winfrey v. City of Chicago, 957 F. Supp. 1014 (N.D. Ill. 1997), *aff'd*, 259 F.3d 610 (7th Cir. 2001), punitive damages not permitted in a Title II employment discrimination case; Title II does not explicitly provide for punitive damages in contrast to Title I, and Title I explicitly exempts government entity from punitive damages..

9. The Civil Rights Act of 1991, 42 U.S.C. § 1981a, in authorizing capped compensatory and punitive damages for intentional employment discrimination, **disallowed** punitive damages against "a government, government agency or political subdivision." 42 U.S.C. § 1981a(b)(1).

3. Equitable Relief

1. Suit against official of public entity for prospective injunctive relief under Ex parte Young
 1. Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001), notwithstanding State immunity from suit by private individual for money damages, Title I of ADA still prescribes standards applicable to the States that can be enforced by private individuals in actions for injunctive relief under Ex parte Young.
 2. Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn, 2001 WL 1159970 (2nd Cir.), Title II standards generally applicable to States; actions for injunctive relief against state officials permitted under Ex parte Young.
 3. Randolph v. Rodgers, 253 F.3d 342 (8th Cir. 2001), hearing-impaired prisoner may seek prospective injunctive relief against director of prison for provision of communication services, pursuant to Ex parte Young. Title II enforcement provisions, unlike those for employment cases under Title I, do not constitute a comprehensive remedial scheme that precludes an action against a state official under Ex parte Young. Distinguishes Eighth Circuit decision in Alsbrook v. City of Maumelle, which held Title II provided detailed remedial scheme that barred § 1983 action against state officials in individual capacity, based on differences between remedial scheme for discrimination in employment versus other public services. Title II still applies to States as an exercise of Congress' power under the Commerce Clause.
 4. Gibson v. Arkansas Dept. of Correction, 265 F.3d 718 (8th Cir. 2001), in Title I

employment discrimination case, state employees may sue officials for prospective injunctive relief. In light of Supreme Court's decision in Garrett, ADA's remedial scheme does not exclude use of Ex parte Young relief, which is consistent with the full panoply of remedies available under the enforcement provisions of the ADA, including equitable orders compelling state officials to perform statutory obligations. Relief under ADA distinguishable from that under Indian Gaming Regulatory Act at issue in Seminole Tribe of Florida v. Florida. Distinguishes Alsbrook as not addressing Ex parte Young claim because claim for injunctive relief was moot and case predated Garrett decision.

5. John Roe # 2 v. Ogden, 253 F.3d 1225 (10th Cir. 2001), Title II suit against director of Colorado State Board of Law Examiners seeking to enjoin inquiry and investigation about past treatment for alcoholism, drug dependence and mental illness in connection with admission to State bar permitted under Ex parte Young. *But see* Lewis v. New Mexico Dep't. of Health, 94 F. Supp.2d 1217 (D.N.M. 2000), *aff'd*, 261 F.3d 970 (10th Cir. 2001) (institutionalization; Ex parte Young does not apply to Title II because officials cannot be sued; Title II claim voluntarily dismissed prior to decision on appeal).
6. Holm v. Washington State Penitentiary, 19 Fed. Appx. 704, 2001 WL 1153229 (9th Cir.), injunctive relief under Ex parte Young permitted, but must sue individual defendant not entity.
7. Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999), prospective injunctive relief against Secretary of State to alter balloting practice would not be barred by 11th Amendment under Ex parte Young, 209 U.S. 123 (1908).
8. U.S. v. Mississippi Dept. of Public Safety, 159 F. Supp.2d 374 (S.D. Miss. 2001), Ex parte Young claim fails where State, but no state official, has been named in action.
9. Frederick L. v. Department of Public Welfare,

157 F. Supp.2d 509 (E.D. Pa. 2001), following Garrett, official can be sued in official capacity to enforce both Title II and Section 504 under Ex parte Young.

10. Gregory v. Administrative Office of the Courts of New Jersey, 168 F. Supp.2d 319 (D.N.J. 2001), leave granted to amend complaint to name officials of administrative office of the court; Ex parte Young claim against officials for failure to provide requested accommodation to enable hearing impaired individual to participate in court proceedings permitted under Title II and Section 504 of Rehabilitation Act.
11. Moyer v. Conti, 2000 WL 1478791 (E.D. Pa. 2000), Ex parte Young action cannot be maintained against state official; no violation of federal law exists since Title II cannot be enforced against the State under the Eleventh Amendment (predated Supreme Court's decision in Garrett; viability questioned in Gregory v. Administrative Office of the Courts of New Jersey and case distinguished in Frederick L. v. Department of Public Welfare, 157 F. Supp.2d 509 (E.D. Pa. 2001)).
2. Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999), front pay may be awarded when reinstatement not appropriate; court must articulate specific basis for end date of front pay award.
3. Layton v. Elder, 143 F.3d 469 (8th Cir. 1998), mandatory injunctive relief appropriate to require county to make courthouse parking and building accessible.
4. Keith v. Mullins, 162 F.3d 539 (8th Cir. 1998), no basis for modifying injunction that required county to construct a ramp at the courthouse, where county's evidence of cost of chair lift did not demonstrate changed circumstances.
5. Tsombanidis v. City of West Haven, 180 F. Supp.2d 262 (D. Conn. 2001), city and fire district enjoined from prosecuting owner of group recovery home for violations of city zoning code and state fire safety code that related to the number of unrelated individuals who reside in the group

home. Ordered to apply zoning and fire safety code standards that govern single-family dwellings to the group home, even though group home does not satisfy zoning code definition of "family."

6. Bartlett v. New York State Bd. of Law Examiners, 2001 WL 930792 (S.D.N.Y.), injunctive relief requiring a reasonable accommodation on the bar examination, including double the allotted time spread over four days; use of a computer; permission to circle multiple choice answers; and large print on state and multi-state portions.
7. Project Life, Inc. v. Glendening, 139 F. Supp.2d 703 (D. Md. 2001), State enjoined to enter into long-term lease with a drug treatment provider for the rental of a berth to locate a ship from which services could be provided.
8. MX Group, Inc. v. City of Covington, 106 F. Supp.2d 914 (D. Ky. 2000), city enjoined from withholding zoning permits for a methadone treatment program and treating it differently from other medical facilities.
9. Salcido v. Woodbury County, Iowa, 119 F. Supp.2d 900 (N.D. Iowa 2000), county enjoined to provide funding for residential services at state mental health facility to which individual with dementia was committed involuntarily.
10. Smith-Berch, Inc. v. Baltimore County, Md., 115 F. Supp.2d 520 (D. Md. 2000), county enjoined from imposing zoning requirements on methadone treatment programs that are not imposed on other medical offices.
11. Levy v. Mote, 104 F. Supp.2d 538 (D. Md. 2000), injunctive relief requiring University of Maryland to install permanent ramp at entrance of one facility ahead of construction schedule denied; no evidence that plaintiff would suffer future discrimination because temporary ramp had been used successfully by others to gain entrance and University followed recommendations of plaintiff's expert in modifying other features of facility that were not in compliance with ADAAG.
12. Bingham v. Oregon School Activities Ass'n, 37 F. Supp.2d 1189 (D. Or. 1999), *vacated in part by Bingham v. Ediger*, 2001 WL 1217701 (9th Cir.)

enjoined use of eight-semester eligibility rule to exclude student with learning disability from participating in interscholastic sports; ordered association to rewrite eight-semester rule to provide an exception for learning disabled students. On appeal, injunction moot as association complied with injunction and student graduated from high school.

13. Wesley v. Vaughn, 1999 WL 1065209 (E.D. Pa.), on remand, 2000 WL 1308798 (E.D. Pa.), summary judgment granted in part, denied in part, 2001 WL 210285 (E.D. Pa.), injunctive relief against State not barred by 11th Amendment, under Ex parte Young, even if damage claim is. Salcido v. Woodbury County, Iowa, 66 F. Supp.2d 1035 (N.D. Iowa 1999); Uttilla v. City of Memphis, 40 F. Supp.2d 968 (W.D. Tenn. 1999), *aff'd*, 1208 F.3d 216 (6th Cir. 2000).
14. Thrope v. State of Ohio, 19 F. Supp.2d 816 (S.D. Ohio 1998), State enjoined from requiring individuals with disabilities to pay for parking placard.
15. Tyler v. Kansas Lottery, 14 F. Supp.2d 1220 (D. Kan. 1998), no standing to request statewide injunctive relief to require lottery operation to comply with Title II, because no evidence that particular plaintiff will face real and immediate threat of future harm. Injunction to suspend sale of lottery tickets at non-compliant sites in city in which plaintiff would participate not granted because plaintiff did not prove imminent threat of injury, a favorable balance of harms and no adverse affect to public, because loss of revenue outweighs benefit through possible slight increase in accessibility.
16. Lightbourn v. Garza, 118 F.3d 421 (5th Cir. 1997), reversed extensive injunctive relief requiring Secretary of State to ensure statewide accessibility of voting systems to visually and mobility impaired persons, concluding that ADA and state law do not impose duty on Secretary to ensure local election officials comply with the ADA.
17. Tyler v. City of Manhattan, 857 F. Supp. 800 (D. Kan. 1994), injunctive relief requiring city to (a) adopt schedule for installing curb ramps as

expeditiously as possible, but no later than January 26, 1995; (b) conduct a self-evaluation of current services, policies and practices; (c) relocate ball games to accessible fields and (d) removing barricade at one park.

18. Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, 884 F. Supp. 487 (S.D. Fla. 1994), permanent injunctive relief requiring city to continue implementing its plans to establish recreational programs that are accessible to disabled individuals.

4. Section 1983 claim based on Title II violation

1. Courts have split over whether the Rehabilitation Act and the ADA provide a sufficiently comprehensive remedial scheme so as to bar Section 1983 claims based on their violation.

1. Section 1983 claim barred. Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (*en banc*), *cert. granted*, 528 U.S. 1146 (2000), *cert. dismissed*, 529 U.S. 1001 (2000); Pona v. Cecil Whittaker's Inc., 155 F.3d 1034 (8th Cir. 1998), *cert. denied*, 119 S.Ct. 1805 (1999), and Davis v. Francis Howell School Dist., 138 F.3d 754 (8th Cir. 1998); Holbrook v. City of Alpharetta, 112 F.3d 1522 (11th Cir. 1997); Porter v. Ellis, 117 F. Supp.2d 651 (W.D. Mich. 2000); Burns-Vidlak v. Chandler, 939 F. Supp. 765 (D. Hawaii 1996) (Section 1983 claim dismissed for lack of jurisdiction; plaintiffs could recover damages under Section 504 and Title II, whereas damage claim under Section 1983 barred by Eleventh Amendment and injunctive relief request moot); Wesley v. Vaughn, 2001 WL 210285 (E.D. Pa.); and Silk v. City of Chicago, 1996 WL 312074 (N.D. Ill.), *summary judgment granted*, 1997 WL 790598, *aff'd*, 194 F.3d 788 (7th Cir. 1999).

2. Section 1983 claim permitted. Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001) (must demonstrate that the government's policy or custom inflicted the injury); W.B. v. Matula, 67 F.3d 484 (3rd Cir. 1995) (Section 504 claim); Smith v. Barton, 914 F.2d 1330 (9th Cir. 1990), *cert. denied*, 501 U.S. 1217 (1991) (Section 504 claim); Pushkin

v. Regents of Univ. of Colorado, 658 F.2d 1372 (10th Cir. 1981) (Section 504 claim); and Frederick L. v. Department of Public Welfare, 157 F. Supp.2d 509 (Title II and Section 504).