

Legal Briefings

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HOT TOPICS IN ADA TITLE III LITIGATION

I. Overview of ADA Title III

Congress passed the Americans with Disabilities Act (“ADA”) based on findings that society isolates and segregates people with disabilities and that discrimination against individuals with disabilities is a serious and pervasive social problem. The purposes of the ADA include:

- Assuring equality of opportunity,
- Full participation and integration of people with disabilities,
- Independent living,
- Economic self-sufficiency,
- Remove barriers to access, and
- Prohibit discrimination.²

In Title III, Congress prohibits public accommodations or services that are operated by private entities from discriminating against people with disabilities. “The following private entities are considered public accommodations... if the operations of such entities affect commerce:

- (A) an inn, hotel, motel, or other place of lodging . . . ,
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store . . . shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.³

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Title III states that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”⁴ Discrimination is prohibited whether it is “done directly, or through contractual, licensing, or other arrangements...” When a Title III entity acts or fails to act in the following ways, then the entity is discriminating under the ADA:

- “the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability ... unless such criteria can be shown to be necessary for the provision of the goods, services, ... or accommodations being offered.”⁵
- a Title III entity’s “failure to make reasonable modifications in policies, practices, or procedures, ... unless ... such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.”⁶
- a Title III entity’s “failure to remove architectural barriers, and communication barriers that are structural in nature ... where such removal is readily achievable.”⁷
- where removal of an architectural barrier is not readily achievable, “a failure to make such goods, services, facilities, privileges, advantages or accommodations available through alternative methods if such methods are readily achievable.”⁸

Thus, discrimination includes denying people with disabilities participation in programs or services; providing participation in unequal benefit “... unless such action is necessary to provide. . . [an] opportunity that is as effective as that provided to others”; and providing only a separate benefit, unless the opportunity is “as effective as that provided to others.”⁹ “Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.”¹⁰

Discrimination includes “a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated

differently than other individuals because of the absence of auxiliary aids and services, ... unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, ... or accommodation being offered or would result in an undue burden, i.e., significant difficulty or expense.”¹¹ Auxiliary aids and devices include:

1. Qualified interpreters, notetakers, computer-aided transcription services, ... assistive listening devices, ... open and closed captioning, [TTYs], videotext displays, or other effective methods of making aurally delivered materials available ...;
2. Qualified readers, ... audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available ...;¹²

Acquisition or modification of equipment or devices; and other similar services and actions.

“If provision of a particular auxiliary aid or service ... would result in a fundamental alteration ... or in an undue burden, ... the public accommodation shall provide an alternative auxiliary aid or service...”¹³

The ADA does not require Title III entities to make fundamental alterations to their programs or services. A fundamental alteration is one that would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved. The ADA also does not require Title III entities to make modification or alterations that would be an “undue burden” because the alteration or modification would cause “significant difficulty or expense.”¹⁴ Title III entities are not required to provide personal devices or services “such as wheelchairs individually prescribed devices, such as prescription eyeglasses or hearing aids; or services of a personal nature including assistance in eating, toileting, or dressing.”¹⁵ Title III entities are not required to make alterations or modifications to buildings, services, or program if the alteration or modification would be a direct threat to the safety of other people.¹⁶

Although the majority of ADA litigation has arisen under the employment provisions of Title I, there has been some significant litigation under Title III. This brief will review and analyze a number of emerging issues that have resulted in Title III

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litigation. Because many employers are also places of public accommodation, it is important to be aware of litigation developments under Title III, as well as Title I.

II. Pre-Litigation Notice

Currently, Title III does not have any requirement to exhaust administrative remedies or provide notice before filing in federal court. Recently, the 9th Circuit Court of Appeals confirmed that pre-litigation was not required under Title III.¹⁷

However, on May 13, 2009, Rep. Duncan D. Hunter (R-CA) introduced H.R. 2397, entitled the ADA Notification Act of 2009 (“Notification Act”). The bill was referred to the House Committee on the Judiciary following its introduction.

If signed into the law, the Notification Act will add a procedure that requires people with disabilities to notify Title III entities of alleged violations of the ADA, or a related state statute, prior to initiating a lawsuit. Under the Act, plaintiffs must give the Title III entity written notice that identifies the alleged violation, including the location and date of the alleged violation. The notice must state that the plaintiff is barred from filing its complaint until the end of a 90-day remedial period. Courts would have discretion to extend this remedial period up to 30 days. If, at the end of the remedial period, the plaintiff files the suit, the complaint must allege that the defendant has not corrected the alleged violation. Similar bills have been introduced in previous years, but have failed to pass.

Many in the business community support a requirement that would give Title III entities an opportunity to address accessibility issues before undue litigation expenses are incurred. Conversely, many in the disability community do not understand why businesses need additional time to come into compliance with the law since the ADA was passed nearly 20 years ago. Further, they argue that no other protected class is required to provide notice before filing suit, and that the lack of monetary damages under Title III would give businesses the incentive to not comply with the ADA until they receive notice of a possible violation.

III. Standing to Sue

Article III of the U.S. Constitution limits federal court jurisdiction to cases or controversies.¹⁸ Courts have interpreted this phrase to mean that plaintiffs only can bring lawsuits if they have “standing.” Standing requires the plaintiff to demonstrate three components.¹⁹ First, the plaintiff must suffer a personalized and concrete injury-in-fact of a legally cognizable interest.²⁰ Second, the injury must be fairly traceable to the defendant’s conduct. Finally, it must be likely, as opposed to speculative, that a favorable court decision would redress the alleged injury.²¹ The standing analysis affects Title III cases in significant ways.

A. Allegation of future harm

To have standing, plaintiffs must show that they will be harmed in the future by an inaccessible place of public accommodation.²² To conduct this type of factual analysis, courts use a set of factors to determine whether the person with disabilities will return to the non-accessible place of public accommodation.²³ These factors are: 1) the proximity of the business to the plaintiff’s home, 2) the plaintiff’s past patronage of defendant’s business, 3) the definiteness of the plaintiff’s plans to return, and 4) the plaintiff’s frequency of travel near business.²⁴

Ault v. Walt Disney World indicates how strictly some courts undertake this analysis.²⁵ In that case, three plaintiffs filed Title III claims against Walt Disney World because it prohibited them from using segways to travel throughout its amusement park grounds.²⁶ The court dismissed the claims of all three plaintiffs for lack of standing. The court found that the first plaintiff failed to allege any intention to return to the amusement park in the future. The second plaintiff alleged that he planned to visit the amusement park in the future, but the court was unsatisfied with the level of specificity of these plans, labeling them merely speculative. The final plaintiff had alleged concrete plans to visit the amusement park in his complaint; however, the date of the visit had passed by the time the court wrote its opinion. The court dismissed for lack of standing because the claim was no longer

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redressable.²⁷

In *Chambers v. Melmed*, the Tenth Circuit dismissed a case for lack of standing when a woman brought a suit to challenge a clinic's denial of insemination treatments because she was blind.²⁸ The plaintiff could not show a likelihood of future harm because she had moved and the doctor had stopped offering artificial insemination services.²⁹ A court also reasoned that future harm was too unlikely to warrant standing in *Access 4 All v. Oak Spring, Inc.*³⁰ In that case, a man alleged that an inn located five hours away from his home violated Title III. The man had stayed at the inn in the past when he visited his aunt or frequented an amusement park nearby. The court reasoned that the threat of future injury to the man was too speculative to confer standing because he had failed to allege plans to visit the amusement park again and his aunt had passed away.³¹

Many courts have shifted away from the narrow and strict Title III analysis, finding standing without necessitating the plaintiff to have concrete or specific plans to return to the defendant's establishment. Focusing on Title III's language which states that the ADA does not require a person with a disability to "engage in a futile gesture," some courts have found standing without requiring the plaintiff to plan on returning to an establishment where they know they will be discriminated against. Under this analysis, plaintiffs need only show that they are aware of the inaccessible conditions and, because of that knowledge, are deterred from frequenting the establishment.³² For example, in *Access 4 All, Inc. v. OM Management, LLC*, the court found that a plaintiff had standing to challenge a hotel's architectural barriers under Title III even though the plaintiff did not allege any future intentions to frequent the hotel in its complaint.³³ The court specifically stated that an intention to return was not required of Article III standing, reasoning that to require a plaintiff to regularly make reservations at an inaccessible hotel would be an "exercise in futility."³⁴

Similarly, in *Kratzer v. Gamma Management Company*, the court also held that a plaintiff could have Title III standing without a specific intent to return; rather, the court only required that the plaintiff knew of the barrier and alleged a desire to

use the facility once the defendant removed the barrier.³⁵

Beyond bypassing the "intent to return" requirement, several cases have interpreted standing even broader to find that plaintiffs have standing in non-traditional cases. For example, in *Castaneda v. Burger King*, the court allowed a plaintiff to bring a class action under Title III against a fast food restaurant that had accessibility barriers for wheelchair users.³⁶ The court allowed the plaintiff to challenge 90 different restaurants within the chain even though the plaintiff alleged that he had frequented only two of the establishments, reasoning that all of the restaurants included in the suit shared common design patterns and similar discriminatory practices.³⁷

In *Van Brocklen v. Government Employees Insurance Co.*, the court found that a man had standing to sue an insurance company under Title III for canceling his insurance policy after the man had a panic attack during a required physical examination related to his disability of post-traumatic stress syndrome.³⁸ Though the man did not allege that he would seek future services from the insurance company, the court found the harm that the insurance company caused the man was ongoing because the violative actions continued to affect the man's ability to get medical care for his condition.³⁹

B. Limited to violations related to plaintiff's disability

Title III plaintiffs may challenge accessibility violations related to their own disability only.⁴⁰ For example, the Eighth Circuit held that a blind man had standing to bring Title III claims against an establishment for ADA violations relating to blindness, but did not have standing to allege injuries resulting from violations unrelated to blindness.⁴¹ This principle has the most significant impact for class action litigation; courts have held that named plaintiffs have standing to pursue claims on behalf of themselves and on behalf of people with the same disabilities.⁴² A Title III plaintiff's own standing "does not confer carte blanche to pursue all Title III claims for all people with disabilities against a business

The Interplay of the ADA and FMLA

establishment.”⁴³

C. Limiting “vexatious” or “frivolous” litigation

Some courts have used the standing analysis as a means to protect against the frivolous use of litigation to collect attorney’s fees or settlement money for Title III violations. These courts interpret standing strictly, finding that a plaintiff has no standing if the court suspects improper motives.⁴⁴ To avoid a “legal shakedown scheme,” courts have emphasized that special diligence and vigilant examination of standing requirements are necessary and appropriate to ensure the litigation serves the purpose for which the ADA was enacted.⁴⁵ Title III standing analysis resolves this issue by inquiring into the plaintiff’s credibility. For this reason, some courts have justified looking into the plaintiff’s litigation history as a relevant part of the standing analysis. These courts have assumed that where plaintiffs have an extensive ADA litigation history, they might not be credible when claiming they have plans to return to an establishment as soon as the barriers are taken down. Without satisfying that inquiry, the plaintiff might not have standing to sue under Title III.⁴⁶

Courts using this analysis determine a plaintiff’s credibility by looking through a plaintiff’s litigation history and inquiring into: 1) the number of ADA lawsuits filed, 2) the frequency that the plaintiff settled the lawsuit, trading accessibility compliance for a cash settlement, 3) the merits of the claims brought, and 4) whether the plaintiff did actually return to establishments after alleging an intent to do so. In *Molski v. Evergreen Dynasty Corp.*, for example, the Ninth Circuit labeled a plaintiff a “vexatious litigant” after discovering that the man had filed over 400 ADA suits, the majority of which rested on complaints that were deemed contrived and not credible.⁴⁷ Determining that the plaintiff’s real motivation was to extract money from the defendant in a quick settlement, the court denied standing for the present case and upheld an order requiring leave of court before filing additional suits under Title III of the ADA.⁴⁸ In *D’Lil v. Best Western Encina Lodge and Suites*, the court found that a plaintiff did not have Title III standing to recover attorneys’ fees based, in part, on the court’s findings that the plaintiff had a

history of bringing similar lawsuits in which she claimed that she would return to the hotel, but did not.⁴⁹

Though in other civil rights contexts, “testers” have standing to challenge illegal conduct, under the ADA, courts are divided over whether to find Title III standing for plaintiffs who frequent establishments solely to find ADA accessibility violations. The court in *Harris v. Stonecrest Auto* found that tester plaintiffs do not have standing because they fail the redressability requirement.⁵⁰ In contrast, the court in *Park v. Ralph’s Grocery Co.* reasoned that a plaintiff’s motives for returning to the establishment are irrelevant; courts may only look to plaintiff’s intent to return—not the motive behind that intent.⁵¹ The Ninth Circuit mirrored this reasoning in *Molski v. M.J. Cable*, rejecting defense’s argument that a plaintiff who had brought over 300 ADA cases was not eligible to recover because he was not an individual as required under the ADA.⁵² The defense unsuccessfully argued that the plaintiff did not visit the establishment in question as a customer or client, but rather as a business.⁵³ The court clarified that the question of ADA eligibility did not hinge on whether or not an individual acted as a consumer or a business, but rather where or not the plaintiff was a person with a disability.⁵⁴

IV. Readily Achievable Barrier Removal

Title III requires removal of physical barriers so that goods and services are available to people with disabilities on an equal basis with the rest of the public. Facilities in existence before the ADA was enacted must retrofit their buildings to remove architectural and communication barriers that are structural where their removal is readily achievable.⁵⁵ Though the ADA Architectural Guidelines (“ADAAG”) do not apply to facilities existing before the ADA’s effective date, the ADAAG, “provide(s) valuable guidance for determining whether an existing facility contains architectural barriers.”⁵⁶

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Under the ADA, the term readily achievable means “easily accomplishable and able to be carried out without much difficulty or expense.”⁵⁷ The law strives to create a reasonable balance between meeting the needs of the entire community and creating hardship on businesses. One commentator, an advocate for the ADA legislation who authored the term “readily achievable,” notes that the concept provides a reasonable standard which requires existing facilities to remove only those obstacles that can be removed without extreme difficulty, but that as a group these minor changes may increase substantially the architectural and communication accessibility for people with disabilities.⁵⁸

The ADA lists factors for determining whether a measure or readily achievable, looking at the difficulty and expense of the measure. These factors are:

- (A) the nature and cost of the action needed under the (ADA);⁵⁹
- (B) the overall financial resources of the facility or facilities involved in the action;
- (C) the number of persons employed at such facility;
- (D) the effect on expenses and resources or the impact otherwise of such action upon the operation of the facility;
- (E) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (F) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.⁶⁰

Though there is no clear mathematical formula for assessing the achievability of barrier removal, courts will consider both the level of need and the level of resources available. Where a Title III entity has a parent entity that can allocate resources to the local facility, courts also might consider the parent entity’s resources, size, and operations. However, they will consider the parent entity’s resources only to the extent appropriate in light of the geographic separateness and the fiscal or

administrative relationship of the site or sites in question to any parent corporation.

To determine whether a barrier removal is readily achievable, courts can look at factors beyond cost.⁶¹ For example, in *Spector*, the U.S. Supreme Court held that removal of barriers on a ship was not readily achievable where the removal would make the ship non-compliant with international law. Several persons with disabilities took action against Norwegian Cruise Lines for ADA violations. The cruise line argued that the accommodations requested would violate international standards. The court ruled that, absent a statement to the contrary in the text, a statute does not apply to foreign-flagged ships. Furthermore, even if it had such a clause, a change that would affect the internal operation of the business could be a defense to barrier removal. In this case, compliance with the ADA would make the ship non-compliant with international laws and thereby useless.⁶² Under such circumstances, the barriers were not removable as they were deemed to be too great a burden on the cruise lines mode/method of business.

Time frames for compliance can affect whether a barrier is readily achievable. In *First Bank Nat. Ass’n v. FDIC*, the court held that “the “readily achievable” standard necessarily includes a temporal element... what is easy to accomplish in one year may not be easily accomplishable in one day, so a determination of what is “readily achievable” depends upon the passage of time.”⁶³

Both tenants and landlords have obligations to ensure that facilities and operations are ADA compliant.⁶⁴ To determine whether a tenant or landlord should be liable, courts will consider the length of the tenant’s lease length. If tenants had all ADA liability, the disability community would be without a remedy in some instances. Furthermore, the court in *Grove v. De La Cruz* found that although a landlord and tenant were free to contract for allocation of compliance duties, this agreement was merely between the parties and does not preclude parties from seeking removal of a barrier.⁶⁵ The court found that the barrier removal was readily achievable in light of the time and resources available to the defendant, despite a lease provision that prevented tenants from making physical alterations to the property.

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Landmark and aesthetic considerations can affect the determination of whether barrier removal is readily achievable. In *Gahright–Dietrich v. Atlanta Lnadmarks, Inc.* the court held that in the context of a historic building, “barrier removal would not be considered ‘readily achievable’ if it would threaten or destroy the historic significance of the building.”⁶⁶ Another court went further to state that the bank showed it was unlikely to obtain city permission to construct the ramp in light of traffic and safety considerations, and that it was problematic as to whether an “aesthetically tolerable design” could be constructed at a reasonable cost.⁶⁷

However, in *Molski v Foley Estates Vineyards & Winery, LLC*, the court held that having a non-compliant exterior ramp at a historic winery did not excuse a winery from making readily achievable accommodations to the maximum extent feasible.⁶⁸ It found that serving people with disabilities in an external gazebo because of the non-compliant ramp was inadequate because barrier removal inside the winery was readily achievable.⁶⁹ Thus, because the removal of the internal barriers was readily achievable, the winery had to make the exterior ramp compliant.

V. Website Access

The ADA was enacted in 1990, just as the World Wide Web was coming into existence; thus Title III is silent on the subject of whether websites must be accessible.⁷⁰ Arguably the website of any Title III entity is a “service” within the meaning of Title III and therefore must be accessible.⁷¹ Also, one could argue that a website is itself a “service establishment” under Title III.⁷²

A. Is a Website a Place of Public Accommodation?

The case law in this area is scarce, and those courts that have addressed the issue disagree.⁷³ For example, in *Doe v. Mutual of Omaha Ins. Co.*, the Seventh Circuit stated, albeit in dicta, that “a store, hotel, restaurant, dentist’s office, travel

agency, theater, *web site*, or other facility . . . that is open to the public” are “places of public accommodation” and cannot exclude disabled people.⁷⁴

Other jurisdictions have held that whether a website is a “place of public accommodation” depends on if it forms a “nexus” with a brick-and-mortar place of business. In *Access Now, Inc. v. Southwest Airlines, Co.*, a blind individual and an organization representing people who are blind sought injunctive and declaratory relief against Southwest Airlines, alleging that its website was inaccessible in violation of Title III.⁷⁵ The Southern District Court of Florida held that Southwest.com did not form a nexus with a place of public accommodation because Southwest’s online ticket counters did not exist in any particular geographical location.⁷⁶

In *National Federation of the Blind v. Target Corp.*, the Northern District Court of California developed the nexus theory further.⁷⁷ National and state associations for people who are blind and a blind individual sued Target alleging that its website was inaccessible in violation of Title III and California civil rights laws.⁷⁸ Denying Target’s motion to dismiss, the court held that the complaint stated a claim to the extent that Target’s website denied full and equal enjoyment of goods and services offered in Target’s stores to people who are blind.⁷⁹ However, the court declined to extend Title III protection to those aspects of Target’s website that provide information and services not connected to Target’s brick-and-mortar stores.⁸⁰ Arguably, this holding contradicts the plain language of Title III, which says people with disabilities are entitled to “full and equal enjoyment” of the goods and services of any place of public accommodation.⁸¹ Regardless, Target later entered into a settlement agreement in which it agreed to make its entire website accessible and to pay \$6 million dollars to blind individuals in California who had tried unsuccessfully to navigate its website.

Related to the question of whether Title III applies to websites is the broader issue of whether a “place of public accommodation” must be a physical place under the ADA. The circuits are split on this question: the First and Seventh Circuits have held that a place of public accommodation

need not be a physical place, while the Third, Sixth, Ninth, and Eleventh Circuits have held that it must be a physical place.⁸³ The Fourth, Fifth, Eighth, and Tenth Circuits and the Supreme Court have yet to rule on this issue.

B. Structured Negotiations and Website Accessibility

Many companies have avoided litigation by making their websites accessible, either on their own initiative or as the result of structured negotiations. Structured negotiations are an alternative dispute resolution tool that California disability rights attorneys Lainey Feingold and Linda Dardarian helped pioneer.⁸⁴ They have negotiated 11 settlement agreements specifically addressing website accessibility. During the last few years, they have negotiated the following agreements:

- May 2005: LaSalle Bank agreed to make its website accessible, along with providing materials in alternate formats and installing “talking” ATMs.
- May, 2007: RadioShack agreed to make its website accessible and to install tactile point-of-sale devices in all of its stores.
- April, 2008: Equifax, Experian, and TransUnion (which collectively operate the website www.annualcreditreport.com) entered agreed to make their website accessible and to provide credit reports in Braille, Large Print and on audio CD.
- April, 2008: RiteAid agreed to make its website accessible. Specifically, the agreement states that if there is a visual “Captcha,” or scrambled word designed to enhance the security of the website, RiteAid will ensure that there is also an alternative security measure that is equally effective and accessible to blind users. In addition, RiteAid agreed to install tactile point-of-sale devices in all of its stores.
- April, 2009: Staples agreed to make its website accessible and to install tactile point-of-sale devices in all of its stores.

Government agencies also have successfully negotiated settlement agreements to improve website accessibility. In September, 2008, Massachusetts Attorney General Martha Coakley negotiated an agreement between Apple Inc. and the National Federation of the Blind in which Apple

agreed to make Apple's iTunes and iTunes U fully accessible to people who are blind or vision-impaired. Similarly, the U.S. Department of Justice (“DOJ”) negotiated settlement agreements with Motel 6 in 2004 and with Ticketmaster in 2005. However, these settlement agreements dealt not with the accessibility of the websites themselves but rather with the addition of online features that would enable consumers to reserve wheelchair-accessible hotel rooms or concert seats.

C. Standards for Accessible Web Design

There are two major web accessibility standards: (1) the Web Content Accessibility Guidelines (WCAG) promulgated by the World Wide Web Consortium (W3C);⁸⁵ and (2) the web accessibility standards contained in § 508 of the Rehabilitation Act.⁸⁶ In addition, several states have adopted standards for accessible web design, mostly modeled after § 508.⁸⁷

The Web Content Accessibility Guidelines (WCAG) of the Worldwide Web Consortium (W3C) are a comprehensive set of recommendations developed by W3C members, web experts, and the public for optimizing web accessibility. The first version of the WCAG (Version 1.0) was published in 1999, and the second version (Version 2.0) was published in 2008. Version 2.0 includes standards addressing more advanced technology, but leaves many of the guidelines contained in the Version 1.0 intact.⁸⁸

In 1998, Congress amended § 508 of the Rehabilitation Act to include a set of website accessibility guidelines modeled after the WCAG.⁸⁹ Section 508 requires that federal agencies make their electronic and information technology – including their websites – accessible to people with disabilities, unless doing so would impose an undue hardship on the agency, in which case the information must be made available by another means.⁹⁰ The Access Board, which administers § 508, is in the process of updating these guidelines. An advisory committee to the board recently recommended that the new regulations harmonize with the WCAG 2.0.⁹¹

Several states, including Illinois, have adopted

their own web accessibility guidelines, modeled mostly on § 508. In Illinois, these guidelines are called the Illinois Information Technology Accessibility Act Implementation Guidelines for Web-Based Information and Applications 1.0 (formerly the Illinois Web Accessibility Guidelines).⁹² All state agencies, including public universities, must comply with these guidelines.

VI. Communication Access – Health Care and Fast Food Restaurants

The ADA states that Title III entities must provide people with disabilities “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations.”⁹³ Discrimination under Title III includes the failure to provide auxiliary aids and services to ensure effective communication with people with disabilities.⁹⁴ The ADA defines “auxiliary aids and services” as “qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments...[and] qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments...”⁹⁵ Two different settings – health care providers and fast food restaurants – have been sources of significant Title III litigation.

A. Healthcare Settings

Under Title III of the ADA, hospitals and the professional offices of health care providers are places of public accommodation.⁹⁶ While hospitals or professional offices of health care providers are clearly subject to the ADA, individual doctors also might be liable when they act as operators of their offices.⁹⁷ Doctors who practice in hospitals are liable under Title III where “(a) he or she is in a position of authority; (b) within the ambit of this authority he or she has both the power and discretion to perform potentially discriminatory acts; and (c) the discriminatory acts are the result of the exercise of the individual’s own discretion, as opposed to the implementation of institutional

policy or the mandates of superiors.”⁹⁸

Title III entities ultimately must decide what measures to take “to ensure effective communication...provided that method chosen results in effective communication.”⁹⁹ Thus, hospitals and professional offices of health care providers must make an effort to ensure effective communication through auxiliary aids and services.¹⁰⁰ Where no attempt to provide an auxiliary aid is made at all, a hospital or the professional office of a health care provider will be liable under Title III for failing to effectively communicate with their patient.¹⁰¹

Courts vary when interpreting which auxiliary aids and services are appropriate and what constitutes “effective” communication in a health care setting. Courts have found that auxiliary aids that are appropriate in some situations are not appropriate in healthcare settings. For example, in *Majocho v. Turner*, a group of Pennsylvania doctors refused the plaintiff’s request for a sign-language interpreter to help him communicate with them about his infant son.¹⁰² The defendants claimed they had offered to write notes with the plaintiff, and as such fulfilled its obligation under the ADA, which lists “note taking” as an example of acceptable aids.¹⁰³ The court declined to award summary judgment to the defendants because it believed that a genuine dispute existed as to whether note taking was an effective form of communication in the health care setting.¹⁰⁴ The court indicated that professional interpreters provide a more thorough means of communication when medical terms are present. A settlement of the case was reached soon thereafter.¹⁰⁵

The U.S. Department of Justice has resolved several cases with various hospitals regarding the provision of auxiliary aids to patients who are deaf or hard of hearing. These settlements provide further guidance to hospitals and professional healthcare providers.

For instance, DOJ filed suit against the Greater Southeast Community Hospital after the hospital failed to provide a qualified interpreter to a deaf patient. Because of the resulting communication barriers, the deaf patient was unaware of why the hospital was performing various tests on him, his wife and supervisor were “improperly imposed”

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upon to attempt to interpret, and nurses mistakenly locked the patient in the bathroom for 45 minutes. In the settlement agreement finalized in October 2008, the hospital agreed to provide appropriate auxiliary aids, as determined by an assessment of the patient or companion's individual needs; to give notice to the community as well as the hospital's personnel and physicians regarding their policy on the provision of auxiliary aids; and to train its personnel to ensure effectiveness in implementing the policy.¹⁰⁶

DOJ has reached similar settlement agreements with other hospitals. All of these settlement agreements highlight the need for qualified interpreters in a healthcare setting to ensure the effective communication required by the ADA. These agreements share similar provisions, usually providing that hospitals or professional health care providers will:

- Provide appropriate auxiliary aids and services free of charge to patients,
- Perform certain assessments to determine what auxiliary aids and services are appropriate for the individual patient or companion.
- Provide qualified professional interpreters in certain situations. They must provide them in a timely manner, even in emergencies. Health professionals should not rely on family members to interpret. Communication in healthcare settings necessarily involves medical terms that are difficult to communicate without a qualified interpreter. Further, using family member to interpret could violate patient confidentiality and could cause the patient not to fully disclose information.
- Provide TTY devices in the rooms of patients who are deaf or hard of hearing.
- Provide TTY devices at a designated station in the hospital, and should have signs directing patients and visitors to them.
- Post policies in the hospital, on websites, or in other locations to inform patients, hospital personnel, and physicians about the hospital's policy regarding the provision of auxiliary aids and services.
- Train staff and other personnel who may interact with patients or visitors who are deaf or hard of hearing.
- Submit evidence of implementation and compliance to the United States.¹⁰⁷

It is in the physician's best interest to provide the most effective means of communication possible, as medical malpractice issues could become involved in addition to discrimination claims. For example, if a physician fails to effectively communicate with a deaf patient and consequently fails to acquire informed consent to medical treatment from that patient, the physician will be liable not only for a Title III discrimination claim, but also a medical malpractice claim. Effective communication benefits not only the patient, but the medical profession as well.

In addition to refusing to provide interpreters, effective communication is often prevented because the health care provider takes the position that it does not have to pay for the sign language interpreter. However, neither the ADA, nor the courts support this position.¹⁰⁸

B. Access in Restaurants

Like health care providers, a number of cases have been brought against fast food restaurants for failing to provide effective communication to its customers with disabilities.

For instance, in *Bunjer v. Edwards*, the court found that a restaurant's drive-through window practices violated Title III of the ADA.¹⁰⁹ A deaf customer attempted to write down his order and drive it to the drive-through window. The employees were uncooperative and demanded he come inside. When he refused, they filled his order at the window, but gave him the wrong change and the wrong drink while "snickering."¹¹⁰ The court held that the defendant's drive-through facility discriminated against all patrons who are deaf or hard of hearing and that the staff was inadequately equipped to deal with the needs of such customers.¹¹¹

Restaurants also are required to make their menus accessible to people who are blind or visually impaired. The plaintiff in *Camarillo v. Carrols Corporation* is able to read large print at a very close distance, but the defendant's fast food restaurants did not provide large print menus.¹¹² When the plaintiff asked employees to read her the menu, she was either made fun of, stared at, made to wait until other customers behind her in line

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were served, or read only part of the menu.¹¹³ The court found that the plaintiff stated a claim under the ADA.¹¹⁴

The DOJ recently reached a settlement agreement with Friendly Ice Cream Corporation that requires the corporation to modify or institute policies to make its restaurants more accessible to people with disabilities. Those policies include providing menus in an audio format or reading menus to customers with visual impairments.¹¹⁵

As the above cases illustrate, restaurants are obligated to make their services accessible to customers with disabilities. Reasonable accommodations can include signs that direct deaf or hard of hearing patrons to drive-through windows,¹¹⁶ large print menus, audio format menus, and training employees to read full menus.

VII. Movie Theater Access

A. Physical Accessibility

With the increase in the construction of movie theaters using “stadium” seating, a significant number of ADA Title III suits have been brought against movie theaters for not providing equal access to people with disabilities. Theaters with stadium seating typically require patrons to climb steps to reach their seats. Unless the theater has an elevator or is designed to provide an accessible entrance within the stadium seating, wheelchair users must sit on the ground level because they cannot reach the tiered seats, which provide a more desirable view of the movie.

At issue is the interpretation of a DOJ regulation requiring that movie theaters provide wheelchair users “lines of sight comparable to those for members of the general public.” Courts have interpreted this provision in a myriad of ways: one held that it did not even require unobstructed views;¹¹⁷ another held that only *some* wheelchair seats had to have unobstructed views;¹¹⁸ one required unobstructed views for all wheelchair seats but not comparable viewing angles;¹¹⁹ and three required unobstructed views and at least some sort of comparable viewing angle.¹²⁰

Even if the courts rule that Title III requires movie theaters to provide wheelchair users unobstructed views or comparable viewing angles, the courts likely would hold that the requirement applies only prospectively. In *U.S. v. AMC Entertainment*, the trial court held that AMC Entertainment, Inc. (“AMC”) violated the DOJ’s sight-line regulations; but the appellate court held that the regulation applied only prospectively because of notice.¹²¹ The trial court had ordered AMC to upgrade seating for people who use wheelchairs at its stadium-style movie theaters and pay penalties, fines, and civil damages.¹²² The court also held that AMC must ensure that all theaters built over the next five years comply with the ADA.¹²³ Finding that AMC could not have had been on notice of “line of sight” requirement until at least the 1998 DOJ *amicus* brief in the *Lara* case the Ninth Circuit reversed the district court’s remedial order to the extent that it required retroactive modification of facilities built before that date.¹²⁴ It remanded the case to the lower court to determine the exact date on which AMC could be considered to have constructive notice of the DOJ interpretation.¹²⁵

Because of this confusion in the courts, at least one theater has sought review by the U.S. Supreme Court, which declined to hear the case based on the Solicitor General’s 2004 representation that the DOJ planned to issue new regulations to remedy the circuit split. In that the DOJ has still neglected to do so in the nearly five years since, it is possible that the Supreme Court soon may agree to hear a case on the issue. If it does so, the decision likely would apply not just to movie theaters, but to all assembly areas, including sports arenas, classrooms, concert halls and auditoriums.

To avoid costly litigation, some movie theaters have opted to enter settlement agreements related to the “sight lines” of their accessible seating. In *U.S. v. Hoyts Cinema*, Hoyts agreed that all future construction of Regal theaters will be designed with wheelchair seating near the middle of the auditorium, and that in the nearly 1,000 existing theatres, it will move wheelchair seating as far back from the screen as possible.¹²⁶ The settlement established specific standards for integrating wheelchair seating in theater auditoriums, including unobstructed views, integration of wheelchair spaces, wheelchair

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spaces with at least one companion seat, and location of spaces within a theater section. There was also a provision that theaters will only be required to make a percentage of their auditoriums wheelchair-accessible based upon the number of other accessible theaters located within a 10-mile radius. Similarly, in *U.S. v. Cinemark*, Cinemark agreed to modify its theaters to provide better lines of sight to wheelchair users and to provide lines of sight comparable to those of the general public in all of its future theaters (though because of the *Lara* decision, the Department of Justice cannot seek any relief for theaters within the Fifth Circuit).¹²⁷

B. Communication Access

Individuals who are deaf or hard of hearing, as well as people who are blind or who have low vision, have raised claims under the ADA for failure to provide equal communication access in movie theaters. The courts are split on how to apply the ADA's auxiliary aid requirements to movie theaters. At least one court has held that individuals who are deaf can raise a claim that movie theaters violate the ADA by failing to provide reasonable accommodations such as captioning or interpretive aids.¹²⁸ Other courts have found that they cannot compel movie theater chains to install captioning devices because it would be an undue burden to do so.¹²⁹

In *Arizona v. Harkins*, a district court held that the ADA cannot compel movie theaters to provide open or closed captioning for people with hearing disabilities, or audio descriptions for people with visual disabilities, because such requirements would fundamentally alter the nature of the services they provide.¹³⁰ The court reasoned that because the only service that movie theaters provide is the screening of the film in the format that the theater received it, people with disabilities are capable of accessing that service – albeit unable to hear it or see it – they were not being discriminated against. That case currently is pending before the Ninth Circuit Court of Appeals. Also, the Department of Justice may soon issue regulations to address this issue. Proposed regulations were deferred until the rules are reviewed and approved by officials appointed by President Obama.¹³¹

C. Companion Seating

Under Title III of the ADA, movie theaters are required to ensure that a companion of a person who uses a wheelchair be given priority in the use of companion seats.¹³² For example, in *Fortyone v. American Multi-Cinema, Inc.*, a person using a wheelchair sued a movie theater company alleging that its policies regarding companion seats during sold-out movies violated the ADA.¹³³ The theater's policies stated that during sold-out shows, it cannot demand that patrons sitting in seats designated for companions relocate to provide seating for individuals accompanying an individual who uses a wheelchair. The Ninth Circuit found that the theater's policies violated Title III and that the plaintiff's request for a modification of the theater's policies to allow him to sit with his companion was reasonable.

VIII. Emergency Preparedness

Emergency and evacuation procedures and policies serve a critical role in ensuring full access for people with disabilities to safe evacuations. Title III entities should be attentive to creating emergency plans that account for the needs of people with disabilities because these plans are important to an overall ADA compliance strategy and can help avoid litigation and the resulting negative publicity arising from allegations of discrimination. However, many Title III entities are unsure how to develop emergency procedures that provide for full and effective access for people with disabilities.

Though the ADA does not provide specific requirements for evacuations, the structure and overall purpose of the ADA imply the right to egress.¹³⁴ Government guidelines promulgating the ADA also indicate that the ADA compliance requires accessible evacuations. The Title III Technical Assistance Manual, created by the DOJ to encourage voluntary ADA compliance, indicates that Title III entities should modify their evacuation procedures, if necessary, to provide alternate means for clients with mobility impairments to be safely evacuated.¹³⁵ It also indicates that entities

should modify evacuation procedures to take into account the needs of individuals with visual, hearing, and other disabilities. ADA regulations and technical assistance guides provide direction to Title III entities so they can create evacuation plans that provide for people with disabilities.

A. Construction Requirements

The ADA Accessibility Guidelines (ADAAG) instructs Title III entities how to comply with the ADA's design and construction requirements. The ADAAG includes specific requirements for accessible means of egress, emergency alarms, and signage.

Buildings and facilities covered by Title III of the ADA must have accessible means of egress in the same number as emergency means of egress required by local building or fire codes.¹³⁷ Each accessible route in a public accommodation should serve as a means of accessible egress during emergencies.¹³⁸ To be accessible, the egress route should comply with ADA requirements for width, grade of slope, clearance, and texture.¹³⁹

These means of egress must be reasonable. In *Access 4 All, Inc. v. Atlantic Hotel Condominium Association*, the court held that a restaurant's assigned means of accessible egress was unreasonable, and therefore were not compliant with the ADA.¹⁴⁰ The defendant ("Atlantic Hotel") owned a restaurant.¹⁴¹ Atlantic Hotel identified the restaurant's two required means of accessible egress as the accessible public entrance at the front of the building and the accessible employee entrance in the restaurant's kitchen.¹⁴² To access the employee entrance during an emergency, a guest would have to overcome many obstacles. The guest would have to know that a door marked "staff only" was the route to accessible evacuation. If this door were locked, the guest would have to find an employee to unlock the door. Then, the guest would have to navigate the restaurant's kitchen to reach the exterior accessible door to evacuate the building. Meanwhile, guests who could ambulate could exit the restaurant quickly. Thus, the court held that the restaurant's plan was unreasonable and did not provide guests with disabilities with equal access to emergency egress from the restaurant.¹⁴³

Whenever possible, the accessible means of egress should allow a person to evacuate the building completely and safely. Sometimes, complete evacuation is extremely difficult in multi-story buildings because elevators, which often serve as accessible routes between floors, are out of service during emergencies. Thus, the ADAAG provides that accessible evacuation routes in multi-story buildings either may lead to "areas of rescue assistance" or to horizontal exits that comply local building and fire codes.¹⁴⁴ A variety of areas can serve as areas of rescue assistance including:

- stairway landings within smoke proof enclosures,¹⁴⁵
- stairway landings within an exit enclosure which is vented to the exterior and is separated from the interior of the building with not less than one-hour fire-resistive doors¹⁴⁶
- a portion of an exterior exit balcony located immediately adjacent to an exit stairway, where that balcony complies with local requirements for exterior exit balconies and is protected with fire assemblies with 45-minute fire protection ratings,¹⁴⁷
- an elevator lobby when the elevator shafts and adjacent lobbies are pressurized as required for smoke proof enclosures by regulations and when complying with requirements for size, communication, and signage.¹⁴⁸
- a one-hour fire-resistive corridor located immediately adjacent to an exit enclosure,
- a vestibule located immediately adjacent to an exit enclosure that is constructed to fire-resistive standards¹⁵⁰
- other areas approved by local authorities, so long as those areas are separated from other portions of the building by a smoke barrier that has a fire-resistant rating of not less than one hour and that completely encloses the area. The ADAAG has other requirements for the doors, proximity to exits, and construction.¹⁵¹

Areas of rescue assistance must provide two accessible areas each being not less than 30" by 48" in size, per story of the building.¹⁵² Each story should have at least one area of that size for every 200 persons served by the area of rescue assistance.¹⁵³ These areas may not encroach on other exit paths that are required by other codes including local fire codes.¹⁵⁴ Stairways adjacent to areas of rescue assistance must be at least 48

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inches wide; this width is necessary so that rescue workers can help individuals in wheelchairs exit the building without encroaching on the exit path for ambulatory individuals.¹⁵⁵

Areas of rescue assistance must be equipped with a method of two-way communication between the area of rescue assistance and the primary entrance to the building.¹⁵⁶ This communication should include both visible and audible signals so that it is accessible to people with visual and auditory disabilities.¹⁵⁷ Next to the communication system, the facility must post instructions for how to use the area during an emergency.¹⁵⁸

Areas of rescue assistance must be marked clearly with a sign that says "AREA OF RESCUE ASSISTANCE" and display the international symbol of accessibility.¹⁵⁹ The facility should include signs at all inaccessible exits to clearly indicate the direction to areas of rescue assistance.

In addition to these construction requirements, the ADAAG contains accessibility requirements for emergency warning systems, like fire alarms. If a place of public accommodation provides emergency warning systems, those systems must be accessible to people with visual or auditory disabilities. Auditory alarms should be of such intensity and frequency that they will attract the attention of individuals who are hard of hearing.¹⁶⁰ Signals that have periodic elements to its signal are best.¹⁶¹

Title III entities should provide visual alarms in restrooms, hallways, lobbies, general usage areas (e.g. meeting rooms), and any other area for common use.¹⁶² In most cases, it is insufficient to install visual signals at audible alarm locations only because visual signals serve smaller areas than audible alarms.¹⁶³ The lamp in the visual alarm should be xenon strobe type or something equivalent.¹⁶⁴ The ADAAG has requirements for color, pulse rate and duration, intensity, height, and location of visual alarms.¹⁶⁵

The ADAAG and courts have recognized exceptions to the visual and auditory alarm requirements in some limited situations. For example, medical care facilities have the authority to decide to place emergency warning systems to

suit health care alarm design practice.¹⁶⁶ In *Access Now, Inc. v. Ambulatory Surgery Center Group, LTD*, the court held that medical facilities might consider several factors to determine whether Title III requires visual alarms in specific room of the medical facility.¹⁶⁷ These factors include the safety of the patients and guests, the need for orderly and safe evacuations, the activities that take place in those rooms (e.g. surgery), the evacuation procedures that apply to that room, and the likelihood that lights could trigger seizures or cause health problems.¹⁶⁸ Relying on these factors, the court ordered the hospital to install visual alarms in some rooms (e.g. waiting rooms and public restrooms), but not in other rooms (e.g. operating rooms, recovery rooms, and special services rooms like ICU and NICU).¹⁶⁹

B. Evacuation Policy Requirements

In addition to its structural requirements, the ADA requires that places of public accommodation make "reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations."¹⁷⁰ Emergency management plans with specific provisions to ensure safe evacuation for people with disabilities "play an essential role in fire safety and life safety."¹⁷¹

Few courts have confronted the question of whether Title III requires public accommodations to make modifications to emergency evacuation plans for people with disabilities. Most recently, in *Savage v. City Place Limited Partnership*, the court held that a Marshall's store may have violated Title III when it did not make accommodations to its evacuation plan for people with disabilities.¹⁷² The plaintiff, a woman who used a wheelchair, was shopping at Marshall's when the fire alarm went off.¹⁷³ The store was located on the second floor of a mall. During the emergency, elevators deactivated, removing the accessible route between the first and second floors of the mall. The plaintiff was unable to evacuate the building until after the emergency was over.¹⁷⁴ While

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refraining from defining the term “policy” as used by the ADA and its promulgating regulations, the court found that Marshall’s evacuation plans “would certainly constitute a public accommodation’s policies.”¹⁷⁵ Reasoning that policy changes are more readily achievable than architectural changes, the court held that evacuation plans could violate the ADA, even absent specific Title III rules concerning the content of those plans.¹⁷⁶ The court held that in cases such as this one, where the issue is whether evacuation plans are violative of the Title III, the plaintiff has the burden to prove the reasonableness of a modification to those plans, and the defendant has the burden to prove that the proposed modification fundamentally would alter the nature of the public accommodation or its services.¹⁷⁷

Following the court’s ruling that Title III of the ADA does apply to the issue of evacuation, the defendants in *Savage* decided to settle.¹⁷⁸ In its settlement, Marshall’s agreed to re-develop its emergency evacuation procedures at its more than 700 stores located in 42 states and Puerto Rico and provide certified accessible emergency exits for people with disabilities. These accessible emergency exits would lead to either emergency exits or areas of rescue assistance. It also agreed to train all store managers to assist customers in locating and using evacuation routes and all employees on evacuation procedures. It further agreed to hire ADA consultants to develop and implement the new policies and procedures and to designate responsible corporate employees to oversee and coordinate implementation of the terms of the settlement.

Though few courts have confronted the question of Title III’s requirements for evacuation procedures and policies, courts have faced similar questions in Title II cases. Title II, which applies to state and local governmental entities, provides that “no qualified individual with a disabilities shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity.”¹⁷⁹ A “qualified person with a disability” is “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the

participation in programs or activities provided by a public entity.”¹⁸⁰ This language is similar to the Title III language on which the *Savage* court relied in its analysis.¹⁸¹ Thus, courts are likely to use similar analysis in both contexts.

Courts had found that, under Title II, public entities are required to include safe evacuation procedures for people with disabilities in their evacuation plans. In *Shirley v. City of Alexandria School Board*, the court faced with the question of whether a school board failed to provide students with disabilities safe evacuation from school buildings.¹⁸² The plaintiffs, a child who uses a wheelchair and her parents, brought complaints about two separate incidents. The first incident involved a bomb threat against the school. The school evacuated all of the ambulatory children from the building; but the children with disabilities were left with a responsible adult inside the school for 70 minutes after the evacuation. After this incident, the school worked with the child, her parents, faculty, and fire and police departments to create an Emergency Preparedness Plan. Under this plan, children with disabilities and a responsible adult would go to a safe room during emergencies. This room was marked and had a cellular phone. In an actual evacuation, emergency personnel would rescue the children directly from this room. The school explained the plan to students and faculty, and ran practice drills. The second incident involved a fire drill during which the newly implemented Emergency Preparedness Plan was not properly executed. The court held that the school board violated the ADA in the first incident because the school had no reasonable plan to evacuate disabled children from the building during emergencies.¹⁸³ However, the court found that the second incident did not violate the ADA because the school board had fulfilled its duties under the ADA; it had developed a plan with advice from local fire and police officials, explained how the program worked to everyone who would be affected by it, and did practice runs to make sure that the plan would work.¹⁸⁴

When developing emergency evacuation and disaster plans, Title II entities should include people with disabilities in their planning. A recent ADA case was filed against the City of Los Angeles for failing include services to disabled residents during emergencies as part of its plan.¹⁸⁵

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The complaint alleges that the Los Angeles area is one of the most disaster-prime areas in the U.S. and the needs of people with disabilities should have been incorporated into the planning process. The court has not ruled on this case yet, but it could provide guidance to Title II entities about possible liability if the disaster and emergency evacuation plans do not include people with disabilities.

C. Direct Threat

The Direct Threat doctrine is an affirmative defense to claims under Title I and Title III. Under Title III, a public accommodation can deny an individual participation in or benefit from “the goods, services, facilities, privileges, advantages, and accommodations of such entity where such individual poses a direct threat to the health or safety of others.”¹⁸⁶ A “direct threat” is “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.”¹⁸⁷

Title III entities must base their determinations of direct threats on individualized assessments.¹⁸⁸ To succeed as a defense, the threat must be based on real risks, not on stereotypes, mere speculation, or generalizations about individuals with disabilities. To evaluate risks, Title III entities can rely on current medical knowledge or on the best available objective evidence.¹⁸⁹ They should consider several factors including the nature, duration, and severity of the risk, the probability that the potential injury will actually occur, and the likelihood that reasonable modifications to policies, practices, or procedures will mitigate the risk.¹⁹⁰

For example, in *Leiken v. Squaw Valley Ski Corp.*, the court held that the defendant (“Squaw Valley”)’s direct threat defense likely was not valid.¹⁹¹ Squaw Valley had a longstanding policy that banned wheelchairs because Squaw Valley believed that wheelchair users would pose a direct threat to other patrons in an emergency. The court found that Squaw Valley failed to conduct any studies or introduce any evidence to support its opinion that wheelchairs posed a greater risk to safety than the risk posed by others. Instead of using documented actual risks, Squaw Valley made its determination based on speculation,

stereotypes, or generalizations. Thus, the court enjoined Squaw Valley from enforcing its policy because it failed to base its determination on real risks or individualized assessments.

In cases that involve architectural changes, courts may find that Title III entities can satisfy the individualized assessment requirement through a more generalized assessment based on a class of people. However, this assessment still must be based on real risks, not on stereotypes, generalizations, or speculation. For example, in *Fielder v. American Multi-Cinema*, a man who uses a wheelchair sued a movie theater because its accessible seating was located only in the back of its theaters.¹⁹² The defendant (“AMC”) raised a direct threat defense, arguing that placing the accessible seating in other areas would pose a real threat to the safety of other patrons. In an emergency evacuation, persons in wheelchairs could impede the progress of other people evacuating through non-accessible exits at the front of the theater. Fielder claimed that he could negotiate the path without impeding other patrons. The court determined that Fielder’s abilities were not a factor. Because the structural modification requested would be available to all people in wheelchairs, AMC could base its “individualized assessment” on the class of people who use wheelchairs, rather than on Fielder’s abilities alone. The court found that the presence of wheelchairs in the lower levels of the theater could impede an evacuation because the wheelchair would need to travel against the flow of evacuating patrons. The court held that the direct threat defense was convincing because AMC based its determination on a real threat, not on stereotypes.¹⁹³

The direct threat analysis courts use in a Title III context is similar to the analysis they use in the Title I context. For example in *E.E.O.C. v. DuPont De Nemours & Co.*, the court held that the direct threat defense was invalid where a company did not make an individualized assessment of the threat posed by the employee.¹⁹⁴ The defendant (“DuPont”) terminated an employee after its doctors determined that her medical condition prevented her from evacuating during an emergency, which DuPont claimed was one of her essential job duties. The trial court determined that DuPont did not make an individualized assessment

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and thus found that DuPont failed to assert a valid direct threat defense.¹⁹⁵

Because of the similarities between direct threat analysis under Title I and Title III, some commentators are concerned that courts will expand the Supreme Court's ruling in *Chevron USA v. Echazabal* to Title III entities.¹⁹⁶ If this were to happen, the Title III direct threat defense would be expanded from "direct threat to the health or safety of others" to "direct threat to the health or safety of the patron or others." The impact of such an expansion potentially could severely impair access to some public accommodations for some people with disabilities. However, plaintiffs can argue that courts should not extend the reasoning in *Echazabal* case to Title III entities because the underlying statutory and regulatory provisions are different.

In *Echazabal*, the court held that employers could exclude people with disabilities from jobs where, based on an individualized assessment, the employer determines that the position's essential job duties would be a real threat to the health or safety of the employee.¹⁹⁷ The court relied on Title I regulations, which state that employers can screen out potential employees based on the risks the job pose to the employee's own health and safety.¹⁹⁸ The court held that these regulations were consistent with the ADA.¹⁹⁹ ADA Title I states that an employer's job qualifications "may include a requirement that an individual shall not pose a direct threat to the health and safety of other individuals in the workplace."²⁰⁰ The court determined that Congress' usage of the term "may" indicates that this provision is nonexclusive and, thus, that the Title I direct threat defense also can include direct threats to the employee herself.²⁰¹

Courts likely would not expand this reasoning to interpretations of Title III's direct threat provision. First, in Title III regulations, unlike Title I regulations, direct threat is limited to "health or safety of others."²⁰² Second, the text of Title I's direct threat provision is significantly different from the text of Title III's direct threat provision. Because Title III's direct threat provision, unlike Title I's direct threat provision, lacks qualifiers such as "including" or "may", courts most likely would not expand the Title III direct threat definition, and therefore would limit it to "threats to the health or

safety of others."

IX. Service Animals

A. Background

The ADA authorizes the use of service animals for the benefit of people with disabilities. A "service animal" is any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.²⁰³ The ADA does not limit the kind of animal that can provide service or the types of tasks or work a service animal can perform.

While the ADA does not limit the type of disability one must have to use a service animal, there must be a direct link between the task an animal performs and the person with a disability. For example, in *Pruett v. Arizona*, the court found that a chimpanzee did not qualify as a service animals under the ADA because the plaintiff could not prove that she need needed the chimpanzee to do individualized tasks for her that she could not do on her own.²⁰⁴ The plaintiff argued that she needed the chimpanzee to monitor her blood sugar levels and retrieve sugar for her if needed. However, she presented no evidence that the chimpanzee was trained to do these tasks. Reasoning that the plaintiff could care for herself without help from the chimpanzee, the court held that the chimpanzee was not a service animal under the ADA.

Title III entities cannot require people with disabilities to provide certification that their animal is a service animal. The ADA does not require service animals to be specifically identified with certification papers, a harness, special collar, or any other form of identification. The ADA regulations merely establish minimum requirements for service animals, namely, that an animal (1) is individually trained and (2) works for the benefit of the individual with a disability. Title III entities may inquire into whether an animal is a service animal and may ask what tasks the

animal has been trained to perform. However, entities may not ask specific questions about the person's disability.²⁰⁵ In *Thompson v. Dover Downs, Inc.*, the Delaware Supreme Court said a business could exclude a service animal if the owner refused to answer questions about its training.²⁰⁶ Although this case was brought under Delaware state law, the court stated that the state law and the ADA's provisions regarding service animals were essentially the same.

B. Modification of "No Animal" Policies

Title III entities must modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability in any area open to the general public, unless the entity can demonstrate (1) that making such modifications would fundamentally alter the nature of the entity's goods, service, facilities, privileges, advantages, or accommodations, (2) the safe operation of the entity would be jeopardized, or (3) such modifications would result in an undue financial or administrative burden.²⁰⁷ DOJ commentary suggests that Congress intended the ADA to allow service animals the "broadest feasible access" to public accommodations and public entities and to avoid unnecessarily separating service animals from their owners.²⁰⁸

Covered entities that have blanket policies or practices excluding service animals may be subjected to court orders or settlement agreement requiring modification of the relevant policy or practice. For example, following a complaint filed by three individuals who are blind after they were refused airport shuttle service unless their guide dogs were restrained in kennels, Budget Rent A Car Systems modified its car rental policies to allow individuals with disabilities to use service animals without being separated from them at any time.²⁰⁹ Policy modification also was required when an individual made a complaint against a retail supermarket that refused to allow his service animal into the store.²¹⁰ The modification requirement extends to restaurants as well. The United States reached settlements for policy modification with two different restaurants that would previously not serve patrons with service animals and told them to leave.²¹¹ More recently,

Wal-Mart Stores reached a settlement with the United States to modify its policy to allow people with disabilities to use service animals while shopping. The new policy requires Wal-Mart to provide access to the store, assistance from the employees, prominent notice that service animals are welcome in the store, training and certification of each employee that he understands the service animal policy, and the implementation of a grievance policy to address future complaints.²¹²

C. The Fundamental Alteration Defense

Service animals may be excluded if the Title III entity can demonstrate that the presence of such animals would fundamentally alter the nature of the entity's goods, services, facilities, privileges, advantages, or accommodations. The entity has the burden to allege and prove the existence of a fundamental alteration. The outcome of such defense will depend on the facts of each case.

Whether an accommodation constitutes a fundamental alteration is an "intensively fact-based inquiry."²¹³ For example, in *Lentini v. California Center of the Arts, Escondido*, the court conducted a fact-based inquiry of the Title III entity's particular needs and the alleged threats posed by the service animal to determine that the defendant did not allege a valid fundamental alteration defense. The arts center had refused to allow a patron with quadriplegia to continue attending music performances with her service dog that had previously yipped or barked during the intermission of two Center concerts. The Center argued that modifying its policy to allow service animals would fundamentally alter the Center's services because permitting a dog to make noise may deter patrons and artists from coming to the Center. However, and the facts of this case showed that although the patron's service dog did yip or bark twice, no patron ever complained and the two incidents did not cause a significant disturbance. The Center's mere speculation of potential future disturbances was undercut by evidence that demonstrated otherwise.

Similarly, in *Johnson v. Gambrinus Company/ Spoetzel Brewery*, the Fifth Circuit Court of

Appeals affirmed the district court's decision that a brewery violated the ADA when it refused to permit an individual who is blind to take a public brewery tour with his guide dog.²¹⁴ The brewery argued that permitting animals on the tour would fundamentally alter the nature of the tour and that the Food, Drug, and Cosmetics Act prevented the brewery from modifying its blanket "no animals" policy. The Fifth Circuit disagreed holding that the Act did not prevent the brewery from allowing guide dogs on at least part of the tour and that the risk of contamination posed by the few foreseeable service animal visits was minimal, if not altogether unlikely or impossible in certain locations within the brewery.

D. The Safety Defense

A showing that health and safety will be jeopardized if an animal is present could serve as a basis for excluding a service animal. However, allegations of safety risk must be based on actual risks rather than on mere speculation, stereotypes, or generalizations about individuals with disabilities.²¹⁵ A perceived threat without evidentiary basis will not likely support exclusion. Moreover, if other alternatives exist that can alleviate health and safety concerns while allowing service animals to accompany their owners, these should be considered before a blanket exclusionary policy is implemented.

Covered entities can make reasonable requests to minimize the potential threat of harm to other people. For example, in *Assenberg v. Anacortes Housing Authority*, the court found that a public housing authority did not violate Title II of the ADA after the housing authority refused to allow the tenant to keep snakes, which the tenant maintained were service animals.²¹⁶ The housing authority made a modification to its policies to allow the tenant to keep the snakes; but it required the tenant to provide a declaration that the snakes were not dangerous and to keep the snakes in a cage when staff members were in his apartment or when he transported the snakes. The tenant refused to provide the requested declaration and continued to carry the snakes around the housing complex without a cage. The court stated that the housing authority made a reasonable request in asking for additional information to assess potential safety risks, and did not discriminate

against the tenant.

The DOJ has opined that the presence of a service animal could pose a significant health risk in certain areas within a hospital. In such situations, the DOJ has stated that determination of such risk should be based on a decision made by appropriate medical personnel who, upon finding such a risk, should list specific areas where exclusion is appropriate (e.g., intensive care unit), and permit the service animals in all other areas.²¹⁷ For examples, the court in *Pool v. Riverside Health Services, Inc.* held that a hospital did not violate the ADA where its policy permitted service animals in public areas, but excluded them from non-public areas like the emergency room.²¹⁸ The court found this policy reasonable based on the hospital's medical testimony that explained that the purpose of the partial exclusion was to safeguard infection control, cross-exposure, and allergic reactions.

In the event that a service animal must be separated from an individual to avoid a fundamental alteration or threat to safety, the individual, and not the covered entity, is responsible for securing supervision and care for their service animal, including provision of food or finding a special location for the animal.²¹⁹

The ADA must prevail over any conflicting state law unless the state law provides greater or equal protection for individuals with disabilities than is provided by the ADA. For example, in *Green v. Housing Authority of Clackamas County*, the court determined that an Oregon state law requiring hearing assistance animals to be on an orange leash was more restrictive than the ADA's requirements for service animals. In that instance, the ADA prevailed over Oregon law. Because plaintiff's hearing assistance dog still met the ADA definition for a service animal, even though it did not have an orange leash, the housing authority was required to modify its policy to allow for plaintiff's use of the dog.²²⁰

X. Accommodations in Post-Secondary Education and Licensing

One “purpose of the ADA is to guarantee that those with disabilities are not disadvantaged and to ‘place those with disabilities on an equal footing’ with others.”²²¹ That purpose often is overlooked in the context of accommodating persons with disabilities in higher education and professional licensing. Many private colleges, universities, and graduate schools are included in this mandate, as are private professional licensing entities.²²² Nonetheless, these entities do not always grant accommodation requests, and the implications may be that people with disabilities are denied equal opportunities to pursue degrees in higher education and professionally licensed careers.

A. Relevant Statutory Provisions and Regulations

Many colleges and universities are public rather than private, meaning they are owned and operated by or are an instrumentality of a state or local government. Although students have similar accommodation needs in both public and private educational settings, public places of higher education are covered under Title II of the ADA.²²³ This distinction is important when a student wants to bring a claim that a university failed to accommodate his or her disability, because a Title II plaintiff will have to prove that the public university or college is not immune from suit under the 11th Amendment of the United States Constitution.²²⁴

Private entities, in the context of higher education and licensing, must comply with the general prohibition against discrimination in the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations” under section § 12182 of Title III.²²⁵ Failing to make reasonable modifications in policies, practices, or procedures to accommodate a person’s disability-related accommodation request is discrimination,

unless the entity can show that making the changes would cause undue hardship or “fundamentally alter the nature of [its] services.”²²⁶ The most contested provision of Title III in higher education and licensing accommodation litigation is Section 12189, which states: “Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.”²²⁷ The DOJ regulations further direct private entities to offer examinations and courses in a manner that “accurately reflects the individual’s aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual’s [impairment].”²²⁸ Additionally, the regulations expound upon the statute and give examples of reasonable accommodations for (1) administrative methods, (2) eligibility requirements, (3) modification to policies, practices and procedures, and (4) auxiliary aids and services.²²⁹

B. Disability Coverage under the ADA

Many students with learning disabilities and other disabilities need accommodations when taking tests. Frequently, when seeking to enforce their ADA rights, students allege that they are substantially limited in the major life activity of learning. However, a number of courts have been hostile to claims made by students who have succeeded in the past despite having a learning disability that may or may not have been diagnosed. Because of the hostility by some courts to these kinds of claims, plaintiffs should try to identify a major life activity other than learning in which they are substantially limited, such as speaking, thinking concentrating, and communicating, although the new ADA Amendments Act may make it easier for plaintiffs with learning disabilities to prove that they are substantially limited in a major life activity, and therefore, have an ADA disability.

Prior to the ADA Amendments Act, the ADA’s employment regulations defined “substantially

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limits” as: “significantly restricts as to the condition, manner or duration under which and individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.”²³⁰ The ADA’s regulations stated that an individual must be substantially limited compared to the “average person,” rather than, for example, compared to the *average student* in that individual’s university.²³¹ The latter construction would presumptively be more favorable to most of the plaintiffs in post-secondary education and licensing accommodation litigation, who tend to have impairments that materially limit them in a very specific major life activity related to education, but they still exceed above the “average” person in most other areas of life. When passing the ADA Amendments Act (ADAAA), Congress found that the EEOC’s interpretation of “substantially limits” was overly restrictive. New regulations are expected later this year from the EEOC, which may provide clarification on this issue and broader protection for students with disabilities.

An example of the hostility of courts toward students seeking testing accommodations prior to the ADAAA can be seen in *Love v. Law School Admission Council, Inc.*, in which a plaintiff with ADHD and a learning disability sought additional time on the Law School Admission Test. The court held that the fact that plaintiff was clinically diagnosed as having a learning impairment does not automatically mean that he is entitled to an accommodation under the ADA. The court held that in light of evidence of plaintiff’s past test scores, educational history, and his reported ability to function in both academic and professional environments, he was not substantially limited in the major life activity of learning and therefore, did not have a disability as defined under the ADA.²³²

Similarly, in *Singh v. George Washington University School of Medicine and Health Sciences*, a medical student failed several courses using multiple-choice tests and was dismissed from the program.²³³ She then underwent testing and was found to have a learning disability. When the dean was provided this information, he did not reinstate her and she sued under Title III of the ADA. The court found in favor of the school holding that the student’s inability to perform well

on one aspect of an extremely competitive elite academic program did not demonstrate a substantial limitation in the major life activity of learning where the student has otherwise excelled in school and is able to fully function in other aspects of her life. The court cautioned the school that refusing to reassess a termination decision after a student presents medical documentation could be problematic in other cases, although this student was ultimately deemed not to have an ADA disability.²³⁴

Not all students with disabilities are unsuccessful in getting courts to address the failure of a university or licensing entity to provide ADA accommodations. For instance, in *Toledo v. University of Puerto Rico*, a student with schizoaffective disorder notified the school of his disability and requested a number of accommodations, including additional time on tests. However, instead of providing this accommodation, the student’s professor ridiculed him in front of his fellow students, denied his request, and advised him to consider pursuing another career. Similar results occurred each time the student requested an accommodation. When he asked for permission to arrive to class late due to his medication’s side effects, his professor ignored him, advised him to stop taking his medication, and warned him that she would not grant time extensions. The student sued under the ADA and the University filed a motion to dismiss the case. The court ruled in favor of the student holding that he could pursue his case in court as there were genuine issues of material fact as to the accommodations provided and their reasonableness.²³⁵

Often, people with a diagnosis of ADHD or processing speed conditions must produce for the record his or her history of medical and/or educational limitations caused by the impairment from elementary school to high school, and (if applicable) also college or graduate school. The record should include documented or verifiable evidence, not just self-reported, anecdotal statements of the affect of the impairment on the plaintiff’s life. Courts have noted when expected signs of substantial limitations are missing from the record. For instance, the court might comment that “she was not held back a year,” or note “no tutor required or requested despite struggles.”²³⁶

Some courts stress the rule that “outcomes alone should not be determinative” of whether a person is disabled, while others only give such information a cursory review. As the court in *Love, supra*, points out, defining disability solely based on outcomes would rule out those students who are very intelligent and hardworking allowing them to overcome the expected limitations of their impairments in some areas.

C. Qualified Issues Under Title III

Once students overcome the hurdle of showing that they are a person with a disability, they must also demonstrate that they are qualified for the program. While this is not expressed explicitly in Title III, (probably as most public accommodations do not have eligibility requirements), the Rehabilitation Act contains language regarding an “otherwise qualified individual with a disability,”²³⁷ and Title II of the ADA provides that it protects “a qualified individual with a disability,” defined as, “A disabled person who, with or without reasonable modifications, ... [barrier removal, or auxiliary aids or services], meets the essential eligibility requirements for the... services or the participation in programs or activities ...”²³⁸ Courts have applied these standards to educational institutions covered under Title III saying, “Basic qualifications come into play [in] post-secondary education... implicit in Title III’s acknowledgment... that requested modifications need not be provided if they will fundamentally alter the nature of the program.”²³⁹ A student who can not meet eligibility standards with accommodations is not “qualified.”²⁴⁰

Generally, an educational institution is not required by the Rehabilitation Act or the ADA to lower its academic standards for a professional degree as “It ... would fundamentally alter the nature of a graduate program to require the admission of a disabled student who cannot, with reasonable accommodations, otherwise meet the academic standards of the program.”²⁴¹ The court in *Mershon* stated the general position of courts regarding the ADA and Rehabilitation Act, “We will... consider cases dealing with each Act as ‘applicable and interchangeable.’”²⁴² The qualification issue has also arisen in other contexts under Title III including the PGA Golf Tour and in camp settings.²⁴³

D. Program Requirement Accommodations and Fundamental Alterations

Colleges and universities with undergraduate and graduate programs are given a fair amount of leeway by courts to proscribe various program requirements and curriculums with which admitted students must comply. The most difficult accommodations to secure while matriculating through a higher education program are modifications to a course requirement, elimination of a program requirement, and exemption from a school’s standard academic policies. The general rule across disciplines and schools is that a faculty or administrative assessment of a student’s performance or qualifications is given a lot of deference. Courts will often find in favor of the defendant school in cases where a student is dismissed for repeatedly failing to meet academic standards and where the requested accommodation would entail fundamentally altering the school’s policies or program design.

In *Powell v. NBME*, a second-year medical student sued to be readmitted to the University of Connecticut Medical School (“UConn”) and to receive accommodations to retake the United States Medical Licensing Examination (“USMLE”).²⁴⁴ The student failed the USMLE twice after receive two years worth of free tutoring and accommodations from the medical school to help improve her score and remediate multiple course deficiencies.²⁴⁵ UConn initiated the dismissal process after the student failed the test a third time. The court noted that the school provided her with accommodations for two years after her second year to help her pass the USMLE, but refused to give her more chances after she failed for the third time and was denied accommodations from the NBME to sit for a fourth attempt.²⁴⁶ The claim charged that UConn should change its established policy of making promotion to the third year of the four-year program conditioned on passing the USMLE when a student performed poorly on the second year required courses. The court disagreed and affirmed summary judgment in favor of the defendants. The medical student could not prove she was a qualified person with a disability under the ADA, despite a diagnosis of dyslexia and ADD. Furthermore, the court noted that the

requested modifications were not reasonable and would be an undue hardship on the operation of the medical school program.²⁴⁷

E. Effective Accommodations

The accommodation provided by an educational institution must be effective. In *Di Lella v. Univ. of D.C. David A. Clarke Sch. of Law*, a law student was suspended from law school due to poor performance.²⁴⁸ The school had already provided the reasonable accommodations of: double time to complete examinations, a separate, quiet testing room, extended time on written projects, and a notetaker, which the school later unilaterally changed to using transcriptions. The court held that there was an issue of fact whether using the transcriptions was an “effective accommodation” as the transcriptions were often late or were not produced. This lack of effectiveness was seen as a contributing factor to the student’s poor performance. Rather than granting “any” accommodation, the school had the duty to give an accommodation that “address[ed] the limitation arising from the individual’s disability.”²⁴⁹ Whether the accommodation given was reasonable and effective was a factual question that survived the school’s motion to dismiss. However, the discriminatory suspension claim was not valid because the suspension related to her plagiarism not her disability.²⁵⁰

F. Entrance Exam Accommodations

Most accredited post-secondary education programs require applicants to submit scores from a designated standardized test in order to objectively compare the applicants on a uniform measure. However, these standardized instruments may be biased against persons whose impairments substantially limit them in certain basic learning or test-taking skills. Enlarged print and accessible test taking sites and seating are moderate accommodations requests compared to requests for a separate test setting, or for extended time. Prior to the test date, a person with a disability must formally apply for extended time

or other accommodations on the entrance exam from the private company that owns and/or administers the exam.²⁵¹ The company assesses how the person’s reported impairment relates to the skills and functions involved in the taking that particular test. The company then grants or denies the accommodation based on its own assessment of whether the person is disabled under the ADA, and whether the accommodation is necessary for the manifestation of that person’s disability. In most cases, testing entities will require documentation of both the disability and the need for the requested accommodation.

A number of cases have risen with respect to accommodations for the Law School Admissions Test (“LSAT”), which is owned and administered by the Law School Admissions Council, Inc. (“LSAC”), and the Medical College Admission Test (“MCAT”), owned and administered by the Association of American Medical Colleges (“AAMC”).²⁵² One common concern is that individuals who are granted accommodations to take these tests have their test “flagged” to alert admissions committees that the test-taker received accommodations. Whether this flagging violates the ADA is not settled in the courts. However, the recent discontinuance of flagging by the College Board, the American College Testing Program (“ACT”) and the Educational Testing Services on the Scholastic Aptitude Test (“SAT”), and Graduate Management Admission Test (“GMAT”) may help guide the policy debate.²⁵³

For example, in *Rothberg v. LSAC*, the district court held that a law school applicant with a learning disability, was disabled under the ADA and entitled to extended time on the LSAT.²⁵⁴ Unlike the applicant in *Love* discussed earlier, the applicant in *Rothberg* was diagnosed with a learning disability related to processing speed at an early age, for which she received help from special education teachers and an Individualized Educational Program (“IEP”).²⁵⁵ She continued through high school on a special education track, and received extended time on all in-class tests and written assignments. She requested and was granted extra time on the ACT. In college, the applicant requested and was granted extended time accommodations on in-class tests and note-taking services. Unlike the applicant in *Love*, who only requested extended time for his second

attempt on the LSAT, the applicant in *Rothberg* requested and was denied extended time on her first LSAT attempt.²⁵⁶ However, LSAC stated that her documentation was incomplete and not up-to-date. After scoring in the low-average range on the first LSAT, she was reevaluated and submitted the new results in her second accommodation application to the LSAC. The applicant was diagnosed with Developmental Expressive Writing Disorder and Developmental Arithmetic Disorder. Despite these diagnoses, the LSAC again denied the request, triggering a lawsuit. LSAC argued that the plaintiff was not disabled under the ADA. However, the court found that she was disabled and that LSAC violated the ADA by not providing extra time.

G. Licensing Exam Accommodations

The National Board of Medical Examiners (“NBME”) is a private non-profit corporation that develops and administers the United States Medical Licensing Examination. The exam is administered in three steps, and a number of cases have been litigated regarding the denial of accommodations for the “USMLE Step 1,” which is required after completion of the second year of medical school.²⁵⁷ For many medical schools a second year student cannot move on to the third year of the program unless he or she passes USMLE Step 1. In other medical school programs, the student’s score is simply (but no less significantly) a measure used in applying for residency and other specialty programs.²⁵⁸ The test measures the student’s mastery of basic medical sciences and the ability to apply to his or her knowledge. Additional time for persons with reading and processing disabilities could mean the difference between passing and failing the test. In terms of licensing, the issue is whether the person is qualified with a disability under the ADA and entitled to an accommodation from the NBME.²⁵⁹

In *Rush v. NBME*, a second year medical student, with reading and visual processing skills impairments, requested and was denied extended time on the USMLE Step 1.²⁶⁰ The NBME took the position that the student was not disabled under the ADA. However the court found that the student was, in fact, substantially limited in his ability to

read and process information compared to most people; it was not the student’s “education or innate ability” that substantially limited him in his ability to take time-limited tests. The court also ruled that the student would suffer an irreparable injury if the requested injunction for additional time were denied.

Law students face a different set of issues when applying for accommodations to take a state bar exam. Title III covers the administration of bar examinations. Unlike the NBME, which is nationally administered test, bar exams differ based on the state, as do the administrators. Generally, the exam includes intensive reading and writing. The usual reasonable extended time requests are the common issue in this category of litigation.²⁶¹ However, requests for changes to the scoring of the exam have been dismissed as unreasonable.²⁶²

The district court in *Bartlett v. NYSBLE*, on remand from the 2nd Circuit Court of Appeals, ruled in favor of the prospective bar exam-taker by finding that she was entitled to extended time, the use of a computer, large print, and permission to circle her multiple choice answers in the exam booklet.²⁶³ The court held that the NYSBLE illegally discriminated against the plaintiff when it failed to accommodate her dyslexia on five separate and unsuccessful exam attempts. She was found to be substantially limited in the major life activity of reading and working, regardless of the fact that she had the ability to employ coping strategies to overcome some of the reading and processing problems she encountered.²⁶⁴

XI. Conclusion for Hot Topics in ADA Title III Litigation

Litigation under Title III of the ADA for businesses, non-profit organizations, schools, and other organizations continues to evolve and raise a number of complex issues. This brief analyzed a sampling of hot topics arising in Title III litigation. This area of the law will be affected by the ADA Amendments Act of 2008 which went into effect

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January 1, 2009, and new regulations under Titles II and III are also anticipated in the near future and these will likely further change the legal landscape. Entities covered by Title III and individuals protected by the ADA are both encouraged to utilize effective resources and to keep abreast of all the legal requirements and changes under Title III.

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Notes:

1. This legal brief was written by Barry C. Taylor, Legal Advocacy Director at Equip for Equality, Alan M. Goldstein, Senior Attorney with Equip for Equality, and Gwynne Kizer, an Equip for Equality intern. The authors would like to thank the following legal interns for their assistance with this brief: Allison Sues, Gillian Barjon, Martina Brendel, Aaron Gavant, Kaitlyn Jakubowki, Cassie Linders, Katelyn Kooy, and Michelle Hook Dewey. Equip for Equality is the Illinois Protection and Advocacy Agency (P&A) for people with disabilities. Equip for Equality is providing this information under a subcontract with the DBTAC: Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability Rehabilitation and Research Award No. H133A060097. 42 U.S.C. 12102(7)
2. The Americans with Disabilities Act, 42 U.S.C. § 12101(a)(8) (1990).
3. *Id.* § 12101(a)(8).
4. *Id.* § 12181(7); 28 C.F.R. § 36.104 (1994).
5. 42 U.S.C. § 12182(a).
6. *Id.* § 12182(b)(2)(ii) (emphasis added).
7. *Id.* § 12182(b)(2)(iv).
8. *Id.* § 12182(b)(2)(v).
9. *Id.* § 12182(b)(1)(A)(I-iv).
10. *Id.* § 12182 (b)(1)(B).
11. *Id.* § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303(a).
12. 28 C.F.R. § 36.303(b)(1-3).
13. *Id.* § 36.303(c), (f).
14. <http://washlaborwire.com/2009/05/14/ada-notification-act-of-2009-hr-2397/>.
15. 28 C.F.R. § 36.306.
16. *Id.* § 36.208.
17. *Molski v. Conrad's La Canada Restaurant*, 2009 WL 166931 (9th Cir. Jan. 14, 2009).
18. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).
19. *Id.* at 560.
20. *Id.*
21. *Id.* at 561.
22. *See Molski v. Arby's Huntington Beach*, 359 F.Supp.2d 938, 947(C.D. Cal. 2005).
23. *See Molski v. Arby's Huntington Beach*, 359 F.Supp.2d 938, 947(C.D. Cal. 2005).
24. *Id.*
25. 2008 WL 490581 (M.D.Fla. Feb. 20, 2008).
26. *Id.*
27. *Id.*; but see *Ault v. Walt Disney World Co.*, 2008 WL 2047930 (M.D. Fla., May 13, 2008) (rejecting defendant's motion to dismiss amended complaint's claim because all three plaintiffs had alleged a specific intent to visit the park in the future and the possibility that the plaintiffs may change their plans does not foreclose standing).
28. 141 Fed.Appx. 718, 720 (10th Cir. 2005).
29. *Id.*
30. *Access 4 All v. Oak Spring, Inc.*, 2005 WL 1212633 (M.D. Fla. 2005).
31. *Id.*
32. *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1136, 37 (2d Cir. 2002).
33. *Access 4 All, Inc. v. OM Management, LLC*, 2007 WL 1455991 (S.D. Ohio May 15, 2007).
34. *Id.*
35. 2005 WL 2644996 (E.D. Pa. 2005).; *See Steger*, 228 F.3d 889, 892 (8th Cir. 2000); *compare with Marcovecchio v.*
36. *Commerce Bancorp, Inc.*, 2005 WL 159596 (D.N.J. 2005) (dismissing claims against any other bank location other than plaintiff's local branch because plaintiff had never been to the branches and did not have plans to frequent them in the future.)

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Notes:

37. *Castaneda v. Burger King*, 597 F.Supp.2d 1035, 1042 (N.D. Cal. 2009).
38. *Id.*
39. *Van Brocklen v. Government Employees Insurance Co.*, 2009 WL 414053 (N.D.N.Y. Feb. 18, 2009).
40. *Id.*
41. *Steger v. Franco*, 228 F.3d 889, 892 (8th Cir. 2000). *Id.*
42. *Association for Disabled Americans v. 7-11*, 2002 WL 546478 (N.D. Texas 2002).
43. *Id.*
44. This type of Title III litigation has been casually referred to as “drive-by” litigation. This term is inappropriate and offensive, as it compares vindicating legal rights to murder.
45. *Harris v. Stonecrest Auto Care Center, LLC*, 472 F.Supp.2d 1208, 1217 (S.D. Cal. 2007).
46. *Id.*
47. *Molski v. Evergreen Dynasty Corp.*, 2007 WL 2458547 (Aug. 31 2007).
48. *Compare Wilson v. Pier 1 Imports (US), Inc.*, 441 F.Supp.2d 1196, 1200 (E.D. Cal. 2006) (denying motion to impose a restrictive pre-filing order on ADA plaintiff reasoning that the number of Title III complaints filed does not reflect that a plaintiff is a vexatious litigant, but rather that many defendants have failed to comply with the law).
49. *D’Lil v. Best Western Encina Lodge and Suites*, 415 F.Supp.2d 1048, 1058 (C.D. Cal. 2006).
50. *Harris v. Stonecrest Auto*. 472 F.Supp.2d at 1217.
51. *Park v. Ralph’s Grocery Co.*, 254 F.R.D. 112, 119 (C.D. Cal. 2008).
52. *Molski v. M.J. Cable*, 2007 WL 865532 (9th Cir. March 23, 2007).
53. *Id.*
54. *Id.*
55. 42 U.S.C. § 12181(9).
56. *Hubbard v. 7-Eleven, Inc.*, 433 F.Supp.2d 1134 (S.D. Cal. 2006); see also *Access Now, Inc. v South Florida Stadium Corp.*, 161 F.Supp.2d 1357 (S.D. Fla. 2001).
57. *Id.*
58. Burgdorf, Robert L. “Equal Member of the Community”: the Public Accommodations Provisions of the Americans with Disabilities Act, 64 Temple L. Rev. 551 (1991).
59. See also 28 C.F.R. § 36.304.
60. 42 § U.S.C. 12181(9).
61. See *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005).
62. *Id.*
63. *First Bank Nat. Ass’n v. F.D.I.C.*, 433 F.Supp.2d 1134 (S.D. Cal. 2006).
64. *Grove v. De La Cruz*, 407 F.Supp.2d 1126 (S.D. Cal. 2005); see also recent discussion in *Clark v. Simms*, slip copy 2009 WL 890685 (W.D. Va. 2009).
65. *Grove v. De La Cruz*, 407 F.Supp.2d 1126 (S.D. Cal. 2005).
66. *Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269 (11th Cir. 2006).
67. *Spencierv. Nations Bank, N.A.*, 215 F. Supp. 2d 622 (D. Md. 2002).
68. *Molski v Foley Estate Vineyards & Winery, LLC*, 531F.3d 1043 (Cal. 2008).
69. *Id.*
70. For information about accessible web design, visit <http://www.w3.org/WAI/>.
71. See 42 U.S.C. § 12182.
72. See 42 U.S.C. § 12181 (7)(f).
73. This brief is limited in scope to Title III. Lawsuits over website accessibility also have been brought under Title II of the ADA, e.g. *Martin v. Metropolitan Atlanta Transit Authority*, 225 F.Supp.2d 1362, 1377 (N.D.Ga. 2002) (holding Title II of the ADA applies to websites), and under state civil rights laws, e.g. *National Federation of the Blind v. Target Corp.*, 452 F.Supp.2d 946, 962-64 (N.D. Cal. 2006) (holding that the Commerce Clause does not prevent state courts from enforcing state accessibility regulations against a national website); see also *Smith v. Hotels.com*, No. 07327029 (Ca. Sup. Ct., agreement reached 1/8/09); *Nat’l*

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Notes:

- Fed'n of the Blind v. Law School Admissions Council Inc.*, No. RG-09435591 (Ca. Sup. Ct., complaint filed 2/19/09).
74. *Id.* at 559 (emphasis added). Following *Doe*, there was a string of settlement agreements favorable to Internet-users with disabilities. In 1999, the National Federation of the Blind sued America Online, alleging violations of Title III. AOL agreed to address NFB's accessibility concerns. In 2000, Access Now sued Claire's Stores, Inc. and Barnes & Noble, alleging violations of Title III. Claire's agreed to make its website and its 2,200 stores accessible at a cost of \$19 million. 2002 WL 1162422, *2 (S.D. Fla. 2002). Barnes & Noble also settled; information regarding the terms of the Settlement Agreement is unavailable.
 75. *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F.Supp.2d 1312, 1321 (S.D. Fla. 2002).
 76. *Id.* at 1321 (Plaintiffs could not argue a nexus between Southwest's virtual ticket counters and its planes because aircrafts are not covered by the ADA).
 77. *National Federation of the Blind v. Target Corp.*, 452 F.Supp.2d 946, 956 (N.D. Cal. 2006).
 78. *Id.* at 949-950.
 79. *Id.* at 956.
 80. *Id.* at 956.
 81. 42 U.S.C. § 12182 (emphasis added).
 82. *Doe v. Mutual of Omaha Ins. Co.*, supra note 6, at 559 (Title III applies to both physical and non-physical public entities, but does not regulate to the policies of those entities); *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (a "public accommodation" under Title III is not limited to physical structures).
 83. *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1284-85 (11th Cir. 2002) (game show's inaccessible telephone-selection process violated Title III because it formed a nexus with the TV studio, a physical place); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 - 15 (9th Cir. 2000) ("public accommodation" means an actual physical place; therefore an employer-provided benefit plan did not form a nexus with a public accommodation); *Ford v. Shering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998) (same); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1008 (6th Cir. 1997) (a place of public accommodation must be a physical place).
 84. For more information about structured negotiations, visit <http://llegal.com/faqs/#structured-negotiations>.
 85. <http://www.w3.org/TR/WCAG20/> (last visited June 23, 2009).
 86. 29 U.S.C. § 794d (2006); 36 C.F.R. § 1194.22 (2008).
 87. Nancy Hoffman, *Web Content Accessibility White Paper* (Minnesota Historical Society/State Archives, November, 2008), http://www.mnhs.org/preserve/records/legislativerecords/docs_pdfs/WebAccessibility.pdf (last viewed June 23, 2009).
 88. <http://www.w3.org/WAI/WCAG20/from10/diff.php> (last visited June 23, 2009).
 89. 29 U.S.C. § 794d (2006); 36 C.F.R. § 1194.22 (2008).
 90. *Id.*
 91. Telecommunications and Electronic and Information Technology Advisory Committee, Report to the Access Board: Refreshed Accessibility Standards and Guidelines in Telecommunications and Electronic and Information Technology (April 2008), <http://www.access-board.gov/sec508/refresh/report/#43> (last visited June 23, 2009).
 92. <http://www.dhs.state.il.us/IITAA/IITAAWebImplementationGuidelines.html> (last visited June 23, 2009).
 93. 42 U.S.C. §§ 12182-12189; 28 C.F.R. § 36.303(c).
 94. 42 U.S.C. § 12182(b)(2)(A)(iii).
 95. *Id.* § 12103(1)(A)-(B).
 96. *Id.* § 12181(7)(F).

HOT TOPICS IN ADA TITLE III LITIGATION

Notes:

97. *Mayberry v. Valtier*, 843 F.Supp. 1160, 1163-1164 (E.D. Mich. 1994) (doctor liable for failing to provide sign language interpreter because she operated the office); *United States v. Morvant*, 843 F.Supp. 1092, 1094 (E.D. La. 1994) (dentist liable under the ADA where he was the “owner” of his dental office).
98. *Howe v. Hull*, 873 F.Supp. 72, 77 (N.D. Ohio 1994).
99. DOJ’s ADA Title III Technical Assistance Manual § 4.3200 (1993 & Supp.)
100. See *Constance v. State of New York Health Science Center at Syracuse*, 166 F.Supp.2d 663, 668 (N.D. N.Y. 2001) (no liability where hospital made an early attempt to secure an interpreter even though it failed to secure an interpreter).
101. See *Naiman v. New York University*, 1997 WL 249970 (S.D. N.Y. May 13, 1997); *Aikins v. St. Helena Hosp.*, 43 F.Supp. 1329, 1336 (N.D. Cal. 1994).
102. *Majocha v. Turner*, 166 F.Supp.2d 316 (W.D. Pa. 2001).
103. *Id.* at 321.
104. *Id.* at 324.
105. Go to <http://www.nad.org/site/pp.asp?c=foINKQMBF&b=177340> for details about the settlement. A case involving similar facts resulted in a \$400,000 jury verdict for a patient that was deaf. The case was brought under the ADA, Rehabilitation Act and state law. For a summary of the case, go to <http://www.law.com/jsp/article.jsp?id=1202425326286>.
106. See <http://www.ada.gov/secommhosp.htm> for a copy of the settlement agreement.
107. Go to <http://www.ada.gov/settlemt.htm> for a list of DOJ’s ADA settlements.
108. Go to <http://www.nad.org/site/pp.asp?c=foINKQMBF&b=3876577> for the summary of a case in which the health care provider initially refused to pay for an interpreter, but agreed to change its position under a settlement.
109. *Bunjer v. Edwards*, 985 F.Supp. 165 (D.D.C. 1997).
110. *Id.* at 166.
111. *Id.*
112. *Camarillo v. Carrols Corporation*, 518 F.3d 153 (2nd Cir. 2008).
113. *Id.* at 154.
114. *Id.* at 158.
115. Go to <http://www.ada.gov/friendb.htm> for a copy of the Consent Order.
116. *Bunjer*, 985 F.Supp. at 166.
117. *Caruso v. Blockbuster-Sony Music Entertainment Centre*, 193 F.3d 730 (3d Cir.1999) (regulation failed to reach the issue of unobstructed sight lines because the regulation’s “lines of sight” language is ambiguous; thus, concert halls, and by implication all theaters, could not be compelled to provide even unobstructed views for wheelchair users).
118. See *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C.Cir.1997).
119. *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000) (ADA does not impose a viewing angle requirement because the common meaning of “lines of sights” does not require theaters to provide all patrons who use wheelchairs with anything more than an unobstructed view).
120. See e.g. *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003), *petition for cert. denied* 124 S. Ct. 2903, (U.S. Jun 28, 2004), (deferring to the DOJ’s interpretation, held that a movie theater violated the ADA by not providing wheelchair users with a comparable view of the screens to patrons who do not use wheelchairs); see also *U.S. v. Cinemark USA, Inc.*, 348 F.3d 569 (6th Cir. 2003) (reasoning that one of the central goals of Title III is to provide equal access and enjoyment to people with disabilities, held that DOJ regulations require something more than merely an unobstructed view).
121. *U.S. v. AMC Entertainment*, 549 F.3d 760 (9th Cir. 2008).
122. *U.S. v. AMC Entertainment*, 2006 WL 224178 (C.D.Cal. 2006).
123. *Id.*
124. *AMC Entertainment*, 549 F.3d. at 773.
125. *Id.*

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Notes:

126. Go to http://www.usdoj.gov/opa/pr/2005/June/05_crt_309.htm for a summary of the settlement.
127. Go to http://www.usdoj.gov/opa/pr/2004/November/04_crt_754.htm for a summary of the settlement terms.
128. *Ball v. AMC Entertainment*, 246 F.Supp.2d 17 (D.D.C. 2003) (Following the court's ruling, the parties settled the case, providing that the theater chain will provide a specific number of rear window captioning devices for each theater).
129. *Cornilles v. Regal Cinemas*, 2002 WL 31469787 (D. Or. Mar. 19, 2002); *Todd v. AMC Entertainment International* 2004 WL 1764686 (S.D. Tex. Aug. 6, 2003).
130. *Arizona v. Harkins*, 548 F.Supp.2d 723 (D.Ariz. 2008).
131. See <http://www.ada.gov/ADAREGswithdraw09.htm>.
132. 42 U.S.C. § 12182(b)(2)(A)(ii).
133. *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075 (9th Cir. 2004).
134. *Rights of People with Disabilities to Emergency Evacuation Under the Americans with Disabilities Act* by William C. Hollis III, 13 Va.J.Soc. Pol'y & L. 127 (160) citing ADA 12182 ("No individual shall be discriminated against in the full and equal enjoyment of... facilities... or any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation).
135. DOJ's ADA Title III Technical Assistance Manual § 4.2100.
136. *Id.*
137. ADA Accessibility Guidelines for Buildings and Facilities § 4.1.3(9) (2002).
138. *Id.* § 4.3.10.
139. See *Id.* § 4.3.
140. *Access 4 All, Inc. v. Atlantic Hotel Condominium Association*, 2005 WL 5643878 *12 (S.D.Fla. 2005).
141. *Id.* at *10.
142. *Id.* at *12.
143. *Id.* citing ADAAG § 4.1.3(8)(a).
144. ADAAG § 4.1.3(9).
145. *Id.* § 4.3.11.1(1).
146. *Id.* § 4.3.11.1(5).
147. *Id.* § 4.3.11.1(2).
148. *Id.* § 4.3.11.1(7).
149. *Id.* § 4.3.11.1(3).
150. *Id.* § 4.3.11.1(4).
151. *Id.* § 4.3.11.1(6).
152. *Id.* § 4.3.11.2.
153. *Id.*
154. *Id.*
155. *Id.* §§ 4.3.11.3; A4.3.11.3.
156. *Id.* § 4.3.11.4.
157. *Id.*
158. *Id.* § 4.3.11.5.
159. *Id.*
160. *Id.* §§ 4.28.2; A4.28.2.
161. *Id.* § A4.28.2.
162. *Id.* § 4.28.1.
163. *Access Now, Inc. v. Ambulatory Surgery Center Group, LTD*, 149 F.Supp.2d 1334, 1337 (S.D.Fla. 2001).
164. ADAAG § 4.28.3(1).
165. See *Id.* § 4.28.3.
166. *Id.* § 4.13.3(14).
167. 146 F.Supp.2d at 1341.
168. *Id.*

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Notes:

- 169.*Id.* at 1343.
- 170.28 C.F.R. § 302(b)(2)(A)(ii); 42 U.S.C. § 12182(b)(2)(A)(ii).
- 171.ADAAG § A4.3.10.
- 172.*Savage v. City Place Limited Partnership*, 2004 WL 3045404 (Md.Cir.Ct. Dec. 20, 2004).
- 173.*Id.* at *1.
- 174.*Id.*
- 175.*Id.* at *5.
- 176.*Id.*; Contrast with *Caruso v. Blockbuster-Sony Music Enter. Centre*, 968 F.Supp. 210 (D.N.J. 1997).
- 177.*Citing Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052 (5th Cir. 1997).
- 178.*See 17 J.Legal Aspects Sport I; See also, Disabled Patriots of American, Inc. v. S & S Realty Ltd.*, 2006 WL 1473114 (N.D. Ohio May 28, 2006); *See also, Bancroft v. Trizechahn Corporation*, 2006 WL 5878142 (C.D.Cal January 17, 2006).
- 179.42 U.S.C. § 12132.
- 180.*Id.* § 12131(2).
- 181.*Savage*, 2004 WL 3045404 *4 quoting 42 U.S.C. § 12182(b)(2)(A)(ii) (“a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations”).
- 182.*Shirley v. City of Alexandria School Board*, 2000 WL 1198054 (4th Cir. 2000).
- 183.*Id.* at *5.
- 184.*Id.*
- 185.*Communities Actively Living Independent and Free v. City of Los Angeles*, Case No. 09-0287 (N.D. Cal. *complaint filed* 1/14/09).
- 186.42 U.S.C. § 12182(b)(3).
- 187.42 U.S.C. § 12182(b)(3); 29 C.F.R. § 36.208(b).
- 188.28 C.F.R. § 36.208(c).
- 189.28 C.F.R. § 36.208(c).
- 190.28 C.F.R. § 28.36.208(c).
- 191.1994 WL 494298 (E.D. Cal 1994).
- 192.*Fielder v. American Multi-Cinema*, 871 F.Supp. 35 (D.C. 1994).
- 193.*Id.*
- 194.*E.E.O.C. v. DuPont De Nemours & Co.*, 347 F.Supp.2d 284 (E.D.La. 2004).
- 195.*Id.* at 297-298.
- 196.William C. Hollins III, *Rights of People with Disabilities to Emergency Evacuation Under the Americans with Disabilities Act of 1990*, 5 J. Health Care L. & Pol’y 524, 544 (2002).
- 197.*Chevron v. Echazabal*, 536 U.S. 73, 85 (2002).
- 198.29 C.F.R. § 1630.15(b)(2).
- 199.*Id.*
- 200.42 U.S.C. § 12113(b).
- 201.*Chevron*, 536 U.S. at 85.
- 202.*See* C.F.R. § 36.208 (a) (“This part does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others.”)
- 203.28 C.F.R. § 36.104.
- 204.*Pruett v. Arizona*, 606 F. Supp. 2d 1065 (D.Ariz. 2009).
- 205.*See* DOJ Guidance on Service Animals at www.us.doj.gov/crt/ada/animal.htm and the DOJ’s Business Brief on service animals at www.usdoj.gov/crt/ada/svcanimb.htm.
- 206.887 A.2d 458 (Del. Super. Ct. 2005).

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Notes:

- 207.28 C.F.R. §§ 35.130(b)(7), 35.150(a)(3), 35.164, 36.301(b), 36.302(c)(1), and 36.303(a).
208.28 C.F.R. pt. 36 App. B.
209. *See* Settlement Agreement Under the Americans with Disabilities Act of 1990 Between the United States of America and Budget Rent A Car Systems, Inc., DJ 202-79-16, 202-79-42, and 202-79-50. (1997).
www.usdoj.gov/crt/ada/budget.htm
210. *See* Settlement Agreement Under the Americans with Disabilities Act of 1990 Between the United States of America and World Fresh Market, LLC., DJ 202-90-3. (2008). www.ada.gov/worldmarket.htm.
211. *See* Settlement Agreement Under the Americans with Disabilities Act of 1990 Between the United States of America and Shoney's, LLC., DJ 202-72-58. (2006). www.ada.gov/shoneys.htm; *See also* Settlement Agreement Under the Americans with Disabilities Act of 1990 Between the United States of America and The Historic Hilton Village Parlor Restaurant. DJ 202-1-17. (2006) www.ada.gov/hishiltonva.htm.
212. *See*, Settlement Agreement Under the Americans with Disabilities Act of 1990 Between the United States of America and Wal-Mart Stores, Inc. (2009). www.ada.gov/walmart.htm.
213. *Lentini v. California Center of the Arts, Escondido*, 370 F.3d 837 (9th Cir. 2004).
214. *Johnson v. Gambrinus Company/Spoetzel Brewery*, 116 F.3d 1052 (5th Cir. 1997).
215.28 C.F.R. § 36.301(b).
216. *Assenberg v. Anacortes Housing Authority*, 2006 WL 1515603 (W.D. Wash. May 25, 2006).
217. *See*, e.g., DOJ Technical Assistance Letter, Doc. 302, May 10, 1993, Danforth, John C., service animals in hospitals.
218. *Pool v. Riverside Health Services, Inc.*, 1995 WL 519129 (D. Kan. Aug. 25, 1995).
219.28 C.F.R. § 36.302(c)(2) & DOJ Guidance.
220. *Green v. Housing Authority of Clackamas County*, 994 F.Supp.253 (D. Or. 1998).
221. *Rothberg v. Law School Admission Council, Inc.*, 300 F.Supp.2d 1093, 1105 (D. Colo. 2004).
222. *Id.*
223.42 U.S.C. §§ 12132.
224. This is a very complicated area of law and is beyond the scope of this brief, but for examples of cases reviewing sovereign immunity issues *see Robinson v. University of Akron School of Law*, 307 F.3d 409 (6th Cir. 2002), and *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474 (4th Cir. 2005).
225.42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. 35.130(b)(7).
226.28 C.F.R. § 36.309.
227.42 U.S.C. § 12189.
228. *Id.*
229.28 C.F.R. §§ 36.204; 36.301; 36.302; 36.303; 36.307.
230.29 C.F.R. § 1630.2(j)(1)(ii).
231.28 C.F.R. § 35.104.
232. *Love v. Law Sch. Admissions Council, Inc. ("LSAC")*, 513 F.Supp.2d 206 (E.D. Pa. 2007). *See Love, supra* note 31 (A court may look for predictable or typical limitations that should have manifested at certain grade levels based on the plaintiff's impairment. Courts often dismiss claims where a person has only anecdotal or patchy evidence of limitations).
233. *Singh v. George Washington Univ. School of Medicine*, 597 F.Supp2d 89 (D. D.C. 2009).
234. *Id.* This case also stated that being a medical student was a "benefit" offered by a school.
235. *Toledo v. University of Puerto Rico*, 2008 WL 189561 (D. Puerto Rico Jan. 18, 2008).
236. *Love*, 513 F.Supp.2d at 214.
237.29 U.S.C. § 794(a).
238.42 U.S.C. § 12131(2); *See also, Powell v. Nat'l Bd. of Med. Exam'rs ("NBME")*, 364 F.3d 79 (2d Cir. 2004).
239. *Mershon v. St. Louis Univ.*, 442 F.3d 1069 (8th Cir. 2006); *See 42 U.S.C. § 12182(b)(2)(A)(ii)*.
240. *Id.* at 1076; *See also Millington v. Temple Univ.*, 261 Fed.Appx. 363 (3d Cir. 2008).
241. *Mershon*, 442 F.3d at 1076.
242. *Id.*

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Notes:

243. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001). While no reported cases on this issue in the camp setting were discovered, there are settlements regarding camps on the DOJ website, www.ada.gov.
244. *Powell v. NBME., et.al.*, 364 F.3d 79 (2nd Cir. 2004).
245. *Id.* at 82-84.
246. *Id.*
247. *Id.*
248. *Di Lella v. Univ. of D.C. David A. Clarke Sch. of Law*, 570 F.Supp.2d 1 (D. D.C. 2008).
249. *Id.*
250. See *Rush v. NBME*, 268 F.Supp.2d 673, 677 (N.D. Tex. 2003).
251. See generally *Love, supra* note 31; *Rothberg, supra* note 1; *Agranoff v. LSAC*, 97 F.Supp.2d 86 (D. Mass. 1999).
252. See Ali A. Aalaei, *The Americans with Disabilities Act and Law School Accommodations: Test Modifications Despite Anonymity*, 40 Suffolk U. L. Rev. 419 (2007); Jennifer Jolly-Ryan, *The Fable of the Timed and Flagged LSAT: Do Law School Admissions Committees Want the Tortoise of the Hare?*, 38 Cumb. L. Rev. 33 (2007); Michael Edward Slipsky, *Flagging Accommodated Testing on the LSAT and MCAT: Necessary Protections of the Academic Standards of the Legal and Medical Communities*, 82 N.C. L. Rev. 811 (2004).
253. 38 Cumb. L. Rev. at 33.
254. *Rothberg v. Law School Admission Council, Inc.*, 300 F.Supp.2d 1093, 1105 (D. Colo. 2004).
255. *Id.* at 1095.
256. *Rush v. NBME*, 268 F.Supp.2d 673, 677 (N.D. Tex. 2003).
257. *Id.*
258. *Id.*
259. Compare with *Powell*, 364 F.3d 79, where the issue centered on the medical school's promotion policy.
260. *Rush*, 268 F.Supp.2d 673 at 678.
261. See generally *In re Petition of Kara B. Rubenstein*, 637 A.2d 1131 (Del. 1994); *Bartlett v. N.Y. State Bd. of Law Exam'rs ("NYSBLE")*, 2001 WL 930792 (S.D. N.Y. Aug. 15, 2001) (unpublished).
262. See *Fla. Bd. of Bar Exam'rs re S.G.*, 707 So.2d 323 (Fla. 1998) (holding that accommodations would result in preferential treatment)
263. *Bartlett*, 2001 WL 93079, at 46.
264. *Id.*