An Overview of the ADA Regulations

Congress delegated authority to promulgate regulations that effectuate the ADA’s mandates to the Attorney General.\(^1\) Regulations under Part 35 apply to “all services, programs, and activities provided or made available by public entities.”\(^2\) The Attorney General’s regulations have “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”\(^3\)

The following sections provide a summary of the Title II regulations relevant to correctional facilities and, where applicable, provide an overview of cases involving claims based on correction’s officials alleged violations of those regulations. The comprehensive regulations give force to the ADA’s mandate.

**General Prohibitions**

Section 35.130 sets forth the general prohibitions against discrimination and provides that “[n]o qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.”\(^4\)

Subsection (b) sets forth the specific, substantive requirements governing the provision of any aid, benefit, or service by public entities. Section 35.130(b)(1) prohibits public entities from engaging in any of these practices:

- Completely denying persons with disabilities access to prison programs, services, and activities. For example, prison officials may not deny a wheelchair users access to showers simply because the facility does not have shower units large enough to fit a wheelchair. Similarly, a prison cannot exclude a deaf person from participating in a drug treatment program because there are no ASL interpreters.\(^5\)

- Providing persons with a disability unequal, separate, or otherwise different access with respect to a program, service, or activity. For example, prison officials may not place prisoners with ambulatory disabilities in a recreation area that is smaller than the recreational areas provided to non-disabled prisoners.\(^6\)

- Partnering with other entities, through contracts, licenses, or other arrangements, that deny benefits to persons with disabilities, perpetuate discrimination, or “otherwise limit a qualified individual with a disability in the enjoyment of any

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\(^1\) *Id.* § 12134(a).
\(^2\) 28 C.F.R. § 35.102(a).
\(^3\) *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1065 (9th Cir. 2010) (internal quotation marks omitted).
\(^4\) 28 C.F.R. § 35.130(a).
\(^5\) 28 C.F.R. § 35.130(b)(1)(i).
\(^6\) 28 C.F.R. § 35.130(b)(1)(ii).
right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.\textsuperscript{7} For example, the prison may not deny proper medical care to wheelchair users because the outside contractor hired by the prison to provide vans for emergency care is not wheelchair accessible would violate the law.\textsuperscript{8}

Providing persons with disabilities an aid, benefit, or service that is not as effective, or does not provide an equal opportunity to achieve the same result, benefit, or level of achievements as provided to persons who are not disabled.\textsuperscript{9} For example, requiring all prisoners to pass a comprehension test prior to participating in educational and vocational programs, but failing to provide test materials in a format that is accessible to blind or low vision prisoners.

Offering different or separate aids benefits or services to persons with disabilities or the same class of disabilities as provided to those who are not disabled unless necessary to provide such persons with aids, benefits, and services that are equally effective.\textsuperscript{10} For example, requiring that blind prisoners from one custody level to eat their meals in their cells as opposed to out-of-cell while permitting seeing persons from the same custody level to eat out-of-cell.

Relying on eligibility criteria for jobs, vocational, educational, or recreational activities that screen out or tend to screen out persons with disabilities.\textsuperscript{11} For example, requiring that all participations in outside prison jobs be able to walk without assistance or need for an assistive device.

Failing to provide persons with sensory disabilities with auxiliary aids and service necessary for effective communications.\textsuperscript{12} For example, failing to provide videophones or telecommunication devices to deaf prisoners for legal visits with their attorneys, or failing to provide blind or low vision prisoners with GED program materials in audio text.\textsuperscript{13}

\textbf{Pop-Out: Integration Mandate}

The so-called “integration regulation” embodies the ADA’s prohibition against the unjustified exclusion and segregation of disabled persons. The regulation states that “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”\textsuperscript{14} The “most integrated setting appropriate to the needs of qualified individuals with disabilities” is defined as “a setting that enables individuals with disabilities to interact with nondisabled persons to the

\begin{itemize}
\item \textbf{Endnotes}
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\item \textsuperscript{7} 28 C.F.R. § 35.130(b)(1),(3).
\item \textsuperscript{8} [Cite to Lewis v. Cain case]
\item \textsuperscript{9} 28 C.F.R. § 35.130(b)(1)(iii).
\item \textsuperscript{10} 28 C.F.R. § 35.130(b)(1)(iv).
\item \textsuperscript{11} 28 C.F.R. § 35.150(b)(8).
\item \textsuperscript{12} 28 C.F.R. § 35.160-164
\item \textsuperscript{13} A deaf man’s jail ordeal in Arlington: ‘I felt stuck. I was stuck.’ Wash. Post, http://wpo.st/gmfd0
\item \textsuperscript{14} 28 C.F.R. § 35.130(d).
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fullest extent possible[.]” A state’s failure to provide services in the most integrated setting appropriate is excused only when the state can demonstrate that the relief sought would result in a “fundamental alteration” of the state’s service system.

Reasonable Accommodations

Subsection (b) sets for an affirmative obligation on the part of public entities to “make reasonable modifications in policies, practices, or procedures[.]” Reasonable modifications—also known as reasonable accommodations—can vary considerably based on the specific needs of persons with a disability. For instance, imagine that a facility permits prisoners to use the telephone for only 30 minutes per day. Deaf or hard of hearing prisoners that rely on the telecommunication devices like video phones, TTY/TTD, or relay services may in practice receive less time for phone calls due to the additional time it takes to set up these devices, as well as delays in transmitting and receiving messages. A reasonable accommodation is one that would allot additional time for telephone calls by deaf prisoners.

Reasonable accommodations help prevent discrimination against persons with disabilities by providing them with the opportunity to “fully and equally participate in a program, service, or benefit.” For instance, if a prisoner with quadriplegia requires an electric, motorized wheelchair, or a personal assistant to help with pushing a manual wheelchair, in order to access the dining hall, showers, recreational areas, and library in the facility, under the ADA, prison authorities would be required to provide a reasonable accommodation so that the prisoner can participate fully and equally in these programs, services, and benefits offered at the facility. Courts have adopted a list of factors to consider in determining whether an accommodation is reasonable or unduly burdensome.

In general, determining whether a particular accommodation

15 28 C.F.R. pt. 35 app. A; see also Townsend v. Quasin, 328 F.3d 511, 516 (9th Cir. 2003); Disability Advocates, Inc. v. Paterson, 653 F. Supp. 2d 184, 191 (E.D.N.Y. 2009).
17 28 C.F.R. § 35.130(b)(7).
18 A modification or accommodation is reasonable if it does not fundamentally alter a program, service, or activity. See infra “Defenses.”
20 One court discussed the factual inquiry as follows:

Whether a requested accommodation is reasonable is highly fact-specific, and determined on a case-by-case basis by balancing the cost to the defendant and the benefit to the plaintiff. Whether the requested accommodation is necessary requires a showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability. The overall focus should be on whether waiver of the rule in the particular case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change.

Dadian v. Village of Wilmette, 269 F.3d 831, 838–39 (7th Cir.2001) (citations and quotation marks omitted). For Title II claims brought against state prisons, some courts have also adopted the factors articulated in Turner to determine whether the accommodation is reasonable:
that is requested by a prisoner is reasonable requires case-by-case analysis into the prisoner’s
disability, specific accommodation requested and its benefits to the prisoner, and the institutional
interests (e.g. cost, security, administration, etc.).

**Equal Access not Preferential Treatment**

The ADA’s guarantees of equal protection do not amount to so-called preferential
treatment for persons with disabilities, but rather equal access and treatment. These legal
protections help to ensure that persons with disabilities do not face discrimination and enjoy the
full benefit of all programs, services and activities offered non-disabled persons. The obligation
to provide equal access in many cases requires affirmative steps to remove barriers to the equal
enjoyment of benefits offered by a public entity. These protections are critical in the correctional
setting where prisoners and detainees rely on staff to meet their basic human needs. As a result,
prisons and jails may violate the ADA where they “fail[] to provide critical healthcare and
personal services (e.g. access to mammograms and pap smears), necessary consumable medical
supplies (e.g., sterile catheters, colostomy bags, and diapers), durable medical equipment and
other disability-related equipment (e.g., wheelchairs, walkers, crutches, and canes), and personal
assistance services (e.g., assistance in eating, dressing, bathing, bowel and bladder management,
transferring to and from a wheelchair, and maintenance of a cell).”

**Maintenance of Accessible Features**

Public entities must ensure that areas of facilities that are accessible to persons with
disabilities are kept in good condition. In relevant part, section 35.133 provides that, “[a] public
entity shall maintain in operable working condition those features of facilities and equipment that
are required to be readily accessible to and usable by persons with disabilities by the Act or this
part.” Temporary failures or disruptions do not violate this regulation.

In *Turner*, the Court singled out four factors to be considered in assessing the constitutionality of
restrictions on prisoners’ rights: (1) whether there is a valid, rational connection between the prison
regulation and the legitimate governmental interest put forward to justify it; (2) whether there are
alternative means of exercising the right that remain open to the prisoners; (3) the impact that
accommodation of the prisoner's alleged constitutional right will have on guards and other
inmates, and on the allocation of prison resources generally; and (4) whether “there is a ready
alternative to the policy ‘that fully accommodates the prisoner's rights at de minimis cost to valid
penological interests,’ ” See, e.g., *Russell v. Richards*, 384 F.3d 444, 447 (7th Cir.2004) (quoting

Phipps v. Sheriff of Cook Cty., 681 F. Supp. 2d 899, 921 (N.D. Ill. 2009). But see [list cases holding that Turner
does not apply].

21 U.S. Mem. Of Law as Amicus Curiae on Issues Under the Americans with Disabilities Act and Rehabilitation Act
That are Likely to Arise on Summ. J. or at Trial 8, Miller v. Smith, Civil Action No. 6:98-cv-109-JEG (DATE),
available at [link].

22 28 C.F.R. § 35.133(a).

23 28 C.F.R. § 35.133(b) (“This section does not prohibit isolated or temporary interruptions in service or access due
to maintenance or repairs.”). Appendix A to Part 35 clarifies the extent to which temporary interruptions will be
permitted under the ADA:

This paragraph is intended to clarify that temporary obstructions or isolated instances of
mechanical failure would not be considered violations of the Act or this part. However, allowing
Program Access in Facilities

Programs, services, and activities of a public entity “readily accessible to and usable by individuals with disabilities.” Program access in facilities involves many aspects of prison life including housing units, dining spaces, shower stalls, work assignments, visitation areas, and architectural design.

Program access is governed by three provisions contained in the implementing regulations:

**Section 35.149:** This provision incorporates the nondiscrimination mandate requiring that public entities make “all programs, services, and activities . . . readily accessibility to and usable by individuals with disabilities.”

**Section 35.150:** This provision sets forth what is required for a public entity to comply with the ADA in buildings already in existence.

**Section 35.151:** This provision sets forth legal obligations for public entities for new construction or alterations to existing facilities occurring after January 26, 1992. All new construction and alterations to existing facilities—say, for example, a new prison facility, or a renovated visiting area in an existing prison—must also be “readily accessible to and usable by individuals with disabilities.”

Removing Architectural Barriers: Existing Facilities

The general provision of § 35.150 provides that “[a] public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—

1. Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

   obstructions or “out of service” equipment to persist beyond a reasonable period of time would violate this part, as would repeated mechanical failures due to improper or inadequate maintenance. Failure of the public entity to ensure that accessible routes are properly maintained and free of obstructions, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access would also violate this part.

28 C.F.R. §35.133, Pt. 35, App. A (emphasis added). Courts have determined that whether the delays extended beyond a “reasonable period of time” was a question to be determined by the trier of fact. Cohen v. City of Culver City, 754 F.3d 690, 700 (9th Cir. 2014) (“A genuine dispute of material fact also exists as to whether the City failed to maintain this curb ramp in “operable working condition,” 28 C.F.R. § 35.133(a), by allowing the private vendor's booth to block the ramp for more than “a reasonable time,” 28 C.F.R. pt. 35, app. B. The trier of fact must determine whether the duration of the obstruction was reasonable.”).

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25 28 C.F.R. § 35.149.
26 28 C.F.R. § 35.149.
27 28 C.F.R. 35.151(a).
(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or
(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.  

The public entity has the burden of proving that compliance with this section would result in a fundamental alteration of the service, program, or activity, or would “result in undue financial and administrative burdens” where the affirmative defense is raised. In addition, the determination must be made by the entity’s head, or his or her designee, and must be documented in writing. Public entities may comply with section 35.150 through a variety of means.

New Constructions & Alterations to Detention & Correctional Facilities

New construction of building or facilities, and any alterations, made after January 26, 1992, are governed by Section 35.151. Public entities must construct new facilities in a manner that makes them “readily accessible to and usable by individuals with disabilities.” Alterations to existing facilities must “to the maximum extent feasible . . . be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities.” To comply with Title II, public entities must adhere the requirements set forth in the 2010 ADA Standards for Accessible Design.

Detailed guidelines govern the design and construction of accessible cells in correctional facilities. Section 35.151(k)(1) applies to new construction of correctional facilities and provides that: “New construction of jails, prisons, and other detention and correctional facilities shall comply with the 2010 Standards except that public entities shall provide accessible mobility features complying with section 807.2 of the 2010 Standards for a minimum of 3%, but no

28 C.F.R. § 35.150(a).
29 Id. § 35.150(a)(3).
30 Id. § 35.150 (a)(3); see also Pena v. Bexar Cnty., Texas, 726 F. Supp. 2d 675, 683 (W.D. Tex. 2010).
31 For example,

A public entity may comply with the requirements of this section through such means as redesign or acquisition of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries . . . delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities.

28 C.F.R. § 35.150(b)(1).
32 28 C.F.R. § 35.151(a).
33 Id. § 35.151(b).
34 “State and local government facilities must follow the requirements of the 2010 Standards, including both the Title II regulations at 28 CFR 35.151; and the 2004 ADAAG at 36 CFR part 1191, appendices B and D.” http://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm#titleII
fewer than one, of the total number of cells in a facility.” 37 The section also mandates that “[c]ells with mobility features ... be provided in each classification level.” 38

Alterations to correctional facilities are also governed by section 35.151(k)(2). That section states that “[a]lterations to jails, prisons, and other detention and correctional facilities shall comply with the 2010 Standards except that public entities shall provide accessible mobility features complying with section 807.2 of the 2010 Standards for a minimum of 3%, but no fewer than one, of the total number of cells being altered until at least 3%, but no fewer than one, of the total number of cells in a facility shall provide mobility features complying with section 807.2.” 39 As with new construction, “[a]ltered cells with mobility features shall be provided in each classification level.” 40

Paragraph (k)(3) specifically addresses medical and long-term care facilities and states that “[w]ith respect to medical and long-term care facilities in jails, prisons, and other detention and correctional facilities, public entities shall apply the 2010 Standards technical and scoping requirements for those facilities irrespective of whether those facilities are licensed.” Id. 35.151(k)(3); see also 2010 ADA Standards, supra note 3, at 209.

Specific mandates for jails, detention and correctional facilities, and community correctional facilities

Section 35.152 “applies to public entities that are responsible for the operation or management of adult and juvenile justice jails, detention and correctional facilities, and community correctional facilities, either directly or through contractual, licensing, or other arrangements with public or private entities, in whole or in part, including private correctional facilities.” 28 C.F.R. § 35.152(a). Under this section, “[p]ublic entities shall ensure that qualified inmates or detainees with disabilities shall not, because a facility is inaccessible to or

When alterations are made to specific cells, detention and correctional facility operators may satisfy their obligation to provide the required number of cells with mobility features by providing the required mobility features in substitute cells (cells other than those where alterations are originally planned), provided that each substitute cell—

(i) Is located within the same prison site;
(ii) Is integrated with other cells to the maximum extent feasible;
(iii) Has, at a minimum, equal physical access as the altered cells to areas used by inmates or detainees for visitation, dining, recreation, educational programs, medical services, work programs, religious services, and participation in other programs that the facility offers to inmates or detainees; and
(iv) If it is technically infeasible to locate a substitute cell within the same prison site, a substitute cell must be provided at another prison site within the corrections system.

Id.
Ž usable by individuals with disabilities, be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.” *Id.* § 35.152(b)(1); *see also* Hernandez, 2015 WL 3868036, at *2. In addition, public entities must ensure that prisoners are “housed in the most integrated setting appropriate to the needs of the individuals.” *Id.* § 35.152(b)(2).

Unless it is appropriate to make an exception, a public entity—

(i) Shall not place inmates or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are available;
(ii) Shall not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;
(iii) Shall not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would otherwise be housed; and
(iv) Shall not deprive inmates or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed.

*Id.* Finally, public entities are required to “implement reasonable policies, including physical modifications to additional cells in accordance with the 2010 Standards, so as to ensure that each inmate with a disability is housed in a cell with the accessible elements necessary to afford the inmate access to safe, appropriate housing.” *Id.* § 35.152(b)(3); *see also* 2010 ADA Standards, *supra* note 3, at 89.

**Notice Requirements**

Notice of protections for persons with disabilities under the ADA must be provided “in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.” *Id.* Prisoners must be able to clearly understand the rights provided to them under the ADA. As one commentator has noted, “[t]he rights established under the ADA would be meaningless to many inmates with disabilities if there were no corresponding right to notification of the institution's obligations under the ADA.” *Id.* Information must be provided to prisoners in an accessible format. To provide actual notice, any information must conveyed in plain English and avoid legalese. Content material should be at a 4-6th grade reading level.

Maine Medical Center provides sign language interpreting services, telecommunication devices (TTYs), and other aids and services to persons who

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41 *Id.*

are deaf or hard of hearing. These services are provided by MMC free of charge. Please ask for assistance in Room [29].

--and--

Free Equipment and Services for People with Disabilities Available in Room 22:

- Sign language interpreters
- TTYs
- Braille materials
- Other equipment and services for people with disabilities

The two bulletins convey the same information, but the second bulletin is easier to understand and eliminates needless jargon. In drafting notice bulletins, or information for prisoner manuals, orientation sessions, and trainings, prison officials should keep these guidelines in mind to ensure that vital information is shared with prisoners with sensory disabilities.

**Effective communications**

In relevant part, section 35.160 provides that “[a] public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.” A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.” The regulation also sets standards for what constitutes effective communication. It states that “[t]he type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place.” Public entities must “give primary consideration to the requests of individuals with disabilities,” and must provide “auxiliary aids and services . . . in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.” The affirmative obligation to provide the requested accommodation does have limitations: A prison is not required to provide the requested accommodation where doing so would “fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.”

**Prohibition against retaliation or coercion**

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43 From pp. 86-87/ When “Equal” Means “Unequal and Other Legal Conundrums.
44 Id.
45 28 C.F.R. § 35.160(a)(1).
46 Id. § 35.160(b)(1).
47 Id. § 35.160(b)(1).
48 Id. § 35.160(b)(2).
49 28 C.F.R § 35.164.
Section 35.134 sets forth express prohibitions against retaliation or coercion. Under this section,

(a) No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

(b) No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part.  

The protections under this subsection apply not only to persons with disabilities who exercise their own rights under the ADA, but also to those persons who seek relief for the benefit of others.  

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50 28 C.F.R. § 35.134.
51 28 C.F.R. § 35.134, Pt. 35, App. A (“This section protects not only individuals who allege a violation of the Act . . . but also any individuals who support or assist them.”).