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**REPORT TO OFFICE OF THE INDEPENDENT MONITOR
OF THE LOS ANGELES UNIFIED SCHOOL DISTRICT
REGARDING THE
SELF-EVALUATION AND TRANSITION PLAN REQUIREMENTS OF THE
AMERICANS WITH DISABILITIES ACT**

October 16, 2015

INTRODUCTION

The Americans with Disabilities Act requirements that apply to public schools and other public entities include a self-evaluation requirement; the self-evaluation is supposed to lead to a public agency's plan to transition to full compliance. This leads to the question of whether the law imposes any particular process or content requirements on a public agency as it fulfills the self-evaluation and transition plan requirements. Here, the question is raised with particular regard to physical accessibility (a/k/a architectural barriers).

This Report does two things. First, it describes the legal applicable requirements. Second, it summarizes the related sub-regulatory guidance and advocacy of the U.S. Department of Justice on this subject.

LEGAL REQUIREMENTS

Statutory Requirements – Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*

Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, *et seq.* (“Title II”) says that:

no qualified individual with a disability shall, by reason of such 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 such entity.

The statute itself does little more than convey this general rule, define a few terms, explain the relationship between the ADA and Section 504 of the Rehabilitation Act regarding accessibility standards, and authorize the Attorney General to promulgate regulations to implement the statute. The statute itself does not discuss self-evaluations or transition plans.

Regulatory Requirements – 28 CFR Part 35¹

The current iteration of the Department of Justice’s Title II regulation was published in 2010 and went into effect on March 15, 2011. Like its earlier versions, it requires public entities to conduct a self-evaluation of services, policies, and practices as set forth below:

§35.105 Self-evaluation

- (a) A public entity shall, within one year of the effective date of this part, **evaluate** its current services, policies, and practices, and the effects thereof, that **do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.**
- (b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.
- (c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:
 - (1) A list of the interested persons consulted;

¹ A properly promulgated regulation has the force and effect of law, except if successfully challenged on the grounds that the regulation is inconsistent with the statute that it purports to implement.

- (2) A description of areas examined and any problems identified; and
- (3) A description of any modifications made.
- (d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation. (Emphasis added)

This indicates that: (1) the self-evaluation is to examine a public agencies operations for aspects that do not or may not comply with the regulations, (2) if some aspect of the public agency's operations necessitates a change in order to be in compliance, then modifications are necessary and the public agency must proceed to make those modifications, and (3) the public agency must keep records of the problems identified and the modifications made. This does not target architectural barriers, but would include architectural barriers.

In addition, this regulation: (4) requires certain public agencies to provide an opportunity to participate in the self-evaluation by submitting comments. This should be implemented by taking into account the regulation's "notice" requirements, which are as follows:

§35.106 Notice

Section 35.106 requires a public entity to disseminate sufficient information to applicants, participants, beneficiaries, and other interested persons to inform them of the rights and protections afforded by the ADA and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe a public entity's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio. In providing the notice, a public entity must comply with the requirements for effective communication in §35.160. The preamble to that section gives guidance on how to effectively communicate with individuals with disabilities.

The Title II regulations then begin to focus on physical accessibility, as follows:

§35.149 Discrimination prohibited

Except as otherwise provided in §35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable 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.

This is followed for §35.150, which is labeled as "Existing facilities" but which shifts the regulatory focus from particular buildings to particular programs. That is, the regulation speaks in terms of each "service, program, or activity" of the public entity. This section does not address the self-evaluation process per se. However, it establishes the legal standards against which the self-evaluation would evaluate a possible need for transition from non-compliance to compliance. Therefore, it bears summarizing here, in highly condensed form, as follows:

- The overall standard is that each program of the public entity must, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities. 34 CFR §35.150(a).
- This does not mean that each building must be made accessible. §35.150(a)(1).
- This does not require a remedial action that would create a fundamental alteration, or an undue financial or administrative burden. However, such circumstances would require the public agency to justify its conclusions and to find another solution to the accessibility noncompliance problem that has been identified. §35.150(a)(3), (b).
- The regulation establishes a series of "safe harbor" provisions that depend on the type of facility and the date of its last alteration. §35.150(b)(2).

The regulations proceed to other substantive areas – such as new construction and alterations – that would logically play an important role in a self-evaluation. §35.151 *et seq.* However, the regulation does not speak further about the process or content of the self-evaluation.

When a structural change to a facility is made in order to move from noncompliance to compliance, that change was to have been completed by January 26, 1995. §35.150(c). The link between the self-evaluation and full compliance is the transition plan, which was to have been completed by July 26, 1992. Here is how the regulation describes and controls the transition plan:

(d) Transition plan.

(1) In the event that structural changes to facilities **will be undertaken to achieve program accessibility**, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, **a transition plan setting forth the steps necessary to complete such changes**. A public entity shall **provide an opportunity to interested persons**, including individuals with disabilities or organizations representing individuals with disabilities, **to participate** in the development of the transition plan **by submitting comments**. A copy of the transition plan shall be made available for public inspection.²

(2) If a public entity has responsibility or authority over **streets, roads, or walkways**, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum—

(i) **Identify physical obstacles** in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

² In addition to participating in the self-evaluation by submitting comments, a litigant may seek to invoke the above-referenced regulations in a separate court action. Courts vary on whether an individual can simply invoke and enforce these regulations. Courts within the Sixth Circuit have held that there is no private right of action to enforce 28 C.F.R. §35.105(a) (relating to self-evaluations) and 35.150(d) (relating to transition plans). *See e.g., Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 914 (6th Cir. 2004) (“§ 35.150(d) . . . is not enforceable under Title II’s private cause of action”); *Ross v. City of Gatlinburg*, 327 F.Supp.2d 834, 844 (E.D. Tenn. 2003)(“The Court does not find any statutory basis to assert a cause of action based solely on a public entity’s failure to conduct a self-evaluation or develop a proper transition plan.”). Other courts have permitted plaintiffs to maintain actions to enforce the regulation. Such actions may not, however, be premised solely upon allegations of regulatory non-compliance. Rather, the actions must be premised on disability-related discrimination, and a plaintiff must allege a clear causal connection between the defendant’s failure to evaluate its services and his asserted injury. *See Iverson v. City of Boston*, 2005 U.S. Dist. LEXIS 47570 at *6-8 (June 28, 2005).

(ii) **Describe in detail the methods that will be used to make the facilities accessible;**

(iii) **Specify the schedule for taking the steps** necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken **during each year** of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied with the transition plan requirement of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall apply only to those policies and practices that were not included in the previous transition plan. (Emphasis added.)

Thus, the transition plan:

- should follow from the analysis in the self-evaluation;
- has its own public comment opportunity in addition to the one that applies to the self-evaluation;
- responds to a "program accessibility" standard, but responds also to the fact that it may be particular architectural barriers that cause the "program accessibility" problem, thus sometimes requiring a building-specific solution; and
- must include a schedule – in some cases a year-by-year schedule – for taking the steps by which the public agency will transition from noncompliance to compliance.

SUB-REGULATORY GUIDANCE

In addition to the text of the regulation itself, the Department of Justice has published³ an ADA Title II Technical Assistance Manual,⁴ an ADA Update: A Primer for State and Local Governments, as well as an ADA Best Practices Tool Kit for State and Local Governments.⁵

The Title II self-evaluation applies only to those policies and practices that were not previously included in a self-evaluation required by section 504. Although not required, the Manual advises that it may be simpler to include all of a public entity's operations in its transition plan rather than identifying and excluding those barriers that were addressed in its previous plan. The complete Technical Assistance Manual is available at <http://www.ada.gov/taman2.html#II-8.1000> (last visited 9/1/2015).

The ADA Primer advises that, while the 2010 regulation does not specifically require public entities to conduct a new self-evaluation or develop a new transition plan, they are encouraged to do so. The complete Primer can be accessed at http://www.ada.gov/regs2010/titleII_2010/title_ii_primer.html#coordinator.

The Technical Assistance Manual states that, as part of the Title II self-evaluation, a public entity should:

- 1) Identify all of the public entity's programs, activities, and services; and

³ Such publications do not have the force and effect of law. They typically include a combination of: (1) statements that accurately repeat the legal requirements, and (2) other statements of advice, best practice, and agency interpretation. To the extent that the issuing agency is honest, it will signal the difference between the two by using "must" for the former and "should" or the like for the latter. They are sometimes persuasive in court, even though not binding.

⁴ Much of what is contained in the Technical Assistance Manual is also contained in the regulation, so this report will not duplicate those sections.

⁵ The Best Practices Toolkit contains useful information, but it does not contain guidance relating to self-evaluations or transition plans. It can be accessed at <http://www.ada.gov/pcatoolkit/toolkitmain.htm>.

- 2) Review all of the policies and practices that govern the administration of the public entity's programs, activities, and services.

The Technical Assistance Manual recommends careful examination of the following with regard to the self-evaluation and transition plan:⁶

- 1) A public entity must examine each program to determine whether any physical barriers to access exist. It should identify steps that need to be taken to enable these programs to be made accessible when viewed in their entirety. If structural changes are necessary, they should be included in the transition plan.
- 2) A public entity must review its policies and practices to determine whether any exclude or limit the participation of individuals with disabilities in its programs, activities, or services. Such policies or practices must be modified, unless they are necessary for the operation or provision of the program, service, or activity. The self-evaluation should identify policy modifications to be implemented and include complete justifications for any exclusionary or limiting policies or practices that will not be modified.
- 3) A public entity should review its policies to ensure that it communicates with applicants, participants, and members of the public with disabilities in a manner that is as effective as its communications with others. If a public entity communicates with applicants and beneficiaries by telephone, it should ensure that TDD's or equally effective telecommunication systems are used to communicate with individuals with impaired hearing or speech. Finally, if a public entity provides telephone emergency services, it should review its policies to ensure direct access to individuals who use TDD's and computer modems.
- 4) A public entity should review its policies to ensure that they include provisions for readers for individuals with visual impairments; interpreters or other alternative communication measures, as appropriate, for individuals with hearing impairments; and amanuenses for individuals with manual impairments. A method for securing these services should be developed, including guidance on when and where these services will be provided. Where equipment is used as part of a public entity's program, activity, or service, an assessment should be made to ensure that the equipment is usable by individuals with disabilities, particularly individuals with hearing, visual, and manual impairments. In addition, a public entity should have policies that ensure that its equipment is maintained in operable working order.

⁶ These are direct quotes from the Manual.

- 5) A review should be made of the procedures to evacuate individuals with disabilities during an emergency. This may require the installation of visual and audible warning signals and special procedures for assisting individuals with disabilities from a facility during an emergency.
- 6) A review should be conducted of a public entity's written and audio-visual materials to ensure that individuals with disabilities are not portrayed in an offensive or demeaning manner.
- 7) If a public entity operates historic preservation programs, it should review its policies to ensure that it gives priority to methods that provide physical access to individuals with disabilities.
- 8) A public entity should review its policies to ensure that its decisions concerning a fundamental alteration in the nature of a program, activity, or service, or a decision that an undue financial and administrative burden will be imposed by title II, are made properly and expeditiously.
- 9) A public entity should review its policies and procedures to ensure that individuals with mobility impairments are provided access to public meetings.
- 10) A public entity should review its employment practices to ensure that they comply with other applicable nondiscrimination requirements, including section 504 of the Rehabilitation Act and the ADA regulation issued by the Equal Employment Opportunity Commission.
- 11) A public entity should review its building and construction policies to ensure that the construction of each new facility or part of a facility, or the alteration of existing facilities after January 26, 1992, conforms to the standards designated under the title II regulation.
- 12) A review should be made to ascertain whether measures have been taken to ensure that employees of a public entity are familiar with the policies and practices for the full participation of individuals with disabilities. If appropriate, training should be provided to employees.
- 13) If a public entity limits or denies participation in its programs, activities, or services based on drug usage, it should make sure that such policies do not discriminate against former drug users, as opposed to individuals who are currently engaged in illegal use of drugs.

Additionally, the Manual advises that while there is no requirement for a public hearing on a public entity's self-evaluation, public entities are required to accept comments from the

public on the self-evaluation and are strongly encouraged to consult with individuals with disabilities and organizations that represent them to assist in the self-evaluation process. Many individuals with disabilities have unique perspectives on a public entity's programs, activities, and services. For example, individuals with mobility impairments can readily identify barriers preventing their full enjoyment of the public entity's programs, activities, and services. Similarly, individuals with hearing impairments can identify the communication barriers that hamper participation in a public entity's programs, activities, and services.

CONCLUSION

These self-evaluation and transition plan requirements are established in the federal regulation issued pursuant to Title II of the ADA. They are relatively straightforward. They are supplemented by non-mandatory guidance documents that do not constitute requirements but that contain ideas and approaches that a public agency can choose to adopt as it pursues its self-evaluation and then its transition plan under Title II of the ADA.



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EMPLOYMENT -- PROFESSIONAL

Member

McNees Wallace & Nurick LLC

1995 –

Member of Harrisburg, Pennsylvania law firm's Litigation Department and Education Law Group, with emphasis on education law and disability law matters. Clients include school districts, Intermediate Units, private schools, and private colleges.

Practice emphasizes special education problem-prevention, solutions, and federal court litigation on behalf of school districts in Pennsylvania and other states pursuant to Individuals with Disabilities Education Act, Section 504, and Americans with Disabilities Act.

Practice includes representation before State Board of Education, Department of Education hearing officers, state and federal courts.

Adjunct Professor

Widener University School of Law

1996

Taught law school course on disability law.

Chief Counsel

Pennsylvania Department of Education

1990-1995

Chief legal officer in education field for the Commonwealth of Pennsylvania.

Responsible for legal representation and internal legal advice to the Secretary of Education and state education agency. Diverse practice in school law, with personal emphasis on special education law and school finance. Responsible for management of office, strategic advice to government clients, and representation before State Board and Legislature. Supervised a staff of seventeen attorneys and support staff.

Division Director

**Office of Special Education Programs
U.S. Department of Education**

1986-1989

Head of federal unit implementing Part B of Individuals with Disabilities Education Act. Responsible for legal interpretation, compliance determinations, review of state special education plans, negotiations with states, technical assistance network, legal and education policy development, and overall management of Division.

Supervised a staff of 39 attorneys, educators, and support staff. Served as Policy Director of Division during 1986-1987, with legal opinions published biweekly in national reporter.

Trial Attorney

Office for Civil Rights

U.S. Department of Education

U.S. Department of Health, Education, and Welfare

1976-1986; 1989-1990

Staff attorney in federal unit responsible for implementing nondiscrimination statutes (race, gender, disability, age) with regard to schools, universities, hospitals, and other federal grantees. Administrative hearings and federal court experience.

EMPLOYMENT -- PREPROFESSIONAL

Experiences include work with county health department (summer 1974), Malaysian Ministry of Health (Peace Corps) (1969-1971), and World Health Organization (Peace Corps) (1971).

EDUCATION

University of Michigan School of Law (Juris Doctor, 1976)

University of Michigan School of Graduate Studies (M.A. in history, 1976)

University of Michigan (B.A. (honors), 1969)

LECTURES, PRESENTATIONS, PUBLICATIONS, AND CONSULTANCIES

Presented at numerous national legal institutes, conventions, statewide conferences in several states, hearing officer training, legislative committees, and university classes on education law, discrimination law, and health planning law. For example, presented in 2004 at National Academy for I.D.E.A. Administrative Law Judges and Hearing Officers (Seattle University School of Law).

Published articles and monographs in areas of special education law, Americans with Disabilities Act, and related topics.

Special Counsel to Board of Education of City of New York; brief consultancies with Chicago Public Schools and District of Columbia Public School Board, both relating to special education litigation and compliance.