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IMPACT OF THE AMERICANS WITH DISABILITIES ACT ON TRANSIT AGENCY LIABILITY

This report was prepared under TCRP Project J-05, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared under Topic 17-01 by Larry W. Thomas, The Thomas Law Firm, Washington, D.C.

The Problem and Its Solution

The nation's 6,000 plus transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their business. Some transit programs involve legal problems and issues that are not shared with other modes, as for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Also, much of the information that is needed by transit attorneys to address legal concerns is scattered and fragmented. Consequently, it would be helpful to the transit lawyer to have well-resourced and well-documented reports on specific legal topics available to the transit legal community.

The Legal Research Digests (LRDs) are developed to assist transit attorneys in dealing with the myriad of initiatives and problems associated with transit start-up and operations, as well as with day-to-day legal work. The LRDs address such issues as eminent domain, civil rights, constitutional rights, contracting, environmental concerns, labor, procurement, risk management, security, tort liability, and zoning. The transit legal research, when conducted through the TRB's legal studies process, either collects primary data that generally are not available elsewhere or performs analysis of existing literature.

Foreword

In the 28 years since its enactment, the Americans with Disabilities Act of 1990 (ADA) has become a fixed part of America's cultural and legal landscapes. The ADA has transformed U.S. transit agencies, which now have sophisticated programs to address a wide variety of accessibility goals in such areas as the design of transit stations, bus and rail vehicle design, media stop announcements, paratransit programs, website design and content, and many other tools that address ADA requirements.

In 1998 when the ADA was relatively new and there was very little reported case law, TCRP saw a need to assess the potential of tort liability and identify unreported tort liability cases arising out of the ADA, and in December 1998, TCRP published *TCRP Legal Research Digest 11: Potential for Tort Liability for Transit Agencies Arising Out of the Americans with Disabilities Act*. In the years since, it has become clear that for transit agencies tort liability is only a small aspect of the many legal risks and liabilities presented by the ADA. In fact, by far the most publicized legal disputes involving transit agencies and ADA claims have been civil rights lawsuits.

In response to several U.S. Supreme Court cases that narrowly interpreted the ADA definition of disability, in 2008 Congress amended the ADA to clarify and broaden the definition.

This digest provides a comprehensive overview of the types of transit agency ADA requirements and legal claims against transit agencies that the ADA as amended has generated. This research presents an assessment of problems in implementing the Act from the perspective of transit operators. Although case law is limited, the Federal Transit Administration (FTA) has issued extensive regulatory guidance, which transit agencies can draw upon in assessing compliance requirements associated with the Act. Relevant FTA guidance is summarized in detail in this report.

This digest will be helpful to transit operators, administrators, planners, risk managers, and attorneys with an interest in devising a transit program that meets the objectives of the ADA.

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IMPACT OF THE AMERICANS WITH DISABILITIES ACT ON TRANSIT AGENCY LIABILITY

By Larry W. Thomas, The Thomas Law Firm, Washington, D.C.

I. INTRODUCTION

Because of the transformative impact of the Americans with Disabilities Act of 1990 (ADA),[1] this digest is a comprehensive analysis of the law and claims under the Act against transit agencies, as well as the ADA's relationship to the civil rights laws and whether transit agencies also may be held liable in tort for violating the rights of individuals with disabilities. This digest analyzes key provisions of the ADA, federal regulations, and guidance issued in November 2015 by the Federal Transit Administration (FTA) and discusses relevant case law.[2]

Part II of this digest provides an overview of the ADA and discusses its history, purposes, and five titles.

Part III of this digest analyzes the ADA Amendments Act of 2008 (ADAAA)[3] and its impact on claims brought under the ADA, in part, because of the ADAAA's rejection of Supreme Court cases that had narrowed the intended breadth of the ADA. The ADAAA also made several important changes to the ADA, such as amending the definition of the term disability and adding a list of major life activities for which an impairment would be considered a disability. Since the enactment of the ADAAA, numerous courts have heeded Congress's instruction to construe the ADA "in favor of broad coverage of individuals … to the maximum extent permitted" by the Act.[4]

Notably, however, of the forty-seven transit agencies that responded to a survey conducted for this digest, twenty-seven agencies reported that since 2008 they have had fewer ADA claims, whereas only eight agencies stated that they have had more claims.[5] Five agencies reported that their number of claims or cases has been about the same since 2008.[6]

Part IV discusses Title I of the ADA and discrimination in employment against individuals with disabilities. As an employer, a transit agency is a covered entity under the ADA. In addition to the issue of whether an individual has a disability, claims under Title I may involve a covered entity's failure to make a reasonable accommodation for an applicant or an employee with a disability, whether an employee's use of illegal drugs and/or whether an employee's use of alcohol in the workplace may preclude employment, or whether a covered entity may make medical inquiries or require a medical exam or a drug test of an applicant or employee as a condition to employment.

Part V discusses Title II of the ADA that prohibits discrimination against individuals with disabilities, including those who use wheelchairs, by public entities providing public services, including transportation services. Part V covers, in particular, the U.S. Department of Transportation (DOT) regulations in 49 C.F.R. parts 37 and 38 that establish minimum accessibility standards for transportation vehicles, including rapid rail vehicles, light rail vehicles, buses, vans, commuter rail cars, intercity rail cars,

[1] Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (2018)).

[2] In 1998, TCRP issued a report addressing tort liability under the ADA, Robert H. Hirsch, TCRP LRD 11: Potential Tort Liability for Transit Agencies Arising Out of the Americans with Disabilities Act, (Transportation Research Board, National Research Council, 1998). In 2003, a report addressed the general impact of the ADA on transit operations, Carolyn B. Witherspoon, Donna S. Galchus & Susan Keller, TCRP LRD 19: Impact of the Americans with Disabilities Act on Transit Operations, (Transportation Research Board of the National Academies, 2003). In 2007, the TCRP issued a collection of Federal Transit Administration (FTA) letters of findings and compliance assessments, Shelly Brown, TCRP LRD 23: The Americans with Disabilities Act: The Federal Transit Administration's Letters of Findings and Compliance Assessments, (Transportation Research Board of the National Academies, 2007). In 2011, a report on reduction in service and fare increases discussed the ADA and other civil rights laws, Larry W. Thomas, TCRP LRD 35: Reductions in Transit Service or Increases in Fares: Civil Rights, ADA, Regulatory and Environmental Justice Implications, (Transportation Research Board of the National Academies, 2011).

[3] Pub. L. No. 110-325, 122 Stat. 3553 (2009) (codified at 29 U.S.C. § 705, 42 U.S.C. §§ 12101, 12102, 12111, 12112, 12113, 12114, 12201, and 12211 (2018)).

[4] 42 U.S.C. § 12102(4)(A) (2018).

[5] *See* Appendix C, Transit Agencies' Responses to Question 1.

[6] *See id.* One agency stated that it was unable to answer the question. Six agencies did not respond to the question.

and over-the-road buses. An FTA circular issued in 2015,[7] referenced throughout this digest, provides guidance for recipients and subrecipients of FTA financial assistance concerning their compliance with the ADA, Section 504 of the Rehabilitation Act,[8] and the DOT regulations in 49 C.F.R. parts 27, 37, and 38.[9] The FTA Circular provides guidance on discriminatory practices prohibited by the ADA and explains required accessibility features and the accommodation of individuals using wheelchairs and other mobility devices.

Part VI concerns the requirements for transportation facilities to be ADA-compliant. Transit agencies must comply with the DOT Standards when constructing new facilities or altering existing ones so that the facilities are readily accessible to individuals with disabilities, including those who use wheelchairs. This digest discusses cases in which plaintiffs have challenged transit agencies' compliance with ADA requirements. For example, inasmuch as the DOT Standards apply to rail platforms, plaintiffs in several cases have challenged platforms' compliance with the ADA. This digest discusses the ADA requirement that transit agencies designate key stations and ensure their accessibility for persons with disabilities. This digest also discusses cases in which plaintiffs alleged that key stations and/or elevators were not readily accessible for use by individuals with disabilities.

Part VII of this digest discusses the requirements for fixed route service under the ADA. When a transit agency purchases or leases a new bus, a new rapid rail vehicle, a new light rail vehicle, or any other new vehicle to be used on its fixed route system, the vehicle must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. The same rule applies to the purchasing or leasing of used or remanufactured vehicles. Whenever a vehicle on a fixed route has an inoperative lift for wheelchairs, transit agencies are obligated to provide alternative transportation promptly for individuals with disabilities.

Part VIII covers the ADA's paratransit service requirements that apply to transit agencies that operate a fixed route transportation system. Under the ADA, transit agencies must provide transportation service to individuals with disabilities on the same basis as other individuals who use fixed route systems. A transit agency may not limit the availability of paratransit service through a pattern or practice of actions or capacity constraints. Part VIII also discusses eligibility for paratransit service, as well as judicial decisions in which individuals with disabilities alleged that they were denied paratransit service in violation of the ADA.

Part IX addresses the requirements that apply to demand responsive service under Title II of the ADA.

Part X analyzes administrative and judicial enforcement of Title II, including FTA oversight and complaints, and private actions for violations of Title II.

Part XI addresses Title III and discrimination in public accommodations, including transportation services that are subject to Title III.

Part XII analyzes the relationship of Titles I, II, and III of the ADA and the Civil Rights Act.

Lastly, Part XIII discusses whether transit agencies may be held liable in tort for claims by individuals with disabilities.

As noted, forty-seven transit agencies responded to a survey conducted for this digest regarding the impact of the ADA on their agency. A list of the transit agencies responding to the survey is Appendix A to this digest. Appendix B is a copy of the survey. The transit agencies' responses to the survey are discussed throughout this digest and summarized in Appendix C. Appendix D includes copies of policies, procedures, and other materials furnished by transit agencies that responded to the survey.

II. OVERVIEW, PURPOSES, AND FIVE TITLES OF THE ADA

In 1990, the ADA was enacted to eliminate discrimination against individuals with disabilities.[10] The ADA was preceded by the Rehabilitation Act of 1973, Section 504 of which banned discrimination by recipients of federal funds against individuals on the basis of a disability.[11]

[7] U.S. Department of Transportation, Federal Transit Administration, FTA C 4710.1: Americans with Disabilities Act (ADA): Guidance (2015) [hereinafter FTA Circular], *available at* https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/Final_FTA_ADA_Circular_C_4710.1.pdf (last accessed June 20, 2018).

[8] Pub. L. No. 93-112, 87 Stat. 355 (1973).

[9] FTA Circular.

[10] 42 U.S.C. § 12101(b)(1) (2018).

[11] As codified in 29 U.S.C. § 794(a) (2018), Section 504 states in part:

> No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 U.S.C.S. § 705(20)] of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by

The ADA has five titles. Title I prohibits entities from discriminating against individuals with disabilities in the context of employment.[12]

Title II applies to *public* entities providing public services, including transportation services,[13] and provides 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."[14] For purposes of the ADA, the term public entities includes state and local governments, instrumentalities of state or local governments, the National Railroad Passenger Corporation (Amtrak), and any public commuter authority.[15]

Title III of the ADA covers discrimination by *private* entities against individuals with a disability. Title III prohibits discrimination against individuals on the basis of a disability by any place of public accommodation, including a terminal, depot, or other station, and by any means of transportation, such as bus or rail, that provides general or special service on a regular and continuing basis to the general public.[16] Title III also prohibits private entities that provide public transportation services from discriminating against individuals with a disability and preventing them from receiving full and equal enjoyment of specified transportation services provided by private entities. Thus, § 12184(a) states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce."[17]

Title IV requires common carriers to make telecommunication services available to individuals with hearing and speech disabilities "in a manner that is functionally equivalent to the abilities of a hearing individual who does not have a speech disability"[18] and requires television public service announcements funded by the federal government to have closed captioning.[19]

Title V provides that

> [a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.[20]

Notwithstanding Title V, this digest discusses the extent to which states and state agencies have been held to retain their Eleventh Amendment immunity to ADA claims. Title V also prohibits retaliation.[21]

When enacting the ADA, the Congress found that, although physical or mental disabilities do not diminish a person's right to participate fully in all aspects of society, many people with a disability are precluded from participating fully in society because of discrimination.[22] The types of discrimination include

> outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities….[23]

Prior to the ADA, individuals with disabilities who were discriminated against because of their disability often had no legal recourse to prevent discrimination or to redress its effects.[24] The ADA seeks to eliminate discrimination against individuals with disabilities; provides enforceable standards to address discrimination against individuals with disabilities; ensures that the federal government plays a central role in enforcing the ADA standards; and invokes the authority of Congress, including its powers to enforce the Fourteenth Amendment and to regulate commerce, to prohibit discrimination on a day-to-day basis against people with disabilities.[25]

III. THE ADA AMENDMENTS ACT OF 2008 AND ITS IMPACT

A. Congressional Findings in and Purposes of the ADAAA

Congress enacted the ADA in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals

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any Executive agency or by the United States Postal Service.

[12] 42 U.S.C. § 12112(a) (2018).

[13] Abrahams v. MTA Long Island Bus, 644 F.3d 110, 115 (2d Cir. 2011) (citing 42 U.S.C. § 12131 *et seq*.).

[14] *Id*. (citing 42 U.S.C. § 12132).

[15] 42 U.S.C. § 12131(1) (2018).

[16] *Id*. §§ 12181(7)(G), 12181(10), and 12182(a).

[17] *Id*. § 12184(a).

[18] 47 U.S.C. § 225(a)(3) and (b).

[19] *Id*. § 611 (closed captioning of public service announcements).

[20] 42 U.S.C. § 12202 (2018).

[21] *Id*. § 12203.

[22] *Id*. § 12101(a)(1)-(3).

[23] *Id*. § 12101(a)(5).

[24] *Id*. § 12101(a)(4).

[25] *Id*. § 12101(b).

with disabilities and provide broad coverage...."[26] In the ADAAA in 2008, Congress rejected the United States Supreme Court's decisions in *Sutton v. United Air Lines, Inc.*[27] and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,*[28] because the Court had "narrowed the broad scope of protection" that Congress had intended for the ADA to provide.[29] The Supreme Court "incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities… ."[30] Congress also rejected the Court's ruling that mitigative or corrective measures must be considered when determining whether an individual is substantially limited in a major life activity.[31]

As the Congress stated in the ADAAA, a purpose of the Act is

> to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 194 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[32]

Congress declared in the ADAAA, however, that the standard set by the Court in *Toyota* applicable to the term substantially limits "created an inappropriately high level of limitation necessary to obtain coverage under the ADA…."[33] Congress further declared that the primary objective in ADA cases should be to determine "whether entities covered under the ADA have complied with their obligations" and that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis…."[34]

Finally, Congress stated that it expected the Equal Employment Opportunity Commission (EEOC), whose regulations, for example, had defined the term "substantially limits" to mean "significantly restricted," to revise its regulations so that they are consistent with the ADAAA.[35]

B. Specific Amendments of the ADA

First, in the ADAAA, Congress amended the definition of disability. Although still having three parts or prongs, the term disability with respect to an individual now means:

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment (as described in paragraph (3)).[36]

Second, Congress amended the above third prong of the definition of disability in § 12102(1)(C) by stating that

> [a]n individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.[37]

The ADA, as amended, relieves a plaintiff of having to prove that his or her employer regarded the plaintiff as being disabled. Because of the ADAAA, a plaintiff only has to prove that "he or she has been subjected to an action prohibited under this Chapter because of an actual or perceived physical or mental impairment…."[38] The term impairment does "not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less."[39]

Third, Congress directed that the ADA's definition of disability "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act" and that the term substantially limits "shall be interpreted consistently with the findings and purposes of the [ADAAA]."[40] Congress stated that "[a]n impairment that substantially limits one major life activity need not limit other major life activities … to be considered a disability" and that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[41]

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[26] ADAAA § 2(a)(1).

[27] 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999).

[28] 534 U.S. 184, 122 S. Ct. 681, 151 L.Ed. 2d 615 (2002).

[29] ADAAA § 2(a)(4).

[30] *Id*. § 2(a)(6).

[31] James Concannon, *Mind Matters: Mental Disability and the History and Future of the Americans with Disabilities Act*, 36 LAW & PSYCHOL. REV. 89, 104 (2012), [hereinafter Concannon].

[32] ADAAA § 2(b)(4).

[33] *Id*. § 2(b)(5).

[34] *Id*.

[35] *Id*. § 2(b)(6).

[36] *Id*. § 4(a), 42 U.S.C. § 12102(1)(A)-(C).

[37] *Id*. § 4(a), 42 U.S.C. § 12102(3)(A).

[38] Concannon, *supra* note 31, at 105 (quoting 42 U.S.C. § 12102(3)(A) (2006 & Supp. 2009)) (internal citation omitted).

[39] ADAAA § 4(a), 42 U.S.C. § 12102(3)(B).

[40] *Id*. § 4(a), 42 U.S.C. § 12102(4)(A) and (B).

[41] *Id*. § 4(a), 42 U.S.C. § 12102(4)(C) and (D).

Fourth, the ADAAA added a list of major life activities in response to judicial decisions that had held, for example, that the abilities to concentrate and think are not major life activities. Congress amended the definition of the term major life activities by providing that they

> include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.[42]

As for the meaning of the term major bodily functions, they "include[] the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[43]

Fifth, the ADAAA specified that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures…."[44] Thus, since the ADAAA, the courts are precluded from considering certain mitigating measures when determining whether an individual's impairment substantially limits a major life activity. Mitigating measures include

> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
>
> (II) use of assistive technology;
>
> (III) reasonable accommodations or auxiliary aids or services; or
>
> (IV) learned behavioral or adaptive neurological modifications.[45]

However, regarding the use of ordinary eyeglasses or contact lens, the ADAAA took the approach that "[t]he ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity."[46]

Sixth, Congress amended Section 101(8) of the ADA so that the term qualified individual

> means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.[47]

Finally, the ADAAA amended Section 102 of the ADA so that 42 U.S.C. § 12112(a) now provides that "[n]o covered entity shall discriminate against a qualified individual *on the basis of disability* in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[48] As amended, subsection 12112(b) sets forth various actions, such as "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability," that come within the phrase "'discriminate against a qualified individual on the basis of disability…."'[49]

In sum, because of the enactment of the ADAAA, the courts in ADA cases have redirected their analysis "away from determining whether an individual has a disability[] to determining whether disability discrimination occurred."[50]

IV. TITLE I OF THE ADA AND EMPLOYMENT DISCRIMINATION

A. A Transit Agency as a Covered Entity

Title I of the ADA prohibits discrimination in employment based on a person's disability. As an employer, a transit agency having more than fifteen employees is a "covered entity" under the Act.[51] The

[42] *Id*. § 4(a), 42 U.S.C. § 12102(2)(A).

[43] *Id*. § 4(a), 42 U.S.C. § 12102(2)(B).

[44] *Id*. § 4(a), 42 U.S.C. § 12102(4)(E)(i).

[45] *Id*. § 4(a), 42 U.S.C. § 12102(4)(E)(i)(I)-(IV).

[46] *Id*. § 4(a), 42 U.S.C. § 12102(4)(E)(ii).

[47] *Id*. § 5(c), 42 U.S.C. § 12111(8).

[48] *Id*. § 5(a), 42 U.S.C. § 12112(a) (emphasis supplied).

[49] *Id*. § 5(a), 42 U.S.C. §§ 12112(b) and (b)(6).

[50] National Council on Disability, A Promising Start: Preliminary Analysis of Court Decisions Under the ADA Amendments Act, at 91 (2013), *available at* http://www.ncd.gov/rawmedia_repository/7518fc55_8393_4e76_97e4_0a72fe9e95fb.pdf (last accessed June 20, 2018).

[51] 42 U.S.C. § 12111(2) (stating that "[t]he term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee"). Section 12111(5)(A) states that

> [t]he term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

See Richardson v. Chicago Transit Auth., 292 F. Supp. 3d 810, 815 (N.D. Ill. 2017) (holding that the Chicago

EEOC is responsible for enforcing Title I of the ADA. The EEOC's regulations implementing Title I are in 29 C.F.R. part 1630. Interpretative guidance to Title I is included as an appendix to part 1630.

As discussed further in this digest, many of the claims arising under Title I have involved individuals with disabilities, either as applicants for employment or as employees, and the meaning of the term disability; what constitutes a qualified disability; when an employer must make a reasonable accommodation for an applicant or an employee with a disability; how employers may respond to an employee's use of illegal drugs; how employers may respond to an employee's use of alcohol in the workplace; and when an employer may make medical inquiries or require medical exams.[52]

As for transit agencies' experience with Title I, eighteen agencies responding to the survey reported that they had Title I ADA claims or cases in the past five years; however, twenty-eight agencies reported that they did not have any claims or cases in that period.[53] As for the number of claims or cases, the agencies reported having from one to thirty-six claims or cases in the past five years.[54]

B. Definition of Disability Under the ADA

As Part III.B of this digest discussed, the ADAAA amended the ADA's definition of what constitutes a disability within the meaning of the ADA. The term disability now means

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment (as described in paragraph (3)).[55]

The ADAAA also amended the provision noted in 42 U.S.C. § 12102(1)(C) so that an individual satisfies the requirement of "being regarded as having such an impairment" when "the individual establishes that he or she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[56] Section 12102(1)(C) does not apply to transitory and minor impairments; for example, a transitory impairment is one with an actual or expected duration of six months or less.[57]

C. A Qualified Individual Under the ADA

Under Title I of the ADA, an important issue is whether an individual with a disability satisfies the definition of a qualified individual under the Act and how the term qualified individual affects an employer's obligation to individuals with disabilities. The term qualified individual means "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[58] Nevertheless, the ADA requires that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[59] Thus, an employer's written job description is evidence of a particular position's essential functions.[60]

There are rules to consider when determining whether a qualified individual has been discriminated against because of his or her disability.[61] For example, an employer discriminates against a qualified individual with a disability when an employer does not make a reasonable accommodation for "known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity…."[62]

A covered entity discriminates against a qualified individual with a disability whenever the covered entity denies "employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable

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Transit Authority, as an employer of more than 15 employees, is a covered entity under the ADA (citing 42 U.S.C. § 12111(2) and (5)).

[52] Peggy Mastroianni, Jeanne Goldberg & DeMaris Trapp, Recent Americans with Disabilities Act Decisions, U.S. Equal Opportunity Employment Commission, Office of Legal Counsel (2012), http://www.americanbar.org/content/dam/aba/events/labor_law/2012/03/national_conference_on_equal_employment_opportunity_law/mw2012eeo_mastroianni.authcheckdam.pdf (last accessed June 20, 2018).

[53] *See* Appendix C, Transit Agencies' Responses to Question 2. One agency did not respond to the question.

[54] *See id*.

[55] 42 U.S.C. § 12102(1)(A)-(C) (2018).

[56] *Id*. § 12102(3)(A).

[57] *Id*. § 12102(3)(B).

[58] *Id*. § 12111(8).

[59] *Id*.

[60] *Id*. *See also* Jarvela v. Crete Carrier Corp., 776 F.3d 822, 829 (11th Cir. 2015).

[61] 42 U.S.C. § 12112(b)(1)-(7) (2018).

[62] *Id*. § 12112(b)(5)(A).

accommodation to the physical or mental impairments of the employee or applicant…."[63]

An Ohio federal district court addressed the issue of whether an applicant or an employee was a qualified individual in *Brockmeier v. Greater Dayton Regional Transit Authority*.[64] Brockmeier, a bus driver, had a mild case of multiple sclerosis with occasional relapses. After he underwent several medical examinations, including a "fitness for duty" examination, the Greater Dayton Regional Transit Authority (GDRTA) decided that Brockmeier did not meet the DOT medical certification guidelines for operating a commercial vehicle.[65] A DOT medical examination was not required by federal or state regulation, because GDRTA as a political subdivision was exempt from having to comply. However, the collective bargaining agreement between GDRTA and the union required a medical certification of bus drivers.[66] Because of having been placed on unpaid leave based on his disability, Brockmeier filed suit against GDRTA for violating Title I of the ADA.

It was indisputable that Brockmeier had a disability; the issue was whether he was "otherwise qualified" for a position as a commercial bus driver, notwithstanding his disability.[67] The court ruled that no reasonable jury could find that Brockmeier was otherwise qualified to perform the essential functions of his job during the relevant time at issue.

> Under the DOT medical examination guidelines, an individual with multiple sclerosis is not automatically disqualified from driving a commercial vehicle.… However, such an individual will be disqualified unless he or she can show: (1) no signs of "relapse or progression" of the disease; (2) "no or only functionally insignificant neurologic signs and symptoms"; (3) no new lesions over the course of at least one year, as shown by successive MRIs; and (4) "[n]o history of excessive fatigability or periodic fluctuations in motor performance."[68]

The court found that there was no health care professional who had given deposition testimony who was willing to state that Brockmeier met the applicable DOT medical standards:

> [A] disabled person is not qualified for an employment position … "if he or she poses a 'direct threat' to the health or safety of others which cannot be eliminated by a reasonable accommodation." … A "direct threat" is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[69]

In granting GDRTA's motion for summary judgment, the court ruled that GDRTA's accommodation for Brockmeier, a job-protected leave of absence, was reasonable.[70]

As stated, the issue of whether an employer must make a reasonable accommodation depends on whether the person is a qualified individual with a disability within the meaning of the ADA. In *Cooper v. UPS*,[71] Cooper, an African American, alleged that UPS asked him and a white employee to use their personal vehicles to deliver packages and that, when they refused, UPS transferred Cooper to another location as an "on-road supervisor."[72] The transfer added over 25 minutes of additional time each way to Cooper's commute.[73] In the same month as the transfer, Cooper's doctor diagnosed Cooper as suffering from heat stroke, post-traumatic stress disorder, and other maladies. Cooper's physician recommended that Cooper avoid high heat and high-stress situations and take a medical leave of absence.[74]

During his leave of absence, Cooper continued to receive his salary in accordance with UPS's Income Protection Plan (Plan), but the Plan provided that an employee was subject to "administrative separation" if the employee was absent from work for twelve months.[75] After Cooper's medical experts released him to work with restrictions, Cooper reported for work and presented his requests for accommodations to UPS. UPS denied the requests and offered only to place Cooper in jobs that required the performance of functions that he was restricted from performing.[76] Ultimately, pursuant to the Plan, UPS dismissed Cooper.[77]

Cooper alleged in part that his transfer to another UPS center was an adverse employment action that was racially motivated, that UPS failed to make a reasonable accommodation for his disability and later terminated him because of his disability, and that UPS discharged him in retaliation for Cooper's discrimination claims.[78] Regarding Cooper's ADA claim that UPS failed to accommodate his disability and discharged him because of it, the Fifth Circuit ruled that Cooper failed to show that he could perform the essential positions of his job.[79]

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[63] *Id*. § 12112(b)(5)(B).

[64] No. 3:12-cv-327, 2016 U.S. Dist. LEXIS 90439 (S.D. Ohio July 12, 2016).

[65] *Id*. at *3-6.

[66] *Id*. at *13.

[67] *Id*. at *15.

[68] *Id*. (citations omitted).

[69] *Id*. at *25 (citations omitted).

[70] *Id.* at *26.

[71] 368 Fed. App'x. 469 (5th Cir. 2010).

[72] *Id*. at 471.

[73] *Id*.

[74] *Id*.

[75] *Id*.

[76] *Id*. at 471-72.

[77] *Id*. at 472.

[78] *Id*. at 472-73.

[79] *Id*. at 475.

The court stated that a "'disability' is 'any physical or mental impairment that substantially limits one or more of [the plaintiff's] major life activities.' … Major life activities include 'working.'"[80] Moreover, Cooper had to show that he was "'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position'" that he held or was seeking.[81] "'The ADA does not require an employer to relieve an employee of any essential function of his or her job, modify those duties, reassign existing employees to perform those jobs, or hire new employees to do so.'"[82] Because Cooper could not perform the essential functions of his job, he was "not a 'qualified individual with a disability.'"[83]

Cooper argued that UPS could have reassigned him to a position in plant engineering, but, for an accommodation to be reasonable, a position must exist and be vacant; that is, an "'employer is not required to give what it does not have.'"[84] Cooper did not present evidence that a position in plant engineering was vacant or that he was qualified for such a position.[85]

D. A Disability That Substantially Limits a Major Life Activity

Under § 12102(1) of the ADA, the term disability means, inter alia, "a physical or mental impairment that substantially limits one or more major life activities" of an individual.[86] First, the term substantially limits must "be interpreted consistently with the findings and purposes" of the ADAAA.[87] Second, "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[88] Third, an impairment that substantially limits one major life activity need not limit other major life activities for the impairment to qualify as a disability.[89]

In *Harrison-Khatana v. Washington Metropolitan Area Transit Authority*,[90] a case arising under the Rehabilitation Act of 1973, the court stated that the courts "use the same standards to analyze a claim for discrimination under the Rehabilitation Act as they do a claim for discrimination under the" ADA as amended by the ADAAA.[91] The case concerned whether the Washington Metropolitan Area Transit Authority (WMATA) failed to accommodate an employee with a disability. The issue was whether the plaintiff had a disability that substantially limited a major life activity.

WMATA hired the plaintiff in 2002 as a bus operator. In 2007 or 2008, the plaintiff began working as a "fare box puller," a person who "retrieves money from the fare boxes of WMATA's Metrobuses."[92] The plaintiff claimed that she had a permanent disability in her right knee because of military service and that she had sustained injuries thereafter to her left knee and back. She alleged that WMATA's "refusal to allow her to kneel the bus" to facilitate the removal of money from fare boxes,[93] as well as the defendant's refusal to assign her to "light duty,"[94] had caused her conditions to worsen.

Under the ADA, the plaintiff had to demonstrate that she was an individual with a disability within the meaning of the ADA, that the employer had notice of her disability, that she could perform the essential functions of her position with a reasonable accommodation, and that her employer refused to provide such an accommodation.[95] The court observed that the post-ADAAA version of 29 C.F.R. § 1630.2 that applied to the case did not "contain language providing that 'substantially limits' requires a restriction in the ability to perform a 'class of jobs or a broad range of jobs….'"[96] Although the plaintiff's history of injuries and alleged permanent disability to her right knee were evidence of substantially limiting impairments,[97] "[a]n individualized assessment [was] still required to determine 'whether an impairment substantially limits a major life activity….'"[98]

Although it was not material whether WMATA regarded the plaintiff as having an impairment, there was evidence that WMATA was aware of the plaintiff's disability and failed to accommodate her.[99] Given the ADAAA's "expansive coverage," the

[80] *Id*. at 476 (citations omitted).

[81] *Id*. (citation omitted).

[82] *Id*. (citation omitted).

[83] *Id*. (citation omitted).

[84] *Id*. at 477 (citation omitted).

[85] *Id*.

[86] 42 U.S.C. § 12102(1)(A) (2018).

[87] *Id*. § 12102(4)(B).

[88] *Id*. § 12102(2)(B).

[89] *Id*. § 12102(4)(C).

[90] No. DKC 11-3715, 2015 U.S. Dist. LEXIS 7657 (D. Md. filed Jan. 22, 2015).

[91] *Id*. at *17.

[92] *Id*. at *1.

[93] *Id*. at *4.

[94] *Id*. at *13. Plaintiff later withdrew her claim for failure to accommodate based on light duty. Id. at *13 n.2.

[95] *Id*. at *14.

[96] *Id*. at *22 (citations omitted).

[97] *Id*. at *26-27 (citation omitted).

[98] *Id*. at *22 (quoting 29 C.F.R. § 1630.2(j)(1)(iv)).

[99] *Id*. at *28.

court ruled that there was a genuine issue of whether the plaintiff's "knee and back impairment(s) substantially limited a major life activity of working."[100] Even if kneeling a bus would have posed an "undue hardship" on WMATA, which the Authority did not argue, it was still obligated "to provide a reasonable accommodation for Plaintiff provided she had a qualifying disability…."[101]

In contrast, in 2012, in *Mitchell v. New York City Transit Authority*,[102] a federal court in New York held that, although both working and eliminating waste are major life activities, the employee had needed only to stop a train mid-route on four occasions since 1999. Thus, the employee failed to demonstrate that the employee's diverticulitis substantially limited a major life activity.

E. Being Regarded as Having a Disability

Section 12102(1)(C) of the ADA, as amended, defines a disability to include "being regarded as having such an impairment,"[103] but an individual meets the "being regarded as" criterion when "the individual establishes that he or she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[104]

In *Adeleke v. Dallas Area Rapid Transit*,[105] the Dallas Area Rapid Transit (DART) allegedly refused to hire Adeleke, in part, because of his disability.[106] In support of its motion for summary judgment, DART provided evidence that none of its decision makers knew or believed that Adeleke suffered from a disability. Adeleke, moreover, failed to present "competent … evidence that DART knew that he was limited by mental illness or regarded him as impaired."[107] Thus, Adeleke failed to show that there was a genuine issue of material fact in dispute regarding DART's purported discrimination against him.[108]

More recently, in *Richardson v. Chicago Transit Auth.*,[109] a federal district court in Illinois stated that for a plaintiff to succeed on a "regarded as" claim, a

> Plaintiff must establish that he was discriminated against "because of an actual or perceived physical or mental impairment." … Because the sole basis of Plaintiff's claim is that the CTA refused to let him return to work because of his obesity, Plaintiff must show that his obesity constitutes an actual physical impairment under the ADA or that the CTA perceived Plaintiff to have a qualifying physical impairment.[110]

In dismissing the claim, the court found that "no federal appellate court has held that extreme obesity constitutes a disability under the ADA absent some underlying physiological basis."[111]

F. Reasonable Accommodations for Employees with Disabilities

Under the ADA, an employer may have to make a reasonable accommodation for an individual with a disability. Of the eighteen transit agencies responding to the survey that reported that they had title I ADA claims or cases in the past five years, fourteen agencies stated that they had claims or cases alleging that their agency failed to make a reasonable accommodation for an employee or applicant.[112] On the other hand, no transit agencies responding to the survey reported that they had any claims or cases in the past five years for allegedly questioning an employee or applicant about his or her disability and/or the nature or extent of a disability.[113]

The ADA states that the term reasonable accommodation includes "making existing facilities used by employees readily accessible to and usable by individuals with disabilities…."[114] A reasonable accommodation may include

> job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[115]

In some instances, providing an accommodation may create an undue hardship for a transit agency. In general, there is an undue hardship when an action requires significant difficulty or expense when considered together with other

[100] *Id*. (citation omitted).

[101] *Id*. at *35.

[102] 856 F. Supp. 2d 478 (E.D.N.Y. 2012).

[103] 42 U.S.C. § 12102(1)(C) (2018).

[104] *Id*. § 12102(3)(A).

[105] 487 Fed. App'x. 901 (5th Cir. 2012), *cert. denied*, 2013 U.S. LEXIS 5517 (U.S., Oct. 7, 2013).

[106] *Id*. at 902.

[107] *Id*. at 903 (citation omitted).

[108] *Id*. (citation omitted).

[109] 292 F. Supp. 3d 810 (N.D. Ill. 2017).

[110] *Id*. at 815 (citations omitted).

[111] *Id*. at 816.

[112] *See* Appendix C, Transit Agencies' Responses to Question 3(a). Four of the eighteen agencies stated that they had had no claims or cases in the past five years based on an alleged failure to make a reasonable accommodation for an employee or applicant.

[113] *See id*., Transit Agencies' Responses to Question 3(b).

[114] 42 U.S.C. § 12111(9)(A) (2018).

[115] *Id*. § 12111(9)(B).

factors identified in the statute.[116] The EEOC has published enforcement guidance on reasonable accommodations and undue hardship under title I of the ADA.[117]

Andrews v. Massachusetts Bay Transit Authority[118] illustrates whether a transit agency must make a reasonable accommodation by assigning an employee with a disability to another position. After Andrews injured her knee while employed by the Massachusetts Bay Transit Authority (MBTA) as a streetcar operator, the MBTA refused, apparently because of Andrews's lack of seniority, her request for a position as a customer service agent (CSA). Andrews alleged, however, that the MBTA had offered positions as a CSA to persons with less seniority than the plaintiff.[119]

A federal district court in Massachusetts observed that, because "'[t]he term reasonable accommodations may include … reassignment to a vacant position,'"[120] the ADA requires the MBTA to reassign the plaintiff to a vacant position "unless such a reassignment is unduly burdensome."[121] However, because there was an unresolved question of whether there was a CSA position available when the MBTA terminated the plaintiff's employment, the court granted in part and denied in part MBTA's motion to dismiss.[122]

G. Use of Medical Inquiries and Examinations

The ADA also addresses when it is permissible for a covered entity to inquire of a job applicant about his or her disability or the nature or severity of it or to use a medical examination as a condition to employment.[123] Pre-employment medical inquiries are allowed if they are relevant to an applicant's ability to perform job-related functions.[124] An employer may require a medical examination of an applicant after an offer of employment and prior to the commencement of employment and may condition an employment offer on the results of an examination.[125] However, all entering employees must be subject to the same examination regardless of disability, and the record must be kept confidential.[126] It should be noted that the EEOC has published guidance on the ADA and disability-related inquiries and any requirement of medical examinations.[127]

The requirement of a medical examination was at issue in *Nichols v. City of Mitchell*.[128] The city provided transit services through Palace Transit, a program partially supported by federal, state, and city funds. The plaintiffs began working for Palace Transit as bus drivers in 2003, 2005, and 2007. In 2009, the city adopted a policy that required its Palace Transit bus drivers to pass the DOT Commercial Driver's License Medical Certification examination based on the Federal Motor Carrier Safety Regulations.[129] A federal statute requires the examination for interstate truck drivers.[130]

The United States District Court for the District of South Dakota ruled, first, that there were genuine issues of material fact regarding whether each plaintiff had an impairment that substantially limited a major life activity when "the ameliorative effects of medication" were not considered.[131]

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[116] *Id*. § 12111(10)(A). The factors to consider when determining whether there is undue hardship are:

> (i) the nature and cost of the accommodation needed under this Act;
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) 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
>
> (iv) 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.

Id. § 12111(10)(B)(i)-(iv).

[117] EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), https://www.eeoc.gov/policy/docs/accommodation.html (last accessed June 20, 2018) [hereinafter Enforcement Guidance].

[118] 872 F. Supp. 2d 108 (D. Mass. 2012).

[119] *Id*. at 111.

[120] *Id*. at 114 (footnote omitted) (some internal quotation marks omitted).

[121] *Id*.

[122] *Id*.

[123] 42 U.S.C. § 12112(d)(1) and (d)(2)(A) (2018).

[124] *Id*. § 12112(d)(2)(B).

[125] *Id*. § 12112(d)(3).

[126] *Id*. § 12112(d)(3)(A) and (B) (providing for some exceptions in subsection (B)(i)-(iii) when a disclosure is allowable of some of an applicant's medical condition or history).

[127] Enforcement Guidance, *supra* note 117.

[128] 914 F. Supp. 2d 1052 (D. S.D. 2012).

[129] *Id*. at 1055-56.

[130] *Id*.

[131] *Id*. at 1058.

Second, the court addressed the ADA's prohibitions on the use of medical inquiries and examinations. Under 42 U.S.C. § 12112(d)(4)(A),

> [a] covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.[132]

Third, the court found that, when the city required the plaintiffs to take the DOT physical examination, they were intrastate drivers. Because a South Dakota statute exempted intrastate drivers from the physical requirements of 49 C.F.R. § 391.41, "the request for the DOT medical examination was, as a matter of law, broader and more intrusive than necessary."[133] Furthermore, "to the extent that the DOT physical examination relies on blanket exclusions set forth in 49 C.F.R. § 391.41, *there was no individualized assessment of each plaintiff's ability to perform the job safely*."[134] Although the city violated the ADA by requiring a DOT medical examination for its intrastate drivers, there were "genuine issues of material fact regarding whether the medical examinations were job-related and consistent with business necessity."[135]

H. Use of Illegal Drugs or Use of Alcohol in the Workplace

Of the eighteen transit agencies that reported having title I ADA claims in the past five years, six agencies had claims or cases involving their agency's use of drug testing to determine an employee's or applicant's current use of illegal drugs.[136]

Under the ADA, a covered entity "may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees" and "may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace…."[137] The use of a test to determine the illegal use of drugs does not constitute a medical examination.[138]

A covered entity may take an employment action against an otherwise qualified individual when the person is "currently engaging in the illegal use of drugs…."[139] However, the ADA precludes an employment action against an individual who "has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use" or when an individual "is participating in a supervised rehabilitation program and is no longer engaging in such use…."[140]

Two transit agencies responding to the survey reported that their agency had claims or cases in the past five years because of testing an employee to determine whether the employee was using or under the influence of alcohol while on duty.[141] In *Jarvela v. Crete Carrier Corp*.,[142] the Eleventh Circuit rejected Jarvela's claim that, when his employer terminated his employment, his clinical diagnosis of alcoholism was not "current" under 49 C.F.R. § 391.41(b).[143] The court stated that Jarvela "could not reasonably contend that a seven-day-old diagnosis of alcoholism was not 'current' at the time of his termination."[144]

I. Use of Qualifying Standards, Tests, or Selective Criteria

A transit agency may show that its use of "qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability [is] job-related and consistent with business necessity" and that job performance cannot be accomplished by a "reasonable accommodation."[145] One qualification standard that an agency may require is that an individual may not pose "a direct threat to the health or safety of other individuals in the workplace."[146]

J. Whether States and State Agencies Have Immunity to Title I Claims

As noted, the ADA in Title V purports to preclude state immunity for violations of the ADA and prohibits retaliation.[147] However, as stated by the U. S. District Court for the District of Columbia in *White v. Metropolitan Area Transit Authority,*[148] "Congress's

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[132] *Id*. at 1060.

[133] *Id*. (citing S.D. Codified Laws § 49-28A-3(3)).

[134] *Id*. at 1060-61 (emphasis supplied).

[135] *Id*. at 1061.

[136] *See* Appendix C, Transit Agencies' Responses to Question 3(c).

[137] 42 U.S.C. § 12114(c)(1) and (2) (2018). *See also id*. § 12114(c)(3)-(5) (setting forth other actions that are permitted under the ADA to combat illegal drug use or the use of alcohol in the workplace).

[138] *Id*. § 12114(d)(1).

[139] *Id*. § 12114(a).

[140] *Id*. § 12114(b)(1) and (2).

[141] *See* Appendix C, Transit Agencies' Responses to Question 3(d).

[142] 776 F.3d 822 (11th Cir. 2015).

[143] *Id*. at 830.

[144] *Id*.

[145] 42 U.S.C. § 12113(a) (2018).

[146] *Id*. § 12113(b).

[147] *Id*. §§ 12202, 12203.

[148] No. 17-cv-0735 (TSC), 2018 U.S. Dist. LEXIS 55109, (D.D.C. March 31, 2018)

attempt to abrogate states' sovereign immunity in Title I of the ADA exceeded Congress's authority under Section 5 [of the Fourteenth Amendment.] … Thus, private individuals may not recover money damages from a state in federal court under Title I of the ADA."[149]

In *Bailey v. Washington Metropolitan Area Transit Authority*,[150] the issue was whether WMATA had immunity from suit under the ADA. All parties agreed that when Maryland, Virginia, and the District of Columbia created WMATA, they "conferred" their Eleventh Amendment immunity on the authority.[151]

A federal district court in the District of Columbia granted WMATA's partial motion to dismiss the first amended complaint. The court stated:

> Neither this Circuit nor the Supreme Court has expressly addressed whether state sovereign immunity prevents an individual plaintiff from obtaining injunctive relief under the ADEA or the ADA. The Supreme Court has, however, specified that "sovereign immunity applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief." … Consistent with this precept, *courts in other Circuits have held that individual plaintiffs may not obtain injunctive relief under the ADEA or the ADA from parties protected by sovereign immunity*.[152]

In *McCray v. Maryland Department of Transportation*,[153] the plaintiff had worked for the Maryland Transit Administration (MTA), a subsidiary of the Maryland DOT, for nearly four decades before the MTA terminated her position because of budget cuts.[154] In 1995, McCray was diagnosed with diabetes, but the illness did not affect her job performance.[155] After a fainting episode, a supervisor repeatedly questioned her fitness and demanded that she submit to a medical examination. The examination found that McCray's diabetes would have no impact on her work.[156] A year later, McCray was informed that budget cuts in Maryland had resulted in her position being abolished.[157]

The court held that

> sovereign immunity bars McCray's age and disability discrimination claims.… "[A]n unconsenting State is immune from suits brought in federal courts by her own citizens." … This protection extends to state agencies.… Therefore, absent abrogation of sovereign immunity or consent from Maryland, McCray cannot seek injunctive or monetary relief from the MDOT or MTA. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363-64, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001). *Sovereign immunity has not been abrogated for ADEA claims and ADA Title I claims*. *See id*. at 374 (ADA Title I claims); *Kimel v. Fla Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000) (ADEA claims); *cf. Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 489-90 (4th Cir. 2005) (recognizing abrogation of sovereign immunity for Title II claims but not Title I claims).[158]

Because Congress could not abrogate the states' sovereign immunity for Title I claims, the Fourth Circuit affirmed the district court's dismissal of McCray's ADA claims.

K. Enforcement of Title I of the ADA

1. Incorporation by Title I of the ADA of the Powers, Remedies, and Procedures in the Civil Rights Act

Title I of the ADA incorporates the powers, remedies, and procedures in 42 U.S.C. § 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of the Civil Rights Act of 1964[159] for the enforcement of Title I ADA-employment claims by persons alleging discrimination on the basis of a disability.[160] It has been held that the procedural requirements of Title I of the ADA and Title VII of the Civil Rights Act must be construed identically.[161]

Section 2000e-4 of the Civil Rights Act created the EEOC. Section 2000e-5 empowers the Commission to prevent any person from engaging in any unlawful employment practice as set forth in 42 U.S.C. § 2000e-2 or 2000e-3. When a violation is alleged, § 2000e-5(e)(1) states, in part, that a "charge … shall be filed within one hundred and eighty days after the alleged unlawful employment

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[149] *Id.* at 7-8 (discussing Board of Trustees v. Garrett, 531 U.S. 356, 374, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001)), (holding that WMATA was immune from suit under the Eleventh Amendment in claims for damages under Title I of the ADA). *See also* Demshki v. Monteith, 255 F.3d 986 (9th Cir. 2001) (holding that states enjoy Eleventh Amendment immunity from suits brought in federal court by private individuals seeking money damages when claims are predicated on alleged violations of Title I of the ADA).

[150] 696 F. Supp. 2d 68 (D.D.C. 2010).

[151] *Id*. at 71.

[152] *Id*. at 72 (emphasis supplied).

[153] 741 F.3d 480 (4th Cir. 2014), *on remand at, dismissed by* McCray v. Md. DOT, No. ELH-11-3732, 2014 U.S. Dist. LEXIS 132362 (D. Md., Sept. 16, 2014*), affirmed by* McCray v. Md. DOT, 662 Fed. App'x. 221, 224 (4th Cir. 2016) (holding that McCray had exhausted her administrative remedies regarding her Title VII claim but that all of her claims were time-barred).

[154] *Id.* at 481.

[155] *Id*. at 482.

[156] *Id*.

[157] *Id*.

[158] *Id*. at 482-83 (some citations omitted) (emphasis supplied).

[159] Pub. L. No. 88-352, 78 Stat. 241.

[160] 42 U.S.C. § 12117(a) (2018).

[161] Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304 (10th Cir. 2005), *but see* Martin v. Mt. St. Mary's Univ. Online, 620 Fed. App'x. 661, 663 (10th Cir. 2015) and Gad v. Kan. State Univ., 787 F.3d 1032 (10th Cir. 2015) (questioning *Shikles* on other grounds).

practice occurred" with notice of the charge served as required by the section.[162]

A provision that may be an issue in litigation is the 90-day rule in § 2000e-5(f)(1) within which a civil action must be brought,[163] a rule that the courts have strictly enforced.[164] The statute states that when

> the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General … shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.[165]

Section 2000e-6(a) authorizes the Attorney General to bring a civil action whenever he or she "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter [42 U.S.C. § 2000e-2000e-17]."

2. Transit Agencies' Approaches to Preventing or Managing or Defending Against Title I Claims or Cases

Twenty-four transit agencies responding to the survey stated that they had determined that there are approaches that are useful in preventing or managing or defending against Title I ADA disability-employment claims or cases.[166] Their approaches are summarized in Appendix C.[167]

Eight agencies responding to the survey have a report or other record of ADA employment claims or cases for the past five years that provides information on the number of claims or cases, the nature or type of claim, and/or the disposition of claims or cases.[168] Some agencies provided an Internet link to and/or a copy of their report or record, which is included in Appendix D to this digest.[169]

V. TITLE II OF THE ADA AND DISCRIMINATION BY PUBLIC ENTITIES

A. Introduction

The ADA applies to almost all providers of transportation service, regardless of whether they are public or private and regardless of whether they receive federal financial assistance.[170] Title II applies to public entities, a term that includes any state or local government; any department, agency, special-purpose district, or other instrumentality of a state or states or local government; the National Railroad Passenger Corporation (Amtrak); and any commuter authority.[171] Title II prohibits discrimination by public entities providing public services, including transportation services, against individuals with disabilities, including those who use wheelchairs.[172] Title II mandates that a qualified individual with a disability shall not, because of a 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."[173] Under Title II, a qualified individual with a disability is one

> who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[174]

Section 12141 of the ADA defines other important terms used in Title II. Designated public transportation is "transportation … by bus, rail, or any other conveyance … that provides the general public with general or special service (including charter service) on a regular and continuing basis."[175] A fixed route system is a designated public transportation system

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[162] A 300-day rule applies to claims by aggrieved persons that are instituted initially with a state or local agency. *See* 42 U.S.C. § 2000e-5(e)(1) (2018).

[163] For example, it has been held that a plaintiff who fails to pay the filing fee within 90 days of the receipt of a right-to-sue letter fails to file her complaint within the time allowed by 42 U.S.C. § 2000e-5(f)(1). Truitt v. County of Wayne, 148 F.3d 644 (6th Cir. 1998).

[164] *See* Williams v Ga. Dep't of Def. Nat'l Guard Headquarters, 147 Fed. App'x. 134 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 1318, 164 L.Ed.2d 57 (2006) (holding that because an employee did not file a complaint within 90 days of receiving the EEOC's letter, as required by § 2000e-5(f)(1), and because the employee did not show any entitlement to equitable tolling of the period, the district court properly dismissed the employee's discrimination complaint).

[165] 42 U.S.C. § 2000e-5(f)(1) (2018).

[166] *See* Appendix C, Transit Agencies' Responses to Question 5.

[167] *See id*.

[168] *See* Appendix C, Transit Agencies' Responses to Question 4.

[169] *See id*.

[170] FTA Circular, Ch. 1, p. 1-1.

[171] 42 U.S.C. § 12131(1)(A)-(C) (2018).

[172] Abrahams v. MTA Long Island Bus, 644 F.3d 110, 115 (2d Cir. 2011) (citing 42 U.S.C. § 12131 *et seq*.).

[173] 42 U.S.C. § 12132 (2018).

[174] *Id*. § 12131(2).

[175] *Id*. § 12141(2). The section excludes public school transportation and transportation by aircraft or intercity or commuter rail transportation as defined in 42 U.S.C. § 12161.

on which vehicles operate on a prescribed route according to a fixed schedule.[176] A demand responsive system provides public transportation that is not a fixed route system.[177] The term paratransit refers to "comparable transportation service required by the ADA for individuals with disabilities who are unable to use fixed route transportation systems."[178]

Under the ADA, the United States Attorney General and the Secretary of the Department of Transportation are responsible for promulgating regulations to implement Title II. The Attorney General's regulations are in 28 C.F.R. parts 35 to 36, whereas the DOT regulations are in 49 C.F.R. parts 27 and 37 to 39.[179] In addition to other regulations pertinent to Title II, this part of the digest discusses in particular the DOT regulations in 49 C.F.R. parts 37 and 38 that establish minimum accessibility standards for transportation vehicles, such as rapid rail vehicles, light rail vehicles, buses, vans, commuter rail cars, intercity rail cars, and over-the-road buses, and transportation facilities.

B. Regulatory Jurisdiction of Title II

1. Title II, Subtitle A, and Regulations Promulgated by the Attorney General

Subtitle A of Title II of the ADA, which governs public services generally, states 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."[180] Pursuant to the authority in 42 U.S.C. § 12134(a), the Attorney General issued regulations that are contained in 28 C.F.R. part 35 that implement Subtitle A of Title II of the ADA. However, the Attorney General's regulations are not to include any matter within the scope of the Secretary of Transportation's authority under 42 U.S.C. §§ 12143, 12149, or 12164.[181] Thus, the Attorney General's regulations had to

> include standards applicable to facilities and vehicles covered by this subtitle, *other than facilities, stations, rail passenger cars, and vehicles covered by subtitle B.* Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504(a) of this Act [42 U.S.C. § 12204(a)].[182]

The Ninth Circuit has held, for example, that pursuant to 42 U.S.C. § 12143, only the Secretary of Transportation may make rules determining the level of services required for paratransit.[183] The court declined to interpret 28 C.F.R. § 35.102(b) so as to enlarge the Justice Department's jurisdiction beyond the limits established by 42 U.S.C. § 12134.

2. Title II, Subtitle B, and Regulations Promulgated by the Department of Transportation

Subtitle B of Title II of the ADA governs public transportation services.[184] The DOT regulations in 49 C.F.R. part 27 implement Section 504 of the Rehabilitation Act of 1973 so "that no otherwise qualified individual with a disability in the United States shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[185] The regulations in 49 C.F.R. § 27.19(a) state that

> [r]ecipients subject to this part (whether public or private entities as defined in 49 CFR Part 37) shall comply with all applicable requirements of the [ADA] including the Department's ADA regulations (49 CFR parts 37 and 38), the regulations of the Department of Justice implementing titles II and III of the ADA (28 CFR parts 35 and 36), and the regulations of the Equal Employment Opportunity Commission (EEOC) implementing title I of the ADA (29 CFR part 1630).

The DOT regulations in part 37 implement Titles II and III.[186] Section 37.5 of the regulations provides that "[n]o entity shall discriminate against an individual with a disability in connection with the provision of transportation service."[187] The regulations prohibit entities from denying "any individual with a disability the opportunity to use the entity's transportation service for the general public" when the individual is capable of using the service; from requiring an individual with a disability to use designated priority seats when the individual chooses not to use priority seats; or from

[176] *Id*. § 12143(3).

[177] *Id*. § 12141(1). The term operates, when used regarding a fixed route system or demand responsive system, includes the operation of either system by a person having a contractual or "other arrangement or relationship with a public entity." 42 U.S.C. § 12142(4) (2018).

[178] 49 C.F.R. § 37.3 (2018).

[179] Part 39 enforces the ADA's general nondiscrimination requirements that apply to vessels transporting individuals over water. 49 C.F.R. § 39.1 (2018).

[180] 42 U.S.C. § 12132 (2018).

[181] *Id*. § 12134(a).

[182] *Id*. § 12134(c) (emphasis supplied).

[183] Boose v. Tri-County Metro. Transp. Dist. of Or., 587 F.3d 997 (9th Cir. 2009).

[184] 42 U.S.C. §§ 12141-12165 (2018).

[185] 49 C.F.R. § 27.1 (2018).

[186] *Id*. pt. 37 (stating that "[t]he purpose of this part is to implement the transportation and related provisions of titles II and III of the Americans with Disabilities Act of 1990").

[187] *Id*. § 37.5(a).

imposing unauthorized special charges on individuals with disabilities, including individuals who use wheelchairs, for services that part 37 requires or services that are otherwise necessary to accommodate individuals with disabilities.[188] Part 37 states when public and private entities providing public transportation must make reasonable modifications in their policies, practices, and procedures and when they are excused from doing so.[189]

The ADA directed that the DOT regulations had to include standards that applied to facilities and vehicles covered by Title II and that the standards had to be consistent with the Architectural and Transportation Barriers Compliance Board's minimum guidelines and requirements.[190] Part 37 of the DOT regulations require transportation vehicles, such as rapid rail vehicles, light rail vehicles, buses, vans, commuter rail cars, intercity rail cars, and over-the-road buses,[191] to meet the minimum guidelines and accessibility standards set forth in part 38 of the regulations.[192]

C. FTA Guidance on Title II

On November 4, 2015, the FTA released Circular 4710.1, which provides guidance for recipients and subrecipients of FTA financial assistance concerning their compliance with the ADA, Section 504 of the Rehabilitation Act, and the DOT regulations in 49 C.F.R. parts 27, 37, and 38.

As 49 C.F.R. § 37.21(b) states, compliance with part 37 and Section 504 of the Rehabilitation Act is a condition to receiving federal financial assistance. The regulations require that transit providers ensure that their services, vehicles, and facilities are accessible to and usable by individuals with disabilities.[193] Although the DOT regulations apply to transportation services provided by FTA grantees, the Justice Department's regulations apply to other types of services that grantees may provide. The regulations in part 37 are to be interpreted consistently with the Justice Department's regulations, but part 37 prevails whenever there is any inconsistency.[194] Contractors and subcontractors usually are subject to the same obligations as the public transit agencies with which they contract.[195] Moreover, transit agencies are obligated to ensure that their contractors comply with the requirements of part 37 in the same manner as the transit agencies when the agencies are providing the services directly.[196]

The FTA Circular provides guidance on compliance with federal laws and regulations applicable to fixed route bus service; complementary paratransit service; demand responsive service; and rapid, light, and commuter rail service, as well as water transportation/passenger ferries.[197] Part 37 applies

> to the following entities, whether or not they receive Federal financial assistance from the Department of Transportation:
>
> (1) Any public entity that provides designated public transportation or intercity or commuter rail transportation;
>
> (2) Any private entity that provides specified public transportation; and
>
> (3) Any private entity that is not primarily engaged in the business of transporting people but operates a demand responsive or fixed route system.[198]

Specific provisions of the regulations apply to private entities whenever they receive FTA funds as a subrecipient or contractor to provide public transportation.[199] Table 1-1 in the FTA Circular summarizes the parts and subparts of the regulations that apply to various types of transportation services that FTA grantees provide.[200]

In sum, as the FTA states, "[a]lmost all types of transportation providers are obligated to comply with Federal nondiscrimination regulations in one form or another."[201]

D. Prohibition of Discriminatory Practices

Chapter 2 of the FTA Circular provides examples of discriminatory practices and discusses prohibited charges, issues related to insurance, and accessibility features required for both vehicles and facilities.[202] Chapter 2 also discusses required features and the accommodation of individuals using wheelchairs and other mobility devices.[203]

If an individual with a disability is capable of using a transit agency's service, the agency is prohibited from denying the individual the opportunity to use the service that is available to the general public.[204] An agency may not deny service to a person with a

[188] *Id*. § 37.5(b)-(d).
[189] *Id*. § 37.5(i)(2)-(3).
[190] 42 U.S.C. § 12149(a) and (b) (2018).
[191] 49 C.F.R. part 38, subparts (B) through (H) (2018).
[192] *Id.* § 38.1.
[193] FTA Circular, Ch. 1.1.2, p. 1-1.
[194] *See id*. Ch. 1.2.4, pp. 1-3–1-4.
[195] *Id*. Ch. 1.3.2, p. 1-5 (discussing 49 C.F.R. § 37.23(a)).
[196] *Id*.
[197] *Id*. Ch. 1.1, p. 1-1.
[198] 49 C.F.R. § 37.21(a).
[199] FTA Circular, Ch. 1.3.1, pp. 1-4–1-5.
[200] *Id*. Ch. 1.2.3, p. 1-3.
[201] *Id*. Ch. 1.4, p. 1-8.
[202] *Id*. Ch. 2.2.1, pp. 2-1–2-2; Ch. 2.2.6, p. 2-4; Ch. 2.3.1, p. 2-6.
[203] *Id*. Ch. 2.4.1, pp. 2-10–2-13; Ch. 2.4.2–2.5.2, pp. 2-10–2-16.
[204] *Id*. Ch. 2.2.2, p. 2-2 (discussing 49 C.F.R. § 37.5(b)).

disability based on what the agency perceives to be safe or unsafe for that individual.[205] Individuals with disabilities have the right to decide where they want to sit.[206] Transit agencies may not impose special charges on individuals with disabilities,[207] require that they be accompanied by an attendant,[208] or require them to sign a waiver of liability before receiving service.[209]

Unless an individual with disabilities poses a significant risk to the health or safety of others, a transit agency may not refuse service solely because of the appearance of an individual with a disability or the individual's involuntary behavior that may offend, annoy, or inconvenience an entity's employees.[210]

E. Requirement that an Individual Establish that He or She Has a Disability

An individual making a claim under the ADA must allege facts establishing that he or she is an individual with a disability. For example, in *Weese v. Kalamazoo Metro Transit Serv*ice,[211] a federal magistrate judge recommended the dismissal of the plaintiffs' ADA complaint that concerned alleged improper action and lack of assistance by the defendant's bus driver. First, rather than describe the nature of their alleged disability, the plaintiffs simply alleged that they had "ambiguous mental health 'issues.'"[212] Second, the plaintiffs failed to show any connection between their disability and the defendant's driver's alleged action that violated the ADA.[213]

In *Lee v. Southeastern Pennsylvania Transportation Authority*,[214] the court held that the plaintiff's age (84), by itself, was not a disability for purposes of the ADA.[215] Although Lee alleged that she required assistance when boarding the defendant's bus, her complaint failed to explain her disability or how she was limited in any way in her life activities. Thus, the complaint was not factually sufficient for the court to find that the plaintiff had a disability under the ADA.[216]

The following subsections discuss Title II and relevant regulations, as well as cases, applicable to the general accessibility features required by the ADA.

F. General Accessibility Requirements Under Title II

Chapter 2 of the FTA Circular explains the "regulations related to nondiscrimination and other broad crosscutting requirements applicable to fixed route (rail and non-rail), complementary paratransit, and demand responsive services."[217] Part 37 of the regulations applies to the following entities, regardless of whether they receive federal financial assistance: any public entity that provides designated public transportation or intercity or commuter rail transportation, any private entity that provides public transportation, and any private entity that is not primarily engaged in the business of transporting people but operates a demand responsive or fixed route system.[218]

Under Part 37, an entity must ensure that vehicle operators and other personnel make use of accessibility-related equipment or features that are required by Part 38.[219] A transit agency must maintain accessible equipment features in working order, such as lifts and ramps, lighting, mobility aid, securement areas and systems, public address and other communications equipment, seat belts and shoulder harnesses, if required, and signage.[220] For facilities, accessibility features include accessible paths to and within facilities, communications equipment, elevators, fare vending equipment and gates, platforms and handrails, ramps, and signage.[221]

1. Accessibility Information

Transit agencies must provide adequate information on their transportation services to individuals with disabilities and have adequate communications capacity and accessible formats and technology, one example of which is a fully accessible website.[222]

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[205] *Id*.

[206] *Id*. Ch. 2.2.3, p. 2-2 (discussing 49 C.F.R. § 37.5(c)).

[207] *Id*. Ch. 2.2.4, p. 2-3 (discussing 49 C.F.R. § 37.5(d)).

[208] *Id*. Ch. 2.2.5, p. 2-3 (discussing 49 C.F.R. § 37.5(e)).

[209] *Id*. Ch. 2.2.6, p. 2-4 (discussing 49 C.F.R. § 37.5(g)).

[210] *Id*. Ch. 2.2.7, pp. 2-4–2.5 (discussing 49 C.F.R. § 37.5(h)).

[211] No. 1:17-cv-747, 2017 U.S. Dist. LEXIS 170716 (W.D. Mich. Sept. 15, 2017).

[212] *Id*. at *5.

[213] *Id*.

[214] 418 F. Supp. 2d 675 (E.D. Pa. 2005).

[215] *Id*. at 679.

[216] *Id*. at 678. The court dismissed the complaint but allowed the plaintiff to re-plead her ADA claim. *Id*. at 679.

[217] FTA Circular, Ch. 2.1, p. 2-1.

[218] *Id.* Ch. 1.3.1, p. 1-4 (discussing 49 C.F.R. § 37.21(a)).

[219] *Id.* Ch. 2.3.1, p. 2-6 (discussing 49 C.F.R. § 37.167(e)).

[220] *Id.* Ch. 2.3.2, pp. 2-6-2-7 (discussing 49 C.F.R. § 37.161(a) and Appendix D thereto).

[221] *Id.*

[222] *Id.* Ch. 2.8–2.8.2, pp. 2-18–2-20.

2. Assistance by Transit Agency Personnel

When it is necessary, or if requested, even if transit agency personnel must leave their seats to provide assistance, agency personnel must assist individuals with disabilities with their use of securement systems, ramps, and lifts.[223] It may be necessary also to assist riders using manual wheelchairs on and off lift platforms or to assist them up and down ramps.[224] The Circular explains when transit agency personnel are or are not required to assist individuals with disabilities with paying their fares, to assist their personal care attendants or with luggage and baggage, or to hand-carry passengers by lifting them in or out of their mobility devices.

3. Elevators

Although Part VI.F of this digest discusses accessibility of elevators in transportation facilities, this subpart discusses general accessibility requirements and elevators. As required by 49 C.F.R. § 37.167(e), a transit agency must "ensure that vehicle operators and other personnel make use of accessibility-related equipment or features required by Part 38 of this title."[225]

An obligation of public and private entities providing transportation services is to maintain elevators in operative condition so that they are "readily accessible to and usable by individuals with disabilities."[226] Such features are to be promptly repaired when they are damaged or out of order,[227] but the regulations do not prohibit "isolated or temporary interruptions in service or access due to maintenance or repairs."[228] However, although there is no time limit for making repairs, the repairing of accessible features must be a "high priority."[229] Transit agencies must "inspect all accessibility features often enough to ensure that they are operational and to undertake repairs or other necessary actions when they are not."[230]

When an accessibility feature is not working, a transit agency must "take reasonable steps to accommodate individuals with disabilities who would otherwise use the feature,"[231] such as an elevator, so that a rider is not stranded. The accommodations that may be provided include announcing the outage at other stations; furnishing accessible shuttle bus service; posting outage information on websites, informing riders by signage and recorded announcements, alerting riders by e-mail or text messages via rider notification lists; notifying "rider advocacy groups"; and providing sufficient staffing at affected locations to guide riders who need shuttle service or information.[232]

4. Personnel Training

The regulations require that every public or private entity that operates a fixed route or demand responsive system ensure that their personnel are trained proficiently in their duties so that they are able to "operate vehicles and equipment safely and properly assist and treat individuals with disabilities who use the service in a respectful and courteous way, with appropriate attention to the difference among individuals with disabilities."[233]

5. Ramps and Lifts

Section 37.163 of the regulations sets forth the requirements applicable to the maintenance of lifts and ramps used to board non-rail vehicles.[234] For example, transit agencies must remove vehicles for non-rail fixed route systems with inoperable lifts and ramps from service prior to a vehicle's next day of service.[235] However, when agencies lack sufficient spare vehicles, § 37.163(e) allows agencies to return vehicles with inoperable lifts to service for limited periods.[236]

A case involving lack of accessibility is *Kramer v. Port Authority.*[237] Kramer testified that there were approximately 160 instances when he was unable to board a Port Authority of Allegheny County (PAT) bus because of inoperable wheelchair lifts.[238] However, in every instance the next scheduled bus had an operable lift.[239] The court stated that in a Title II case a plaintiff must show that

> (1) he is a qualified individual with a disability; (2) he was either excluded from or otherwise denied the benefits of some public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and

[223] *Id*. Ch. 2.5.1, pp. 2-15–2-16 (discussing 49 C.F.R. § 37.165(f)).

[224] *Id*. Ch. 2.5.1, p. 2-16.

[225] *Id*. Ch. 2.3.1, p. 2-6 (quoting 49 C.F.R. § 37.167(e)).

[226] *Id*. Ch. 2.3.2, p. 2-6 (quoting 49 C.F.R. § 161(a)).

[227] *Id*. Ch. 2.3.2, p. 2-6 (quoting 49 C.F.R. § 37.161(b)).

[228] *Id*. Ch. 2.3.2, p. 2-6 (quoting 49 C.F.R. § 37.161(c)).

[229] *Id*. Ch. 2.3.2, p. 2-7 (quoting 49 C.F.R. § 37.161, app. D).

[230] *Id*. Ch. 2.3.2, p. 2-7 (discussing 49 C.F.R. § 37.161(a) and (b)).

[231] *Id*. (quoting 49 C.F.R. § 37.161(b)).

[232] *Id*. Ch. 2.3.2, pp. 2-7–2-8 (discussing 49 C.F.R. § 37.161(b)).

[233] *Id*. Ch. 2.9, p. 2-20 (quoting 49 C.F.R. § 37.173).

[234] *Id*. Ch. 2.3.3, pp. 2-8–2-9 (discussing 49 C.F.R. § 37.163(b)-(e)).

[235] *Id*. Ch. 2.3.3, p. 2-9 (discussing 49 C.F.R. § 37.163(d)).

[236] *Id*. Ch. 2.3.3, pp. 2-9–2-10 (discussing 49 C.F.R. § 163(e)).

[237] 876 A.2d 487 (Pa. Commw. Ct. 2005), *appeal denied*, 2005 Pa. LEXIS 3061 (Pa., Dec. 28, 2005).

[238] *Id*. at 490.

[239] *Id*.

> (3) such exclusion, denial of benefits or discrimination was by reason of the plaintiff's disability.[240]

The court ruled that there was enough evidence to support the jury's verdict that on four separate occasions a PAT operator denied the plaintiff access to a bus, that in three of those instances the operator refused to provide requested assistance, and that in another instance the operator failed to stop.[241] Although compensatory damages under Title II are not available in the absence of proof of intentional discrimination,[242] the court held that PAT intentionally violated the plaintiff's rights and affirmed a jury verdict for the plaintiff for $10,000.[243]

In *Midgett v. Tri-County Metropolitan Transportation District*,[244] the plaintiff, who had multiple sclerosis and used a wheelchair for mobility, was a qualified person with a disability under the ADA. Midgett alleged that the Tri-County Metropolitan Transportation District (TriMet) had violated Title II of the ADA and sought an injunction because of several service failures that affected him, including TriMet's failures to maintain wheelchair lifts, to implement an effective system of regular or preventive maintenance, to operate a sufficient number of "paratransit cabs," and to call for paratransit services when needed for individuals with disabilities.[245]

First, the court noted that the ADA does not require public transit agencies to provide "better service" to passengers with disabilities than is provided to other passengers, "only *comparable* service."[246]

Second, the court ruled that the plaintiff had standing to seek injunctive relief, because the evidence showed that, if TriMet's allegedly wrongful conduct were allowed to continue, there was a reasonable likelihood that Midgett would suffer harm caused by future lift malfunctions.[247]

Third, the court held that a strong factual showing of an intentional and pervasive pattern of misconduct is necessary to support an injunction against a state agency.[248] Because TriMet had taken corrective action already, and because "occasional lift problems" do not violate the ADA,[249] the court refused to grant an injunction.[250]

6. Reasonable Accommodations

Title II of the ADA mandates that individuals with disabilities "must be provided with 'meaningful access' to a public entity's programs and services."[251] Public entities must make reasonable modifications of policies, practices, or procedures when the modifications are necessary to avoid discrimination because of a disability.[252] Moreover,

> [a] public entity must provide a reasonable accommodation under the ADA when it knows that the individual is disabled and "requires an accommodation of some kind to participate in or receive the benefits of its services." ... "[A] public entity is on notice that an individual needs an accommodation when it knows that an individual requires one, either because that need is obvious or because the individual requests an accommodation."[253]

A determination of what would be a reasonable modification "'is highly fact-specific, requiring [a] case-by-case inquiry.'" [254]

In *Savage v. South Florida Regional Transportation Authority,*[255] the plaintiff, who was blind, was fined for boarding a train without a ticket even though he previously had been told he could pay upon disembarking. Because Savage was unable to use the ticketing machines at the station where he embarked,[256] he brought Title II claims against the South Florida Regional Transportation Authority (SFRTA) for intentional discrimination and failure to make a reasonable accommodation.[257] However, the plaintiff failed to prove intentional discrimination. First, SFRTA's ticketing policy allowed passengers with disabilities an equal opportunity to purchase tickets in advance and at ticket vending machines (TVM) at kiosks.[258] Second, the TVMs met the ADA's accessibility guidelines.[259] Because the court held that SFRTA's ticketing policy was not discriminatory, the court did not inquire into whether the SFRTA was required to make an accommodation.[260]

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[240] *Id.* at 493 (citation omitted).

[241] *Id*. at 494.

[242] *Id*. at 493.

[243] The trial court also awarded the plaintiff $25,307.85 in attorney's fees.

[244] 74 F. Supp. 2d 1008 (D. Or. 1999).

[245] *Id*. at 1010-11.

[246] *Id*. at 1012 (emphasis in original).

[247] *Id*. at 1013.

[248] *Id*. at 1013-14 (citation omitted). The court stated that although TriMet is not a state agency per se, it is a state entity because TriMet is subject to the Oregon Tort Claims Act. *Id*. at 1014.

[249] *Id*. at 1018.

[250] *Id*.

[251] Culvahouse v. City of LaPorte, 679 F. Supp. 2d 931, 946 (N.D. Ind. 2009) (citation omitted in original).

[252] J.V. *ex rel.* C. V. v. Albuquerque Pub. Sch., 813 F.3d 1289, 1299 (10th Cir. 2016).

[253] *Id*. (citation omitted).

[254] Anderson v. City of Blue Ash, 798 F.3d 338, 356 (6th Cir. 2015) (citation omitted).

[255] 523 Fed. App'x. 554 (11th Cir. 2013).

[256] *Id*. at 554.

[257] *Id*.

[258] *Id*.

[259] *Id*.

[260] *Id*.

7. Reasonable Modifications of Policies, Practices, or Procedures

Subject to the limitations in § 37.169(c)(1)–(3), transit agencies that provide designated public transportation service must modify their policies, practices, or procedures when reasonable modifications become necessary "to avoid discrimination on the basis of disability or to provide program accessibility to their services, subject to the limitations of § 37.169(c)(1)-(3)."[261] Transit agencies must respond to requests for a reasonable modification of policies and practices, as well as inform the public on how to request reasonable modifications.[262]

There are three grounds on which a provider of transportation service may deny a requested modification: the requested modification would fundamentally alter the provider's services; it would create a direct threat to the health or safety of others; or the requested modification is not necessary for a passenger to be able to use the entity's services, programs, or activities fully for their intended purpose.[263] FTA recipients may deny a request for a modification when it "would *create an undue financial administrative burden*."[264]

8. Wheelchairs and Safety Harnesses

Transit agencies must transport individuals who use a wheelchair, as long as the wheelchair meets the definition of a wheelchair and may be accommodated in the vehicle.[265] It is discriminatory to require that a wheelchair be equipped with specific features before they may be transported or to deny service "because of the perceived condition of a passenger's mobility device…."[266] As long as a wheelchair fits in designated areas, transit agencies may require a rider who uses a wheelchair to ride in a designated securement area.[267] When transit agencies' buses and vans have designated securement locations, the agencies are not required to allow individuals with wheelchairs to ride elsewhere in a vehicle.[268]

Although securement areas in buses and vans are required to have a seat belt and shoulder harness for a passenger who uses a wheelchair, transit agencies are not permitted to require an individual with a wheelchair to use a seat belt and shoulder harness, unless all passengers in a vehicle are required to use them.[269] If devices are not primarily designed for use by individuals with mobility impairments, then transit agencies are not required to accommodate the devices.[270]

Transit agencies may require all riders in complementary paratransit vehicles to use seat belts and/or shoulder harnesses, regardless of whether there is a similar requirement that applies to riders on fixed route vehicles.[271]

In *Ford v. New Orleans Regional Transit Authority*,[272] the plaintiff, who used a wheelchair because of a disability, alleged that after he boarded one of the defendant's buses the driver failed to secure the bus's safety harnesses to the plaintiff's wheelchair.[273] The plaintiff alleged that he was "limited in his access to the transit system because the Transit Authority bus drivers park at steep angles when picking up Plaintiff and continuously fail to properly use the bus safety harnesses when securing Plaintiff."[274]

"The Supreme Court has recognized that a 'meaningful access' standard … is applicable when courts are required to evaluate ADA claims in which the ADA plaintiff is not denied full access to a service, but rather is denied meaningful access."[275] This court ruled that a denial of meaningful access is equivalent to a "'full denial of access under the ADA'" and that on this issue the plaintiff's pleading was sufficient.[276] In denying the defendant's motion to dismiss, the court stated that the plaintiff's allegations were sufficient, because he alleged that "he was denied safe use of the bus stops and the buses themselves due to the improper use of safety harnesses" and that he was "sometimes denied accessibility to bus stops because of occasional inadequate parking by the bus drivers."[277]

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[261] FTA Circular, Ch. 2.10.1, p. 2-22 (quoting 49 C.F.R. § 37.5(i)(3)).

[262] *Id*. Ch. 2.10.2, p. 2-23 (discussing 49 C.F.R. § 37.169(a)(1) and (2)).

[263] *Id*. Ch. 2.10.2, p. 2-25 (discussing 49 C.F.R. § 37.169(c)(1)-(3)) (quotation marks omitted).

[264] *Id*. Ch. 2.10.2, p. 2-25 (discussing 49 C.F.R. § 27.7(e)) (emphasis in original).

[265] *Id*. Ch. 2.4.1, p. 2-10 (discussing 49 C.F.R. § 37.165(a)).

[266] *Id*. Ch. 2.4.1, p. 2-11 (discussing 49 C.F.R. §§ 37.5(a) and 37.165 (b)).

[267] *Id*. Ch. 2.4.1, p. 2-12 (discussing 49 C.F.R. § 37.165(b)).

[268] *Id*.

[269] *Id*. Ch. 2.4.4, p. 2-14 (discussing 49 C.F.R. §§ 37.5 and 38.23(d)(7)).

[270] *Id*. Ch. 2.4.4, p. 2-13 (discussing 49 C.F.R. § 37.3, Appendix D).

[271] *Id*. Ch. 2.4.4, p. 2-14 (discussing 49 C.F.R. § 38.23(d)(7)).

[272] No. 17-10175 (Section A(2), 2018 U.S. Dist. LEXIS 10429 (E.D. La. Jan. 23, 2018).

[273] *Id*. at *2.

[274] *Id*. at *9.

[275] *Id*. at *9-10 (citing Melton v. DART, 391 F.3d 669, 671-72 (5th Cir. 2004).

[276] *Id*. at *10 (citation omitted).

[277] *Id*. at *12-13.

G. Title II, Public Entities, and Service Animals

1. DOT Regulations on Service Animals

The DOT regulations in 49 C.F.R. part 37 apply to any public entity that provides designated public transportation or intercity or commuter rail transportation, any private entity that provides public transportation, and any private entity that is not primarily engaged in the business of transporting people but operates a demand responsive or fixed route system.[278] Thus, the DOT regulations on service animals apply to transit providers.

Under the DOT regulations, a service animal is

> [a]ny guide dog, signal dog, or other animal individually trained to work or perform tasks for 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."[279]

As the FTA Circular explains, transit agencies must adhere to the DOT definition of a service animal "when assessing whether to accommodate a particular animal."[280] Although "most service animals are dogs, [the] DOT definition recognizes the possibility of other animals."[281] An animal that provides only emotional support or comfort does not come within the definition of a service animal.[282] However, transit agencies may choose to accommodate pets and comfort animals.[283] In contrast, only dogs and miniature horses qualify as service animals under the Title II regulations promulgated in 2010 by the Department of Justice.[284]

Although transit agencies must "permit service animals to accompany individuals with disabilities in vehicles and facilities,"[285] they do not have to transport animals not trained to perform specific work or tasks.[286] Transit agencies are not permitted to have a policy requiring riders to provide documentation for their service animal before boarding a bus or train or entering a facility; however, transit personnel may ask riders whether a service animal is required because of a disability and what work or task the animal has been trained to perform.[287]

The FTA notes that "some persons with hidden disabilities do use animals that meet the regulatory definition of a service animal," such as animals that "are trained to alert individuals with seizure disorders to an oncoming seizure…."[288] The DOT regulations do not set limits on the number of service animals that a rider may have on a single trip.[289] For complementary paratransit or other demand responsive services, transit agencies may ask that riders give notice of their intent to travel with a service animal.[290]

An example of an ADA claim of discrimination against an individual with a service animal is *Silberman v. Miami-Dade Transit*.[291] The plaintiff Silberman alleged that Miami Dade Transit (MDT) violated Title II of the ADA and Section 504 of the Rehabilitation Act of 1973 when on several occasions MDT's employees discriminated against him because of his mental disability and his need for a service dog.[292]

The magistrate judge recommended that the ADA claim be dismissed because the Eleventh Amendment barred Silberman's ADA claim and because there were no allegations of ongoing and continuing violations of the ADA that would permit an action for equitable relief under the *Ex parte Young* doctrine.[293] However, the Rehabilitation Act claim was viable because of the waiver of sovereign immunity based on the defendant's acceptance of federal funding.[294] The magistrate judge found that Silberman's complaint

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[278] FTA Circular, Ch. 1.3.1, p. 1-4 (discussing 49 C.F.R. § 37.21(a)).

[279] *Id*. Ch. 2.6, p. 2-17 (quoting 49 C.F.R. § 37.3).

[280] *Id*. Ch. 2.6, p. 2-17.

[281] *Id*.

[282] *Id*.

[283] *Id*.

[284] 28 C.F.R. §§ 35.104 (dogs) and 35.136(i) (2018) (miniature horses).

[285] FTA Circular, Ch. 2.6, p. 2-17 (quoting 49 C.F.R. § 37.167(d)).

[286] *Id.* Ch. 2.6, p. 2-17 (discussing 49 C.F.R. §§ 37.3 and 37.167(d)).

[287] *Id.*

[288] *Id.* Ch. 2.6, p. 2-17.

[289] *Id.* Ch. 2.6, p. 2-18 (discussing 49 C.F.R. § 167(d)).

[290] *Id.*

[291] No. 16-22336-CIV-MARTINEZ/GOODMAN, 2016 U.S. Dist. LEXIS 174314 (S.D. Fla. Dec. 15, 2016), *adopted by, dismissed without prejudice by, in part, dismissed by, in part,* Silberman v. Miami-Dade Transit, 2017 U.S. Dist. LEXIS 219150 (S.D. Fla. 2017), *motion granted by, in part, motion denied by, in part,* Silberman v. Miami Dade Transit, 2018 U.S. App. LEXIS 12525 (11th Cir. May 11, 2018).

[292] Because Dade County was the proper defendant, the magistrate judge recommended that the plaintiff be allowed to amend his complaint to substitute the county as the defendant. *Id.* at *10-11.

[293] *Id* at *13-14. "Under the doctrine of Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), individuals may sue state offices, 'seeking prospective equitable relief to end continuing violations of the law.'" *Id*. at *13 (citation omitted).

[294] *Id*. at *14-15.

> satisfied the elements to state a cause of action under the [Rehabilitation Act]. He has alleged that (1) he is a qualified individual with a mental disability that requires him to have a service dog; (2) he was excluded from participation in or denied riding the buses of MDT, the public entity; (3) this exclusion stemmed from his disability, which required a service dog; and (4) MDT receives federal funding.[295]

Because the plaintiff sought compensatory damages under Section 504 of the Rehabilitation Act, he had to "show deliberate indifference on the part of an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the organization's behalf and who has actual knowledge of discrimination in the organization's programs and fails to adequately respond."[296]

Although the district court permitted Silberman to file an amended complaint, the court held that the amended complaint would have to include specific facts showing intentional or deliberate discrimination by an MDT official to support a claim for compensatory damages.[297]

2. State Legislation Prohibiting False Identification or Use of Service Animals

It is a violation of New York law for "any person to knowingly affix to any dog any false or improper identification tag, [or] special identification tag for identifying guide, service, therapy or hearing dogs or purebred license tag.…"[298] A violation is punishable under New York's penal law or by an action to recover a civil penalty.[299] In either case, a first offense is punishable by a fine or civil penalty of not less than $25, but a second offense may warrant a fine or civil penalty of not less than $50.[300] However, under the penal law, when a person has committed two or more violations within the preceding five years, a violation is "punishable by a fine of not less than one hundred dollars or imprisonment for not more than fifteen days, or both….[301]

In Kansas, it is a violation for a person to

> (a) [r]epresent that such person has the right to be accompanied by an assistance dog in or upon any place listed in K.S.A. 39-1101, and amendments thereto, or that such person has a right to be accompanied by a professional therapy dog in or upon any place listed in K.S.A. 2013 Supp. 39-1110, and amendments thereto, unless such person has the right to be accompanied in or upon such place by such dog pursuant to this act; or
>
> (b) represent that such person has a disability for the purpose of acquiring an assistance dog unless such person has such disability.[302]

H. Accessibility of a Transportation Program or Service in Its Entirety

The ADA requires that the accessibility of a transportation program or activity must be assessed in its entirely. Thus, with respect to existing facilities used for designated public transportation services, it is discriminatory "for a public entity to fail to operate a designated public transportation program or activity conducted in such facilities so that, when viewed in the entirety, the program or activity is readily accessible to and usable by individuals with disabilities."[303] However, there is an exception that a public entity is not required "to make structural changes to existing facilities in order to make such facilities accessible to individuals who use wheelchairs, unless and to the extent required by section 227(a) [42 U.S.C.S. § 12147(a)] (relating to key alterations) or section 227(b) [42 U.S.C.S. § 12147(b)] (relating to key stations)."[304]

I. Emergency Preparedness

In *Brooklyn Center for Independence of Disabled v. Bloomberg*,[305] the issue was whether New York City had violated Title II of the ADA, as well as the Rehabilitation Act of 1974 or the New York City Human Rights Law, by failing to provide people with disabilities meaningful access to its emergency preparedness program. A federal district court in New York held that the city's emergency

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[295] *Id*. at *15-16 (citations omitted).

[296] *Id*. at *18 (citation omitted).

[297] *Id*. at *19.

[298] N.Y. AGM § 118(1)(c).

[299] *Id.* § 118(2)(a) and (b).

[300] *Id*. § 118(2)(a)(1) and (b)(1).

[301] *Id.* § 118(2)(a)(ii).

[302] KAN. STAT. ANN. § 39-1112(a) and (b) (2018). KAN. STAT. ANN. § 39-1101 addresses the rights of persons with disabilities and states, in part, that they

> shall have the same right as the able-bodied to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities and other public places; and such persons are entitled to full and equal accommodations, advantages, facilities and privileges of: (a) All common carriers, airplanes, motor vehicles, railroad trains, motor buses, street cars, boats or any other public conveyances or modes of transportation…."

Regarding punishment for a violation of KAN. STAT. ANN. § 39-1112(a) and (b), *see* KAN. STAT. ANN. §§ 21-6611 (fines) and 21-6602 (2018) (classification of misdemeanors and terms of confinement).

[303] 42 U.S.C. § 12148(a)(1) (2018).

[304] *Id*. § 12148(a)(2). Subsection (a)(3) states that "[p]aragraph (1) shall not require a public entity to which paragraph (2) applies[] to provide to individuals who use wheelchairs services made available to the general public at such facilities when such individuals could not utilize or benefit from such services provided at such facilities."

[305] 980 F. Supp. 2d 588 (S.D.N.Y. 2013).

preparedness program did not meet ADA requirements, in part because its evacuation plans failed to accommodate the needs of individuals with disabilities for evacuation from high-rise buildings and accessible transportation. The plans for shelters, either architecturally or programmatically, did not require that shelters be sufficiently accessible to accommodate persons with disabilities in an emergency. The city had no plan for ensuring that people with disabilities would be able to have access to city services after an emergency.

J. Claims Against Transit Agencies for Alleged Violations of Title II

Of the forty-seven transit agencies responding to the survey conducted for this digest, twenty-one agencies had claims or cases in the past five years that alleged that their agency violated Title II by the use of prohibited discriminatory practices. The claims related to a lack of accessibility features required for vehicles, such as bus lifts or ramps, and/or facilities, lack of assistance of individuals by transit agency personnel, passengers' use of service animals, inaccessible or inoperable elevators, and/or failure to make reasonable modifications of vehicles and facilities.[306] The claims and cases are discussed in the summary of the transit agencies' responses to the survey.[307] On the other hand, twenty-six agencies responding to the survey did not have any Title II claims or cases in the past five years.

VI. REQUIREMENTS FOR TRANSPORTATION FACILITIES UNDER TITLE II OF THE ADA

A. ADA Standards for Transportation Facilities

Under the ADA, the U.S. Architectural and Transportation Barriers Compliance Board (Access Board) is responsible for design guidelines for the accessibility of facilities and vehicles that the ADA covers.[308] The FTA Circular refers to the ADA Standards for Transportation Facilities that are set forth in Appendices B and D to 36 C.F.R. part 1191 and in Appendix A to part 37 as the "DOT Standards."[309] Section 37.9(a) of the DOT regulations states that "a transportation facility shall be considered to be readily accessible to and usable by individuals with disabilities if it meets the requirements of [part 37] and the requirements set forth in Appendices B and D to 36 CFR part 1191, which apply to buildings and facilities covered by the [ADA], as modified by Appendix A to [part 37]."[310] Thus, the DOT Standards, which differ from the Justice Department's 2010 standards, apply to transportation facilities.[311]

Transit agencies must comply with the DOT Standards when constructing new transportation facilities or altering existing ones. Transportation facilities must be accessible to and usable by individuals with disabilities when the facilities are viewed in their entirety.[312] When a public transit agency owns more than 50% of a rail facility that is used by both commuter and intercity rail, the transit agency is responsible for making the rail facility accessible.[313] When other entities control elements of facilities that individuals with disabilities use or would use, the FTA encourages transit agencies to "engage" with the other entities.[314]

B. Construction of New Transportation Facilities

Section 12146 of the ADA states that for purposes of 42 U.S.C. § 12132, as well as Section 504 of the Rehabilitation Act of 1973,

> it shall be considered discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.[315]

Section 37.41(a) of the regulations also requires that any new facility for providing designated public transportation services must be built so that it is readily accessible.[316]

Chapter 3 of the FTA Circular likewise discusses requirements for transportation facilities and

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[306] *See* Appendix C, Transit Agencies' Responses to Question 6.

[307] *See id*.

[308] FTA Circular, Ch. 3.1.1, p. 3-2 (discussing 49 C.F.R. § 37.9(a)).

[309] *Id*. Ch. 3.1.1, p. 3-2. The DOT Standards are accessibility standards for transportation facilities that are based upon the United States Access Board's ADA Accessibility Guidelines. *See* UNITED STATES ACCESS BOARD, ABOUT THE ADA STANDARDS FOR TRANSPORTATION FACILITIES, https://www.access-board.gov/guidelines-and-standards/transportation/facilities/about-the-ada-standards-for-transportation-facilities (last accessed June 20, 2018).

[310] FTA Circular, Ch. 3.1.1, p. 3-1 (quoting 49 C.F.R. § 37.9(a)).

[311] *Id*. Ch. 3.1.1, p. 3-2.

[312] *Id*. Ch. 3.1.2, p. 3-3 (discussing 49 C.F.R. part 37, subpart C).

[313] *Id*. (discussing 49 C.F.R. § 37.49(b)).

[314] *Id*. Appendix D to 49 C.F.R. § 37.49 explains the requirements for coordinating shared Amtrak and commuter rail stations. *See* FTA Circular, Ch. 3.1.2, p. 3-3.

[315] 42 U.S.C. § 12146 (2018).

[316] *See* FTA Circular, Ch. 3.3, p. 3-10 (discussing 49 C.F.R. § 37.41(a)). "[A] facility or station is 'new' if its construction begins (i.e., issuance of notice to proceed) after January 25, 1992, or, in the case of intercity or commuter rail stations, after October 7, 1991." FTA Circular, Ch. 3.3, p. 3-10 (quoting 49 C.F.R. § 37.41(a)).

emphasizes that the requirements apply to the construction of new facilities,[317] as well as the alteration of existing ones.[318]

C. Alterations of Existing Facilities

The ADA applies to alterations of existing facilities. An alteration is a change that affects the usability of a facility.[319] When there are alterations of an existing facility that is used for designated public transportation services, a public entity discriminates against individuals with disabilities when the public entity fails

> to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations.[320]

The ADA mandates that when there are alterations of a "primary function area" of a facility, such as platforms or waiting areas, a public entity, such as a transit agency, must "ensure that the path of travel to the altered area is readily accessible to the maximum extent feasible, subject to a disproportionate cost analysis."[321] That is, "[w]hen the cost of alterations necessary to make a path of travel to the altered area fully accessible is disproportionate to the cost of the overall alteration, then such areas shall be made accessible to the maximum extent without resulting in disproportionate costs…."[322]

The FTA Circular discusses accessibility issues in connection with DOT Standards and station parking,[323] passenger loading zones,[324] curb ramps,[325] track crossings,[326] and station platforms,[327] as well as the "path of travel to and within facilities, signage and communication, telephones and fare vending, and emergency egress and places of refuge."[328]

D. Claims Arising out of Alleged Inaccessible Facilities

Only one transit agency responding to the survey had a claim or case in the past five years that alleged that a new facility its agency constructed and/or used for public transportation service violated the ADA.[329] Only four transit agencies responding to the survey reported that they had claims or cases in the past five years that alleged that their agency's alteration of an existing facility violated the ADA.[330]

However, since the enactment of the ADA, transit agencies have had cases that alleged that their agency did not comply with the ADA when constructing or altering transportation facilities.

Disabled in Action v. Southeastern Pennsylvania Transportation Authority[331] concerned two separate construction projects for SEPTA involving three stations.[332] SEPTA appealed a district court's grant of a summary judgment in favor of the plaintiff Disabled in Action (DIA) on the basis that SEPTA's work at the 15th Street Courtyard and City Hall Courtyard locations constituted alterations that "triggered" requirements under the ADA and the Rehabilitation Act to make the locations readily accessible to individuals with disabilities.[333]

The Third Circuit had to decide the meaning of the terms alterations, maximum extent feasible, and readily accessible and their application to the SEPTA projects.[334] First, regarding alterations, the court found that § 12147(a) of the ADA does not define the terms alterations or maximum extent feasible.[335] However, the "implementing regulations … in 49 C.F.R. § 37.43(a)(1) echo the requirements of 42 U.S.C. § 12147(a)."[336]

Under the regulations, the term alteration means

> "a change to an existing facility, including, but not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls ... [but not] [n]ormal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical or electrical systems ... unless they affect the usability of the building or facility."[337]

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[317] *Id*. Ch. 3, p. 3-1.

[318] *Id*. Ch. 3.4 p. 3-11.

[319] *Id.* Ch. 3.4.2, p. 3-13 (discussing 49 C.F.R. §§ 37.3 and 37.43(a)).

[320] 42 U.S.C. § 12147(a) (2018). *See also* FTA Circular, Ch. 3.4, p. 3-11 (discussing 49 C.F.R. § 37.43(a)(1)).

[321] FTA Circular, Ch. 3.4, p. 3-11 and Ch. 3.4.4, pp. 3-14–3.15 (discussing 49 C.F.R. § 37.43(a)(2)).

[322] *Id*. Ch. 3.4.6, p. 3-16 (quoting 49 C.F.R. § 37.43(f)(1)).

[323] *Id*. Ch. 3.2.1, p. 3-5.

[324] *Id*. Ch. 3.2.2, p. 3-6.

[325] *Id*. Ch. 3.2.3, p. 3-7.

[326] *Id*. Ch. 3.2.4, p. 3-8.

[327] *Id*. Ch. 3.2.5, p. 3-9.

[328] *Id*. Ch. 3.2, p. 3-5 (discussing DOT Standards).

[329] *See* Appendix C, Transit Agencies' Responses to Question 18.

[330] *See id.*, Transit Agencies' Responses to Question 19. Forty-two agencies responding to the question stated that they had not had any claims or cases. One agency did not respond to the question.

[331] 635 F.3d 87 (3d Cir. 2011).

[332] *Id*. at 89-90.

[333] *Id*. at 92.

[334] *Id*. at 93.

[335] *Id*.

[336] *Id*.

[337] *Id*. (quoting 49 C.F.R. § 37.3).

An alteration is a change that affects the usability of the facility being altered.[338]

The court rejected SEPTA's argument that the ADA Accessibility Guidelines (ADAAG) are incorporated in the DOT regulations and, therefore, limit the types of construction that are alterations within the meaning of the ADA.[339] The Third Circuit ruled that the construction in the 15th Street Courtyard and City Hall Courtyard locations, even if they were not major structural alterations, were still alterations that required SEPTA to comply with part 37 and the ADAAG.[340]

Second, regarding what is meant by the term maximum extent feasible, DIA argued that, because of the absence of any reference to costs, the term maximum extent feasible only refers to technical feasibility. SEPTA argued that the term maximum extent feasible had to include economic feasibility as well.[341] The court held that because of the "narrowness" of 49 C.F.R. § 37.43(b), the term maximum extent feasible "contemplates that the infeasibility of making the altered portion of a facility will be only 'occasional' and will arise from 'the nature of an existing facility….'"[342] Therefore, the term maximum extent feasible does not contemplate a transportation agency's budgetary limitations as they "must be reckoned with at all times…."[343]

Third, as for the meaning of the term readily accessible, "SEPTA argue[d] that the 15th Street Courtyard is a part of Suburban Station, not of 15th Street Station, and thus, since the 15th Street Courtyard may be reached from street level by individuals in wheelchairs via one of the Suburban Station elevators, it is already 'readily accessible.'"[344] The court, however, found that neither the 15th Street Courtyard nor the City Hall Courtyard location was readily accessible.[345]

The court ruled that SEPTA violated Title II of the ADA, as well as the Rehabilitation Act, when it made alterations at the foregoing locations without making the facilities readily accessible to persons with disabilities and affirmed the district court's grant of a summary judgment for DIA.[346]

E. New and Existing Stations for Use in Intercity or Commuter Rail Transportation

Section 12162(e) of the ADA applies to new and existing stations for use in intercity or commuter rail transportation.[347] It is a violation of the ADA if a new station is constructed "for use in intercity or commuter rail transportation that is not readily accessible to and usable by individuals with a disability, including individuals who use wheelchairs."[348]

"The term 'intercity rail transportation' means transportation provided by the National Railroad Passenger Corporation."[349] The term "commuter rail passenger transportation" refers to "short-haul rail passenger transportation in metropolitan and suburban areas usually having reduced fare, multiple-ride, and commuter tickets and morning and evening peak period operations."[350]

As for existing intercity and commuter rail stations, they must be made accessible to and usable by persons with disabilities.[351] When altering intercity or commuter rail stations, they must be altered "to the maximum extent feasible" so that the altered

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[338] *Id*.

[339] *Id*.

[340] *Id*. at 94.

[341] *Id*.

[342] *Id*. at 95.

[343] *Id*. The court noted that

> both 42 U.S.C. § 12147(a) and 49 C.F.R. § 37.43 do contain provisions for the consideration of cost in making public transit facilities accessible, but only in different sections establishing requirements for certain additional changes (e.g., to the bathrooms and drinking fountains) that must be made "to the maximum extent feasible" if an area that serves a "primary function" is altered.

Id.

[344] *Id*. at 96 (footnote omitted).

[345] *Id*. at 97.

[346] *Id*.

[347] 42 U.S.C. § 12162(e)(1) and (2) (2018).

[348] *Id*. § 12162(e)(1).

[349] *Id*. § 12161(3).

[350] *Id*. § 24102(3).

[351] *Id*. §§ 12162(e)(2)(A)(ii) states

> (I) Intercity rail—All stations in the intercity rail transportation system shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable, but in no event later than 20 years after the date of enactment of this Act [enacted July 26, 1990].
>
> (II) Commuter rail—Key stations in commuter rail transportation systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than 3 years after the date of enactment of this Act [enacted July 26, 1990], except that the time limit may be extended by the Secretary of Transportation up to 20 years after the date of enactment of this Act [enacted July 26, 1990] in a case where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes are necessary to attain accessibility.

portions of the stations are readily accessible to and usable by individuals with disabilities.[352] When alterations are completed, the travel paths to altered areas, as well as to bathrooms, telephones, and drinking fountains serving altered areas, must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, to the maximum extent feasible, as long as the costs of the alterations "are not disproportionate to the overall alterations in terms of cost and scope"[353]

F. Accessibility of Elevators

Federal regulations require that "[p]ublic entities providing transportation services must 'maintain in operative condition those features of facilities ... that are required to make the vehicles and facilities readily accessible.'"[354] A public entity must repair accessibility features promptly and "take reasonable steps to accommodate individuals with disabilities who would otherwise use a malfunctioning feature."[355]

In *Cupolo v. Bay Area Rapid Transit*,[356] the plaintiffs alleged that the Bay Area Rapid Transit (BART) systematically failed to provide equal access to its services to individuals with mobility disabilities.[357] In support of their motion for a preliminary injunction, the plaintiffs submitted declarations of class members who had encountered problems with BART's elevators.[358] Because BART was a recipient of financial assistance from the U.S. Department of Transportation, BART was subject to the Rehabilitation Act.[359] As the court observed, the ADA standards apply to entities subject to the Rehabilitation Act.[360]

The court stated that § 37.16(c) of the regulations "'does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.'"[361] However, BART's record persuaded the court that the problems that class members encountered were not simply isolated or temporary interruptions caused by maintenance or repairs.[362] The court found that BART's management decisions had "resulted in a pervasive pattern of neglected maintenance" that repeatedly violated the ADA.[363] BART's promise to change its conduct was "not sufficient to overcome the strong record of its past neglect."[364] The court held that the plaintiffs had satisfied the requirements for preliminary mandatory injunctive relief, first, because there was a strong likelihood of success on the merits of the plaintiffs' ADA claims, and, second, because the "[i]njuries to individual dignity and deprivations of civil rights constitute irreparable injury."[365] The court also rejected BART's argument that the plaintiffs' action was moot.[366]

In *Neighborhood Ass'n of the Back Bay, Inc. v. Federal Transit Administration*,[367] a federal court in Massachusetts held that the FTA complied with 49 U.S.C. § 303(c), which prescribed federal policy for federal lands, wildlife and waterfowl refuges, and historic sites. The FTA found that there was no feasible and prudent alternative to building an elevator headhouse on the granite steps of a library to make an historic subway station accessible to individuals with disabilities. Placing an elevator entrance elsewhere would "pervert" the purpose of making the station compliant with Title II of the ADA.[368]

More recently, in *Williams v. Chicago Transit Authority*,[369] the plaintiff alleged that the Chicago Transit Authority (CTA) failed to notify passengers that the Clark and Lake station's elevator was out of service, that there was no alternative route for wheelchair users to leave the station or to reach

[352] *Id*. § 12162(e)(2)(B)(i).

[353] *Id*. § 12162(e)(2)(B)(ii). Whether alterations are disproportionate are to be determined by criteria established by the Attorney General. *Id*.

[354] Cupolo v. Bay Area Rapid Transit, 5 F. Supp. 2d 1078, 1083-84 (N.D. Cal. 1997) (quoting 49 C.F.R. § 37.161(a)).

[355] *Id*. (citing 49 C.F.R. § 37.161(b)).

[356] 5 F. Supp. 2d 1078 (N.D. Cal. 1997).

[357] *Id*. at 1079 (citing CAL. CIV. CODE § 54).

[358] *Id*. at 1080.

[359] *Id*. at 1082-83.

[360] *Id*. (citing 49 C.F.R. § 27.19(a)). The court acknowledged also that the California Disabled Persons Act, CAL. CIV. CODE § 54(a), incorporates the ADA.

[361] *Id.* at 1083-84 (quoting 49 C.F.R. § 161(c)).

[362] *Id*. at 1083.

[363] *Id*. at 1085.

[364] *Id*.

[365] *Id*. (citations omitted). The court expected the plaintiffs to provide appropriate excerpts from the original manufacturers' specifications on the elevator maintenance procedures that BART should follow so that the court could include them in the injunction. *Id*. at 1086.

[366] *Id*. at 1084 (stating that "[v]oluntary cessation of illegal conduct does not render a challenge to that conduct moot unless '(1) there is no reasonable expectation that the wrong will be repeated, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation'") (citation omitted).

[367] 407 F. Supp. 2d 323 (D. Mass 2005), *aff'd*, 463 F.3d 50 (1st Cir. 2006) (rejecting the organizations' arguments that the proposed modifications would violate the National Historic Preservation Act of 1966 §§ 106 and 110(f), 16 U.S.C. §§ 470f, 470h-2(f), and § 4(f), 49 U.S.C. § 303(f), of the Department of Transportation Act of 1966).

[368] *Id.* at 340.

[369] No. 16 C 9072, 2017 U.S. Dist. LEXIS 166191 (N.D. Ill. Sept. 30, 2017).

ground level, and that the State and Lake station was not wheelchair accessible. Williams alleged also that he was thrown violently to the floor when a CTA rail operator failed to assist Williams as he boarded a second train.[370]

The court observed that "[t]he ADA's implementing regulations provide 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.'"[371] Although DOT regulations

> state that an entity that operates a train station must repair accessibility features "promptly if they are damaged or out of order," and that "[w]hen an accessibility feature is out of order, the entity shall take reasonable steps to accommodate individuals with disabilities who would otherwise use the feature,"… the regulations caution that they do "not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs."[372]

First, the court ruled that the plaintiff's allegations did not create a "reasonable inference" that there was a "frequent denial of access" to individuals with disabilities or a policy that neglects elevator maintenance, that the CTA failed to promptly repair the broken elevator, or that the CTA did not make the repair a high priority.[373]

Second, although the rail operator driving the next train may have been negligent for failing to assist the plaintiff, the court ruled that "'[i]solated acts of negligence by a city employee,' assuming that the alleged acts were in fact negligent, 'do not come within the ambit of discrimination' proscribed by the ADA" against individuals with disabilities.[374] Moreover, when an ADA plaintiff alleges only that the defendant was negligent, the plaintiff may not recover compensatory damages.[375]

Third, however, the court allowed the plaintiff to replead his claim that the State and Lake station violated the ADA.[376]

G. Accessibility of Platforms

The DOT Standards in Section 810.5 establish the general standards for rail platforms.[377] "Section 810.5.3 references the platform-to-rail-car gap standards found in Part 38."[378] Section 38.71(b) of the regulations "requires that light rail systems confined entirely to a dedicated right-of-way provide level boarding, and establishes standards for new vehicles in new stations, new vehicles in existing stations, and retrofitted vehicles in new and key stations."[379] The FTA Circular explains the requirements for rapid rail[380] and light rail platforms.[381]

In September 2011, DOT added § 37.42 to its regulations. The section states in part:

> (a) In addition to meeting the requirements of sections 37.9 and 37.41, an operator of a commuter, intercity, or high-speed rail system must ensure, at stations that are approved for entry into final design or that begin construction or alteration of platforms on or after February 1, 2012, that the following performance standard is met: individuals with disabilities, including individuals who use wheelchairs, must have access to all accessible cars available to passengers without disabilities in each train using the station.
>
> (b) For new or altered stations serving commuter, intercity, or high-speed rail lines or systems, in which no track passing through the station and adjacent to platforms is shared with existing freight rail operations, the performance standard of paragraph (a) of this section must be met by providing level-entry boarding to all accessible cars in each train that serves the station.[382]

As the FTA Circular affirms, the regulations require "intercity, commuter, and high-speed passenger railroads to ensure, at new and altered station platforms, that passengers with disabilities can enter and exit any accessible car of the train."[383]

In *Foley v. City of Lafayette*,[384] the plaintiff alleged that there was inadequate egress from a city-owned train-station platform. The Seventh Circuit found

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[370] *Id*. at *3.

[371] *Id*. at *5 (citation omitted).

[372] *Id*. at *6 (citations omitted).

[373] *Id*. at *8-9 (citations omitted).

[374] *Id*. at *10 (citation omitted).

[375] *Id*. at *11.

[376] *Id*. at *13.

[377] FTA Circular, Ch. 3.7, p. 3-21.

[378] *Id*.

[379] *Id*.

[380] *Id*. Ch. 3.6, p. 3-20 (discussing 49 C.F.R. § 38.53(d)).

[381] *Id*. Ch. 3.7, p. 3-21 (discussing 49 C.F.R. § 38.71(b) and (d)).

[382] 49 C.F.R. § 37.42 (c) states:

> For new or altered stations serving commuter, intercity, or high-speed rail lines or systems, in which track passing through the station and adjacent to platforms is shared with existing freight rail operations, the railroad operator may comply with the performance standard of paragraph (a) by use of one or more of the following means:
>
> (1) Level-entry boarding;
>
> (2) Car-borne lifts;
>
> (3) Bridge plates, ramps or other appropriate devices;
>
> (4) Mini-high platforms, with multiple mini-high platforms or multiple train stops, as needed, to permit access to all accessible cars available at that station; or
>
> (5) Station-based lifts.…

[383] FTA Circular, Ch. 3.8, p. 3-22 (discussing 49 C.F.R. § 37.42(a)).

[384] 359 F.3d 925 (7th Cir. 2004).

that the inoperable elevators and snow-covered ramp that prevented Foley from exiting the station platform were "non-actionable isolated or temporary conditions…."[385]

> The DOT's interpretation of its own regulation makes sense: the only way to apply 49 C.F.R. § 37.161 is to consider the unique circumstances inherent in any particular transportation service site. In other words, there are no universal definitions in the regulations for what is required to "maintain in operative condition" the accessibility features, to repair "promptly" such features, or to take "reasonable steps" to accommodate when the features are not accessible. The extent of inaccessibility covered by the terms "isolated or temporary" in 49 C.F.R. § 37.161 is likewise unclear and only determinable by considering the unique circumstances of the case.[386]

The court ruled that the conditions of which Foley complained were weather-related that the city remedied or repaired promptly.[387] There was no evidence of frequent denials of access to individuals with disabilities or a policy of neglect of elevator maintenance.[388] Even if the defendant were negligent, the negligence "did not constitute a violation of the ADA."[389]

H. Accessibility of Key Stations

Title II specifically requires that transit agencies designate key stations and ensure their accessibility. Under the ADA, a public entity providing designated public transportation must "make key stations … in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs."[390] Section 12163 of the ADA requires that accessibility standards be consistent with the Architectural and Transportation Barriers Compliance Board's minimum guidelines. Key stations used in commuter rail transportation systems had to "be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than 3 years after the date of enactment of [the ADA in 1990]," but the time limit could "be extended by the Secretary of Transportation up to 20 years after [the date of enactment of the ADA] in a case where the raising of the entire passenger platform [was] the only means available of attaining accessibility or where other extraordinarily expensive structural changes [were] necessary to attain accessibility."[391]

The ADA requires public entities operating rapid and light rail systems and commuter rail systems to identify key stations that must be altered "to ensure a basic degree of usability by individuals with disabilities."[392] Commuter authorities must consult with individuals with disabilities and organizations representing them when designating key stations.[393] The authorities must consider factors such as whether ridership is high and whether a station serves as a transfer or feeder station. A commuter authority must hold a public hearing before making a final designation of key stations.[394] Primarily, key stations have to be altered "to provide at least one fully accessible entrance and accessible route to all areas necessary for the use of the transportation system," a requirement that often necessitates the installation of elevators.[395] With some exceptions, key stations have to comply with DOT Standards to the same extent as other new or altered stations.[396]

Plaintiffs have brought claims against transit agencies alleging that stations were not accessible to individuals with disabilities. In *George v. Bay Area Rapid Transit*,[397] the plaintiff, who was legally blind, and for whom it was particularly difficult to negotiate stairs, fell when attempting to use BART's "accessible or universal routes in its train stations."[398] BART's facilities complied with DOT regulations that required each light rail station to have "'at least one accessible route from an accessible entrance to those areas necessary for the use of the transportation system.'"[399] The plaintiff alleged, however, that some of BART's stations did not have "color contrast striping or accessible handrails."[400]

The Ninth Circuit reversed the district court's ruling that the "DOT regulations were 'both arbitrary and plainly contrary to the statute … by failing to address the needs of those with visual impairments.'"[401] The appellate court found that the DOT considered the needs of individuals with visual disabilities, in part, through a performance

[385] *Id*. at 926.

[386] *Id*. at 929.

[387] *Id*. at 930.

[388] *Id*. at 929.

[389] *Id*. at 930.

[390] 42 U.S.C. § 12147(b)(1) (2018). By regulation, the Secretary of Transportation establishes criteria for the determination of key stations. *Id*.

[391] *Id*. § 12162(e)(2)(A)(ii)(II).

[392] FTA Circular, Ch. 3.9, p. 3-27 (discussing 42 U.S.C. § 12147(b) (rapid rail and light rail) and 42 U.S.C. § 12162(e)(2)(a) (commuter rail)).

[393] 42 U.S.C. § 12162(e)(2)(A)(iii) (2018).

[394] *Id*.

[395] FTA Circular, Ch. 3.9, p. 3-27.

[396] *Id*.

[397] 577 F.3d 1005 (9th Cir. 2009).

[398] *Id*. at 1007.

[399] *Id*. at 1008 (citation omitted).

[400] *Id*.

[401] *Id*. at 1009 (citation omitted).

standard that addresses the needs of persons who are unable to negotiate steps. Therefore, the DOT regulations were not arbitrary or capricious.[402] Moreover, the regulations were consistent with the decisions of the Transportation Barriers Compliance Board.[403]

> It may well be sensible to require accessible handrails, contrast striping on stairs, and other such measures to promote accessibility. However, it is not up to this court to decide what is reasonable or sensible in this regard; instead, our task is to ascertain BART's legal obligations. Unless DOT regulations are arbitrary and capricious, BART is required to do no more than follow them.[404]

BART argued that, even if it had violated the ADA, it had immunity from liability under a "safe harbor" provision in § 12150 of the ADA and a similar provision in 49 C.F.R. § 37.9 that stated that

> compliance with existing federal accessibility standards in construction completed after the passage of the ADA but before DOT regulations were issued "shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under" sections 12146 and 12147.[405]

The Ninth Circuit agreed with BART that transit riders "should not be permitted to use the courts … to enact regulations they failed to convince the … Board or the DOT to implement…."[406]

In *HIP (Heightened Independence & Progress), Inc. v. Port Authority*,[407] the Port Authority of New York and New Jersey (Port Authority) appealed a district court's order that the Port Authority modify its Grove Street Station in Jersey City, New Jersey, so that it complied with the ADA.[408] The plaintiff alleged that the renovations to the station "triggered" an obligation under the ADA to make the station accessible to individuals with disabilities.[409] The Third Circuit ruled that the construction project was an alteration: "[a]n alteration is 'a change to an existing facility, including, but not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions.'"[410]

At issue was whether the Port Authority had made the station accessible to the maximum extent feasible.[411] The court ruled "that the ADA's obligations are triggered at the time the construction is undertaken, not after it has been completed and litigation has commenced."[412] The court remanded the case "for consideration of 'feasibility' anew, as of the time of construction."[413]

The Port Authority had raised the issue in the litigation of whether it would be able to acquire the land rights it needed from Jersey City to comply with the ADA. However, the court ruled that "the mere fact that the Authority would now have to acquire land from a third-party [was] not sufficient to render the proposed accommodations *per se* infeasible."[414] Besides other issues of material fact in dispute that were unresolved, the court remanded the case for more development of the record on whether the city would refuse to negotiate a subterranean easement or a sale of land to the Port Authority.[415]

I. Programs and Activities in Existing Facilities

A public transit agency is required to operate or conduct a designated public transportation program or activity "in an existing facility so that, when viewed in its entirety, the program or activity is readily accessible to and usable by individuals with disabilities."[416] Examples of accessible and usable programs and facilities include user-friendly fare cards; accessible websites and mobile applications; user-friendly schedules; edge detection on rail platforms; adequate lighting; use of telecommunication display devices (TDDs) and other means and devices; enhanced wayfinding and signage for people with visual impairments; continuous pathways for individuals with visual disabilities and individuals who use wheelchairs or other mobility disabilities; and public address systems and clocks.[417]

VII. REQUIREMENTS FOR FIXED ROUTE SERVICE UNDER THE ADA

A. Accessibility Issues Specific to Fixed Route Service

Chapter 6 of the FTA Circular provides guidance on the DOT regulations in 49 C.F.R. part 37 that are specific to fixed route service. The term fixed route service "encompasses a variety of transit services and modes, including bus (local, express, commuter, and bus rapid transit (BRT)) and rail (light, rapid,

[402] *Id*.
[403] *Id.* at 1010.
[404] *Id*. at 1011.
[405] *Id*. at 1012.
[406] *Id*. at 1013.
[407] 693 F.3d 345 (3d Cir. 2012).
[408] *Id*. at 349.
[409] *Id*. at 350.
[410] *Id*. at 351 (quoting 49 C.F.R. § 37.3)).
[411] *Id*. at 351-52.
[412] *Id*. at 352-53.
[413] *Id*. at 353.
[414] *Id*. at 354.
[415] *Id*. at 354, 355.
[416] FTA Circular, Ch. 3.10, p. 3-28 (quoting 49 C.F.R. § 37.61(a)).
[417] *Id*. (discussing 49 C.F.R. § 37.61, app. D).

and commuter rail)."[418] The provisions that apply to fixed route service include those discussed in Part V.F of this digest on general accessibility features but include also "alternative transportation when bus lifts are inoperable, service to designated bus stops, priority seating, and stop announcements and route identification."[419]

Section 37.163(f) of the regulations applies whenever a vehicle operating on a fixed route has an inoperative lift and the "headway" to the next accessible vehicle on the route is more than thirty minutes. Under the circumstances, a transit agency must provide alternative transportation promptly to individuals with disabilities who are unable to use a vehicle because of an inoperative lift.[420] Alternative transportation includes the dispatching of a similar vehicle with a working lift or ramp or dispatching a different vehicle that is accessible, such as a paratransit van.[421] However, when a bus with an inoperative lift is unable to accommodate a rider because the bus is full, the requirement for alternative transportation does not apply.[422] A stop may not be made "off-limits" to individuals with disabilities except in one of three situations: the lift cannot be deployed; the lift will be damaged if it is deployed; or temporary conditions beyond the control of a transit agency preclude all passengers from using the stop safely.[423]

The regulations require that transit agencies make onboard stop announcements on fixed route bus and rail service, including for commuter service, so that people with visual impairments and other disabilities will be "oriented to their location."[424] The regulations also require all accessible rail vehicles, such as light rail, rapid rail, and commuter rail, and buses more than twenty-two feet in length, to have a public address system to amplify announcements.[425] When vehicles for more than one route serve the same stop, a public entity must provide the means necessary for "an individual with a visual impairment or other disability [to be] able to identify the proper vehicle to enter or be identified to the vehicle operator as a person seeking a ride on a particular route."[426]

Chapter 6 of the Circular also addresses priority seating and securement areas for wheelchairs[427] and adequate time for and assistance with vehicle boarding and disembarking.[428]

B. Acquisition of ADA-Compliant Vehicles for Fixed Route Service

Although vehicles used for fixed route service must comply with the ADA, it may be noted that as of 2013 "[n]early 100 percent of transit buses and rapid rail cars and 87 percent of commuter rail and light rail cars were reported to be accessible…."[429]

Under § 12142(a) of the ADA, a public entity that operates a fixed route system is discriminating against individuals with disabilities when it purchases or leases a new bus, a new rapid rail vehicle, a new light rail vehicle, or any other new vehicle to be used on such system if the vehicle is not readily accessible to and usable by individuals with disabilities, including those who use wheelchairs.

Likewise, it is discriminatory for a public entity that operates a fixed route system

> to purchase or lease ... a used vehicle for use on such system unless such entity makes demonstrated good faith efforts to purchase or lease a used vehicle for use on such system that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs;[430]
>
> . . . .
>
> to remanufacture a vehicle for use on such system so as to extend its usable life for 5 years or more … [or] purchase or lease for use on such system a remanufactured vehicle which has been remanufactured so as to extend its usable life for 5 years or more, … unless, after remanufacture, the vehicle is, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.[431]

The ADA applies also to private entities who have contracts or other arrangements with public entities. Under § 37.23(b) of the regulations, there are "stand-in-the-shoes" provisions that require

> [a] private entity which purchases or leases new, used, or remanufactured vehicles, or remanufactures vehicles, for use, or in contemplation of use, in fixed route or demand responsive service under contract or other arrangement or relationship with a public entity, shall acquire accessible vehicles in all situations in which the public entity itself would be required to do so by this part.[432]

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[418] *Id.* Ch. 6.1, p. 6-1 (footnote omitted).

[419] *Id*.

[420] *Id.* Ch. 6.2.1, p. 6-2 (discussing 49 C.F.R. § 37.163(f)).

[421] *Id*.

[422] *Id*.

[423] *Id*. Ch. 6.2.2, p. 6-3 (discussing 49 C.F.R. § 37.167(g)).

[424] *Id*. Ch. 6.6, p. 6-7 (discussing 49 C.F.R. § 37.167(b)).

[425] *Id*. Ch. 6.6.5, p. 6-10 (discussing 49 C.F.R. §§ 38.35, 38.61, 38.87, and 38.103).

[426] *Id*. Ch. 6.7, p. 6-12 (quoting 49 C.F.R. § 37.167(c)).

[427] *Id*. Ch. 6.3, p. 6-4.

[428] *Id*. Ch. 6.4, p. 6-5 and Ch. 6.5.1, p. 6-6 (discussing 49 C.F.R. § 37.167(i)).

[429] *Id.* Ch. 4.1, p. 4-1 (footnote omitted).

[430] 42 U.S.C. § 12142(b) (2018).

[431] *Id*. § 12142(c)(1)(A) and (B). There is an exception for historic vehicles. *Id*. § 12142(c)(2).

[432] FTA Circular, Ch. 4.1.3, pp. 4-4–4-5 (quoting 49 C.F.R. § 37.23(b)).

Chapter 4 of the FTA Circular discusses design requirements for accessible buses and vans; design requirements for rapid, commuter, and light rail cars; requirements for various types of service; and suggestions for the acquisition of accessible vehicles.[433] The Circular also discusses the requirements that apply to new fixed route bus or van acquisition,[434] used fixed route bus or van acquisition,[435] remanufactured fixed route bus or van acquisition,[436] and demand responsive bus or van acquisition of inaccessible vehicles,[437] as well as lifts, ramps, and securement systems.[438]

C. Rapid and Light Rail Vehicles

New rapid rail cars and light rail vehicles must be accessible.[439] Likewise, used rapid or light rail vehicles must be made accessible. A transit agency may purchase or lease an inaccessible vehicle if it makes good faith efforts to obtain an accessible vehicle but is unable to do so.[440]

Without a signed FTA determination of "equivalent facilitation,"[441] there are no exceptions to the specific technical and scoping requirements for light rail vehicles.[442] However, for light rail systems where "level boarding" may not be practicable, part 38 allows "the use of various devices to board and alight wheelchair users and others who cannot climb steps."[443]

D. Commuter Rail Vehicles

There are no exceptions to the requirement that all new commuter rail cars must be accessible.[444] Since August 25, 1990, Amtrak or a commuter authority soliciting the purchase or lease of a new intercity or commuter rail car has had to ensure that a vehicle is readily accessible for individuals with disabilities, including those who use wheelchairs.[445] Amtrak or a commuter authority may purchase or lease a used intercity or commuter rail car that is not readily accessible if it is unable to obtain an accessible one after good faith efforts to do so.[446] The FTC Circular explains the requirements that apply to the acquisition of remanufactured commuter railcars.[447]

E. Purchase or Lease of New Rail Passenger Cars for Intercity Rail Transportation

It is a violation of the ADA for "a person to purchase or lease any new rail passenger cars for use in intercity rail transportation … unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs…."[448] There are special rules that apply to single-level passenger coaches and single-level dining cars,[449] bi-level dining cars,[450] and food services for single-level and bi-level dining cars for persons with disabilities, including those who use wheelchairs.[451]

F. One-Car-Per-Train Accessibility

Section 12148(b) of the ADA mandates a "one car per train rule."[452] The one-car-per-train rule does not negate the requirement that all new, used, or remanufactured rail cars must be readily accessible.[453]

When two or more vehicles are operated as a train by a light or rapid rail system, a public entity must have at least one vehicle per train that is accessible to individuals with disabilities, including those who use wheelchairs.[454] The ADA requires that a person who provides intercity rail transportation must have at least one readily accessible passenger car per train.[455] Commuter rail transportation

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[433] *Id*. Ch. 4, p. 4-1.

[434] *Id*. Ch. 4.2.1, p. 4-6–4-7 (discussing 49 C.F.R. § 37.71(a)).

[435] *Id*. Ch. 4.2.2, pp. 4-7–4-8 (discussing 49 C.F.R. § 37.73(a)-(d)).

[436] *Id*. Ch. 4.2.3, pp. 4-8–4-9 (discussing 49 C.F.R. § 37.75(a)-(e)).

[437] *Id*. Ch. 4.2.4, pp. 4-9–4-10 (discussing 49 C.F.R. § 37.77(a) and (b)).

[438] *Id*. Ch. 4.2.5, pp. 4-10–4-13.

[439] *Id.* Ch. 4.3.1, pp. 4-15–4-16 (discussing 49 C.F.R. § 37.79).

[440] *Id*. Ch. 4.3.2, p. 4-16 (discussing 49 C.F.R. § 37.81(b)). According to Appendix D to § 37.83, the regulations for remanufactured rapid or light rail vehicles parallel the ones for buses in § 37.75. *See* FTA Circular, Ch. 4.3.3, p. 4-17 (discussing 49 C.F.R. § 37.83, app. D).

[441] *Id*. Ch. 4.3.5, p. 4-20.

[442] *Id*.

[443] *Id*. (discussing 49 C.F.R. pt. 38).

[444] *Id*. Ch. 4.4.1, p. 4-23 (discussing 49 C.F.R. § 37.85).

[445] *Id*.

[446] *Id*. Ch. 4.4.4, p. 4-23 (discussing 49 C.F.R. § 37.87(b)).

[447] *Id*. Ch. 4.4.3, p. 4-25 (discussing 49 C.F.R. § 37.89(a)-(c)).

[448] 42 U.S.C. § 12162(a)(2)(A) (2018). The requirement applied to a solicitation for new cars made later than thirty days after the effective date of the statute in July 1990.

[449] *Id*. § 12162(a)(2)(B) and (C) and (a)(3)(A).

[450] *Id*. § 12162(a)(2)(D).

[451] *Id*. § 1262(a)(4)(A) and (B).

[452] *Id*. § 12148(b)(1). *See* FTA Circular, Ch. 4.5, at 4-27 (discussing 49 C.F.R. § 37.93(a)-(c)).

[453] FTA Circular, Ch. 4.5, p. 4-27.

[454] 42 U.S.C. § 12148(b)(1) (2018). A special rule applies to historic trains. *Id*. § 12148(b)(2).

[455] *Id*. § 12162(a)(1). As noted, the term intercity rail transportation refers to transportation provided by the National Railroad Passenger Corporation, i.e., Amtrak,

systems must have one readily accessible passenger car per train;[456] new commuter rail cars must be readily accessible;[457] and used and remanufactured rail cars also must comply with the ADA.[458]

G. Equivalent Facilitation

Chapter 5 of the FTA Circular discusses the equivalent facilitation process for transportation vehicles[459] and transportation facilities[460] that permits departures from the vehicle specifications in 49 CFR part 38[461] and the use of "alternative designs or technologies that provide equal or greater accessibility."[462] "Such innovations must provide equal or greater accessibility in comparison to the specific technical and scoping requirements contained in the regulations…."[463]

A party requesting equivalent facilitation must submit, inter alia, "[d]ocumentation of the public participation used in developing an alternative method of compliance."[464] Section 37.7(b) of the regulations sets forth in detail the public participation requirement, which includes at least one public hearing.[465] Section 37.7(b)(4) requires that manufacturers must consult with "representatives of national and local organizations representing individuals with disabilities who would be affected by the request."[466]

The equivalent facilitation process requires that "the FTA Administrator must be able to conclude that the alternative method of compliance meets or exceeds the level of accessibility or usability of the vehicle or vehicle component specified in Part 38."[467]

H. Effect of the ADA on Placement and Location of Transit Stops

Of forty-seven agencies responding to the survey, forty stated that the ADA had influenced their agency's decisions on the placement or location of transit stops along their agency's routes.[468] Thirty-seven agencies stated that the ADA had influenced their decisions on where their agency should relocate or change stops.[469] Appendix C to this digest discusses the transit agencies' responses describing how the ADA has influenced, or is influencing, their agencies' decisions.[470]

As for the adoption of their own policy or other guidance, seventeen agencies said that they have a policy or other guidance regarding ADA requirements and their location or relocation of stops. However, twenty-five agencies stated that they did not have such a policy or other guidance.[471] Some agencies provided an Internet link[472] to or a copy[473] of their policy or guidance.

I. Transit Agencies' Claims or Cases Alleging that Their Fixed Route Service Violated the ADA

Of forty-seven transit agencies responding to the survey, five agencies reported that in the past five years their agency had claims or cases by individuals with disabilities that alleged that their agency's fixed-route system violated the ADA.[474] Thirty-nine agencies reported that they did not have any claims or cases of that nature in the past five years.[475] Of the agencies reporting that they had had claims or cases, only one agency reported a claim or case that involved a vehicle that allegedly was not readily accessible.[476] Four agencies had a claim or case in

whereas the term commuter rail transportation has the same meaning as the term commuter rail passenger transportation has in 49 U.S.C. § 24102(3): "short-haul rail passenger transportation in metropolitan and suburban areas usually having reduced fare, multiple-ride, and commuter tickets and morning and evening peak period operations."

[456] *Id*. § 12162(b)(1).

[457] *Id.* § 12162(b)(2).

[458] *Id.* § 12162(c) and (d).

[459] FTA Circular, Ch. 5.3, p. 5-2.

[460] *Id*. Ch. 5.4, p. 5-5.

[461] *Id*. Ch. 5.3.1, p. 5-2.

[462] *Id*. Ch. 5.1, p. 5-1.

[463] *Id*. Ch. 5.2, p. 5-1.

[464] *Id*. Ch. 5.3.3, p. 5-3 (quoting 49 C.F.R. § 37.7(b)(2)(v)).

[465] *Id.* Ch. 5.3.4, p. 5-3 (discussing 49 C.F.R. § 37.7(b)(3) and (4)).

[466] *Id.* Ch. 5.3.4, p. 5-4 (quoting 49 C.F.R. § 37.7(b)(4)).

[467] *Id*. Ch. 5.3.3, p. 5-3.

[468] *See* Appendix C, Transit Agencies' Responses to Question 7(a). Six agencies said the ADA had not influenced their decisions; one agency did not respond to the question.

[469] *See id*., Transit Agencies' Responses to Question 7(b). Six agencies said the ADA had not influenced their decisions; four agencies did not respond to the question.

[470] *See id*., Transit Agencies' Responses to Question 7(c).

[471] *See id*., Transit Agencies' Responses to Question 7(d). Five agencies did not respond to the question.

[472] *See id*., Transit Agencies' Responses to Question 7(d).

[473] *See* Appendix D to this digest.

[474] *See* Appendix C, Transit Agencies' Responses to Question 8.

[475] *See id*. Three agencies did not respond to the question.

[476] *See id*., Transit Agencies' Responses to Question 9. The transit authority did not provide additional information regarding the claim.

the past five years involving priority seating.[477] Likewise, four agencies had a claim or case arising out of securement areas for wheelchairs.[478] One agency had a claim or case involving adequate time for vehicle boarding and/or disembarking a vehicle.[479] Appendix C summarizes the responses of transit agencies that reported claims or cases involving the foregoing and other issues.[480]

VIII. PARATRANSIT SERVICE REQUIREMENTS UNDER TITLE II OF THE ADA

A. ADA Requirements Applicable to Paratransit Service

Because some individuals with disabilities are unable to use a fixed route system, Congress created a "safety net" in the form of complementary paratransit service. Forty-four of the forty-seven transit agencies responding to the survey provide complementary paratransit service.[481]

Under the ADA, it is discrimination

> for a public entity which operates a fixed route system (other than a system which provides solely commuter bus service) to fail to provide with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such system.[482]

The ADA's paratransit obligations do not apply to commuter bus, commuter rail, or intercity rail systems.[483]

Paratransit service enables individuals with disabilities to have transportation service "on the same basis as individuals using fixed route systems."[484]

B. Regulations Applicable to Paratransit Service

The ADA mandates that regulations must require that each public entity that operates a fixed route system provide paratransit and other special transportation services to any individual with a disability

> who is unable, as a result of a physical or mental impairment … to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities; … who needs the assistance of a wheelchair lift or other boarding assistance device (and is able with such assistance) to board, ride, and disembark from any vehicle which is readily accessible to and usable by individuals with disabilities; … and … who has a specific impairment-related condition which prevents such individual from traveling to a boarding location or from a disembarking location on such system….[485]

Transit agencies may use a "feeder service" to transport some complementary paratransit riders to and from their fixed routes.[486]

The regulations establish also the paratransit service areas for agencies providing bus or rail service. Although a transit agency must "take all practicable steps to provide paratransit service to any part of its service area," it is not required "to provide paratransit service in an area outside the boundaries of the jurisdiction(s) in which it operates, if the entity does not have legal authority to operate in that area."[487]

The paratransit service area for a transit agency that provides bus service is "service to origins and destinations within corridors with a width of three-fourths of a mile on each side of each fixed route."[488] Each corridor must "include an area with a three-fourths of a mile radius at the ends of each fixed route."[489] A entity providing paratransit service within the "core service area" must provide "service to small areas not inside any of the corridors but which are surrounded by corridors."[490] Outside its core service area, an "entity may designate corridors with widths from three fourths of a mile up to one and one half miles on each side of a fixed route, based on local circumstances."[491] The core service area is the area "in which corridors with a width of three-fourths of a mile on each side of each fixed route merge together such that, with few and small

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[477] *See id*., Transit Agencies' Responses to Question 10(a).

[478] *See id*., Transit Agencies' Responses to Question 10(b).

[479] *See id*., Transit Agencies' Responses to Question 10(c). *See id*. for information on claims or cases reported by transit agencies in response to Questions 10(a), (b), and/or (c).

[480] *See id*., Transit Agencies' Responses to Question 11.

[481] *See id*., Transit Agencies' Responses to Question 12. Three agencies reported that they do not.

[482] 42 U.S.C. § 12143(a) (2018).

[483] 49 C.F.R. § 37.121(c) (2018).

[484] FTA Circular, Ch. 8.1, p. 8-1 (discussing 49 C.F.R. §§ 37.3 and 37.121(a)).

[485] 42 U.S.C. § 12143(c)(1)(A)(i)-(iii) (2018).

[486] FTA Circular, Ch. 8.3.2, p. 8-5 (discussing 49 C.F.R. § 37.129(b) and (c)).

[487] 49 C.F.R. § 37.131(a)(3) (2018).

[488] *Id.* § 37.131(a)(1)(i).

[489] *Id*.

[490] *Id.* § 37.131(a)(1)(ii).

[491] *Id*. § 37.131(a)(1)(iii).

exceptions, all origins and destinations within the area would be served."[492]

For an agency that provides rail service, the service area must "consist of a circle with a radius of 3/4 of a mile around each station,"[493] but "[a]t end stations and other stations in outlying areas, the entity may designate circles with radii of up to 1 1/2 miles as part of its service area, based on local circumstances."[494]

If a transit agency demonstrates to the satisfaction of the Secretary of Transportation that providing paratransit and other special transportation services would impose an undue financial burden on the agency, the agency "shall only be required to provide such services to the extent that providing such services would not impose such a burden."[495]

When preparing its paratransit plan, a transit agency must hold a public hearing to allow the public an opportunity to comment on the agency's plan, as well as consult with individuals with disabilities.[496] A transit agency may provide more expansive paratransit or other special transportation service than the ADA requires, such as providing services that the ADA does not require or serving individuals that the ADA does not require to be served.[497]

Chapters 8 and 9 of the FTA Circular provide guidance on complementary paratransit service. As noted, the complementary paratransit requirements do not apply to commuter bus, commuter rail, or intercity rail systems.[498] Chapter 8 discusses the required types of service,[499] service criteria,[500] trip reservations and response time,[501] and fares.[502] Importantly, a transit agency may not limit the availability of paratransit service by a "pattern or practice" of actions, referred to as "capacity constraints."[503]

C. Meaning of "Origin-to Destination" Paratransit Service

The regulations in 49 C.F.R. § 37.129(a) state that, "[e]xcept as provided in this section, complementary paratransit service for ADA paratransit eligible persons shall be origin-to-destination service." Section 37.3 defines origin-to-destination service to mean "service from a passenger's origin to the passenger's destination" but states that an entity providing paratransit service may provide it "in a curb-to-curb or door-to-door mode." If a provider of paratransit service "chooses curb-to-curb as its primary means of providing service, it must provide assistance to those passengers who need assistance beyond the curb in order to use the service unless such assistance would result in a fundamental alteration or direct threat."[504]

The FTA explains that

> [t]he goal behind [the] use of this particular language, rather than characterizing the service as 'curb-to-curb' or 'door-to-door,' is to emphasize the obligation of transit providers to ensure that eligible passengers are able to travel from their point of origin to their point of destination. *The particular factors involved will determine whether curb-to-curb or door-to-door service will be better for that individual or the location.*[505]

Although a transit provider may establish either door-to-door or curb-to-curb service as the basic mode of paratransit service, "a paratransit policy must not be inflexible to the extent that service will not be provided beyond the curb under any circumstance."[506] Thus,

> *[p]aratransit providers must provide enhanced service on a case-by-case basis where necessary to meet the origin-to-destination requirement*; some individuals or locations may require service that goes beyond curb-to-curb service. It should be recognized that transit providers are not required to accommodate individual passengers' needs which would fundamentally alter the nature of the service or create an undue burden. Transit providers' obligations do not extend to the provision of personal services, such as requiring a driver to go beyond a doorway into a building to assist a passenger or requiring a driver to lose visual contact with their vehicle.[507]

The foregoing material is consistent with the ADA regulations and the FTA Circular, which provide that "[a] public entity providing … complementary paratransit services[] shall respond to requests for reasonable modification to policies or practices consistent with this section."[508] A public entity must make information available on how to contact it to

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[492] *Id*. § 37.131(a)(1)(iv).

[493] *Id*. § 37.131(a)(2)(i).

[494] *Id*. § 37.131(a)(2)(ii).

[495] 42 U.S.C. § 12143(c)(4).

[496] *Id*. § 12143(c)(6).

[497] *Id*. § 12143(f).

[498] FTA Circular, Ch. 8.2, p. 8-1 (discussing 49 C.F.R. § 37.121(c)).

[499] *Id*. Ch. 8.3, p. 8-2.

[500] *Id*. Ch. 8.4, p. 8-6.

[501] *Id*. Ch. 8.4.5, p. 8-12.

[502] *Id*. Ch. 8.4.6, p. 8-15.

[503] *Id*. Ch. 8.5, p. 8-19 (discussing 49 C.F.R. § 37.13(f)).

[504] 49 C.F.R. § 37.3 (2018).

[505] Department of Transportation, Federal Transit Administration, Are paratransit service providers required to provide service beyond the curb? https://www.transit.dot.gov/are-paratransit-service-providers-required-provide-service-beyond-curb (last accessed June 20, 2018) (emphasis supplied).

[506] *Id*.

[507] *Id*. (emphasis supplied).

[508] FTA Circular, Ch. 2.10.2, p. 2-23 (quoting 49 C.F.R. § 37.169(a)(1)).

make requests for reasonable modifications.[509] Although 49 C.F.R. § 37.169(b)(3) encourages individuals to make their requests "in advance of the need for modified service,"[510] there may be situations (e.g., an inaccessible path) when transit personnel must make a determination at the time of the request on whether a modification should be provided.[511]

Requests for reasonable modifications may be denied when granting the request for a modification would fundamentally alter the provider's services; granting the request for a modification would create a direct threat to the health or safety of others; or granting the request for a modification is not necessary to allow the passenger to fully use the entity's services, programs, or activities for their intended purpose.[512] Also, FTA recipients may deny a request for a modification when the modification, if granted, would create an undue financial or administrative burden.[513]

The FTA Circular notes that appendix E to part 37 provides examples of requests for a modification that transportation providers would not be required to grant. However, pursuant to 49 C.F.R. § 37.169(e), even when a transportation provider has a "sound basis" for denying a request for a reasonable modification for one of the above reasons, the transportation provider should "do what it can to enable the requester to receive the services and benefits it provides…."[514]

D. Eligibility for Paratransit Service Under the ADA

Because paratransit service is one of the most challenging areas for ADA compliance, the FTA periodically reviews transit agencies and publishes reports on their level of compliance.[515] However, according to the U.S. General Accounting Office, one the most common problems for transit agencies in implementing the ADA's paratransit requirements is determining eligibility for paratransit service.[516]

It may be noted that forty of the forty-four transit agencies responding to the survey that provide paratransit service acknowledged that the federal regulations and/or FTA Circular 4710.1 provide a standard process and/or identify specific information needed for the agencies to determine an individual's eligibility for paratransit service.[517] Nevertheless, thirty-one agencies responding to the survey have adopted their own standard process and/or requirements for determining paratransit eligibility.[518]

Chapter 9 of the FTA Circular provides guidance on eligibility for complementary paratransit service.[519] Under 49 C.F.R. § 37.123(e)(1):

> Any individual with a disability who is unable, as the result of a physical or mental impairment (including a vision impairment), and without the assistance of another individual (except the operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities [is eligible for ADA paratransit].[520]

In general, individuals with disabilities are eligible for paratransit service who have intellectual or cognitive disabilities that prevent them from being able independently to navigate or use accessible fixed route services;[521] when there is a lack of accessible vehicles, stations, or bus stops for persons with disabilities;[522] or when persons with disabilities are unable to reach a boarding point or final destination.[523] Persons with disabilities are not eligible for paratransit service only because it is "more difficult

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[509] *Id*. Ch. 2.10.2, p. 2-23 (discussing 49 C.F.R. § 37.169(a)(2)).

[510] *Id*. Ch. 2.10.2, p. 2-24 (discussing 49 C.F.R. § 37.169(b)(3)).

[511] *Id*. Ch. 2.10.2, p. 2-24 (discussing 49 C.F.R. § 37.169(b)(4)).

[512] *Id*. Ch. 2.10.3, p. 2-25 (discussing 49 C.F.R. § 37.169(c)(1)-(3)).

[513] *Id*. Ch. 2.10.3, p. 2-25 (discussing 49 C.F.R. § 27.7(e)).

[514] *Id*. Ch. 2.10.3, p. 2-25 (discussing 49 C.F.R. § 37.169(e)).

[515] *See, e.g*., U.S. Department of Transportation, Federal Transit Administration, Office of Civil Rights, Metropolitan Atlanta Rapid Transit Authority (MARTA) ADA Complementary Paratransit Service Compliance Review Feb. 9-12, 2009, Final Report December 3, 2012, at 4, https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/MARTA_Final_Report_12.3.2012.pdf (last accessed June 20, 2018). *See also* Federal Transit Administration, ADA Compliance Review Final Reports, https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/ada-compliance-review-final-reports (last accessed June 20, 2018).

[516] U.S. General Accounting Office, GAO-94-58, Americans with Disabilities Act: Challenges Faced by Transit Agencies in Complying with the Act's Requirements, 2 (1994), http://www.gao.gov/assets/220/219165.pdf (last accessed June 20, 2018).

[517] *See* Appendix C, Transit Agencies' Responses to Question 13(a).

[518] *See id*., Transit Agencies' Responses to Question 13(b).

[519] FTA Circular, Ch. 9.1, p. 9-1 (discussing 49 C.F.R. pt. 37, subpt. F).

[520] *Id*. Ch. 9.2.1, p. 9-2 (quoting 49 C.F.R. § 37.123(e)(1)).

[521] *Id*. Ch. 9.2.1, pp. 9-2 and 9-5 (discussing 49 C.F.R. § 123(e)(1)).

[522] *Id*. Ch. 9.2.1, p. 9-3 (discussing 49 C.F.R. § 37.123(e)(2)).

[523] *Id*. Ch. 9.2.1, p. 9-5 (discussing 49 C.F.R. § 37.123(e)(3)).

or inconvenient" for them to get to or from fixed route stops and stations.[524]

A person's type of disability or diagnosis is not a basis of eligibility for paratransit service.[525] Rather, eligibility depends on "the functional ability of individuals with disabilities to use fixed route transit services."[526] An individual's use of mobility aids is not a basis for eligibility; thus, it may not be presumed that because a person uses a wheelchair the person has "automatic eligibility" for paratransit service.[527] Public safety concerns of an individual with a disability, such as using fixed route transit late at night or in high-crime areas, are not bases that qualify an individual for paratransit service.[528]

The FTA Circular explains in more detail eligibility considerations,[529] types of eligibility,[530] the process for determining eligibility,[531] and eligibility decisions.[532]

E. Effect of Temporary or Episodic Disability on Eligibility for Paratransit

Individuals with a temporary or episodic disability are protected by the ADA from discrimination. As analyzed by a federal district court in Michigan in *Deister v. AAA Auto Club of Michigan*,[533]

> An individual may not qualify as disabled … if the impairment is "transitory," meaning "an impairment with an actual or expected duration of 6 months or less," "and minor." … But this requirement does not apply to an impairment that qualifies under the "actual disability" or "record of disability" prongs of the definition; as to those, *"[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section*." 29 C.F.R. § 1630.2(j)(1)(ix). … "[T]he ADA Amendments Act of 2008 added rules of construction that the definition of disability should "be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." … The new rules of construction also provide that "*[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active*." 42 U.S.C. § 12102(4)(D).[534]

Based on the "low threshold for a qualifying disability under the amended ADA," the court held that Deister met the ADA's definition of disabled because he had an "episodic disability that substantially limits a major life activity when active."[535]

Individuals with disabilities, including those with a temporary or episodic disability, presumably should not be subject to "unreasonable travel expectations" that impair their ability to travel to or from fixed transit stops and locations.[536] For example, it would not be reasonable to expect an individual with a disability to navigate a route on crutches that require "considerable exertion" or to expect an individual with a disability to navigate a route when snow or icy conditions prevent the person from getting to or from stops and stations.[537] As the FTA Circular points out, in these and other situations requiring a decision on eligibility, complementary paratransit "[r]eviewers become the 'reasonable people' making such judgments."[538]

F. Whether Paratransit Eligibility Is Restricted When a Transit Stop or Facility Is Accessible via a Network of Streets

As for whether eligibility for paratransit service is affected when a transit stop or facility is accessible to an individual with disabilities via a network of streets, the FTA Circular discusses three categories of eligibility that seem to be relevant.

It does not appear that a network of streets would necessarily have an impact on the eligibility of an individual with a disability for paratransit under the first category of eligibility—inability to navigate a system independently. Individuals are eligible for paratransit service when they have intellectual or cognitive disabilities that prevent them from navigating a transit system.[539] Likewise, persons are eligible who are unable to make complex trips that require transfers between routes.[540]

The accessibility of a transit stop or facility via a network of streets seemingly would not affect the eligibility of an individual with a disability for

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[524] *Id*. Ch. 9.2.1, p. 9-5 (discussing 49 C.F.R. § 37.123(e)(3) and app. D).

[525] *Id*. Ch. 9.2.1, p. 9-1 (discussing 49 C.F.R. § 37.123(a)).

[526] *Id*.

[527] *Id*.

[528] *Id*. Ch. 9.2.1, p. 9-2 (discussing 49 C.F.R. § 37.123(e)(1)).

[529] *Id*. Ch. 9.2.2, pp. 9-7–9-9.

[530] *Id*. Ch. 9.3, pp. 9-9–9-11.

[531] *Id*. Ch. 9.4, pp. 9-12–9-15 (discussing 49 C.F.R. § 37.125).

[532] *Id*. Ch. 9.5, p. 9-15.

[533] 91 F. Supp. 3d 905 (E.D. Mich. 2015).

[534] *Id*. at 916-17 (some citations omitted) (emphasis supplied).

[535] *Id*. at 918 (citation omitted). However, the court granted the Auto Club's motion for summary judgment, because Deister did not meet his burden to propose an objectively reasonable accommodation, show that an accommodation was possible, or even request an accommodation, and because the Auto Club had no reason to know that he needed an accommodation. *Id*. at 929.

[536] FTA Circular, Ch. 9.2.1, pp 9-5–9-6 (discussing 49 C.F.R. § 37.123(e)(3)).

[537] *Id*. Ch. 9.2.1, p. 9-6.

[538] *Id*.

[539] *Id*. Ch. 9.2.1, p. 9-2 (discussing 49 C.F.R. § 37.123(e)(1)).

[540] *Id*.

paratransit under the second category of eligibility—when there is a lack of accessible vehicles, stations, or bus stops. For example, even though a transit stop or station may be accessible via a network of streets, an individual with a disability is eligible for paratransit when the individual is precluded from boarding or disembarking from a vehicle, for example, because of the absence of an operable lift.[541]

The accessibility of a transit stop or facility via a network of streets arguably may affect eligibility under the third category of eligibility—the inability of an individual with disabilities to reach a boarding point or final destination. Under the third category, individuals with a disability are eligible for paratransit when they have a "'specific impairment-related condition' [that] prevents them from traveling to or from fixed route transit stops and stations."[542] As the FTA Circular notes, "[i]nevitably, some judgment is required to distinguish between situations in which travel is prevented and situations in which it is merely more difficult."[543] The distance to a stop or facility or the presence of a steep hill and the extent of a person's health or "ambulatory" disability are factors that affect a decision on paratransit eligibility.[544]

G. Transit Agencies' Approaches to Determining Eligibility

Twenty-one transit agencies responding to the survey require an applicant to apply in person to provide his or her information for eligibility for paratransit service, but twenty-two of the responding agencies do not.[545] Although twenty-two agencies require a physical assessment of an applicant for paratransit service, nineteen agencies do not.[546] Twenty-one agencies require a cognitive assessment of an applicant for paratransit service, whereas twenty agencies do not.[547]

As for who conducts a physical and/or cognitive assessment, the transit agencies' responses varied.[548] Likewise, the agencies' responses differed regarding who makes the determination whether an individual is eligible for paratransit service.[549] Appendix C includes details provided by transit agencies on who conducts assessments and makes determinations of individuals' eligibility for paratransit service.

H. Paratransit Appeal Process for Denials of Eligibility

Transit agencies must have a paratransit "administrative appeal process through which individuals who are denied eligibility can obtain a review of the denial."[550] A transit agency "may require that an appeal be filed within 60 days of the denial of an individual's application."[551] A transit agency need not "provide paratransit service to the individual pending the determination on appeal."[552] However, if an agency has not made a decision within thirty days of the completion of the appeal process, the agency must "provide paratransit service from that time until and unless a decision to deny the appeal is issued."[553] The FTA "encourages transit agencies to hold the appeal hearing promptly (i.e., within 30 days of the initial request)."[554]

The FTA Circular provides guidance on appeal rights, appeal requests, and the right to be heard in person;[555] separation of functions, "meaning that, to the extent practicable," the individuals who decide appeals are not the persons who were involved with an applicant's initial determination of eligibility;[556] and timely decisions on appeals.[557] The Circular also makes suggestions regarding appeals practices and optional internal review practices.[558]

I. Claims Alleging that a Transit Agency's Paratransit Service Violated the ADA

Of forty transit agencies responding to the survey that provide paratransit service, nine agencies had claims or cases in the past five years alleging that

[541] *Id.* Ch. 9.2.1, p. 9-3 (discussing 49 C.F.R. §§ 37.167(g) and 37.123(e)(2)).

[542] *Id*. Ch. 9.2.1, p. 9-5 (discussing 49 C.F.R. § 37.123(e)(3)).

[543] *Id*. Ch. 9.2.1, p. 9-5 (quoting 49 C.F.R. § 37.123, app. D).

[544] *Id*. Ch. 9.2.1, p. 9-6.

[545] *See* Appendix C, Transit Agencies' Responses to Question 14(a). Four agencies did not respond to the question.

[546] *See id*. Transit Agencies' Responses to Question 14(b). Six agencies did not respond to the question.

[547] *See id*. Transit Agencies' Responses to Question 14(c). Six agencies did not respond to the question.

[548] *See id*. Transit Agencies' Responses to Question 14(d)(1).

[549] *See id*. Transit Agencies' Responses to Question 14(d)(2).

[550] FTA Circular, Ch. 9.7, p. 9-19 (quoting 49 C.F.R. § 37.125(g)).

[551] *Id*. Ch. 9.7, p. 9-19 (quoting 49 C.F.R. § 37.125(g)(1)).

[552] *Id*. Ch. 9.7, p. 9-19 (quoting 49 C.F.R. § 37.125(g)(3)).

[553] *Id.*

[554] *Id*. Ch. 9.7.1, p. 9-20 (discussing 49 C.F.R. § 37.125(g)(1) and (2)).

[555] *Id*.

[556] *Id*. Ch. 9.7.2, p. 9-20 (discussing 49 C.F.R. § 37.125(g)(2)).

[557] *Id*. Ch. 9.7.3, pp. 9-20–9-21 (discussing 49 C.F.R. § 37.125(g)(3)).

[558] *Id*. Ch. 9.7.4, p. 9-21.

their agency's paratransit service violated the ADA.[559] Nevertheless, as discussed in the following subparts, since the enactment of the ADA, other transit agencies have had cases in which the courts have had to rule on whether an agency's paratransit service violated the ADA.

1. Accommodation of an Individual Rider's Needs

In *Boose v. Tri-County Metro. Transp. Dist. of Or.*,[560] TriMet had approved the plaintiff's application to its LIFT Paratransit Program (LIFT). Because Boose experienced less dizziness and nausea in sedans and taxis, the plaintiff requested that LIFT accommodate her disability by scheduling rides only in sedans or taxis rather than in LIFT buses.[561]

The issue on appeal was whether LIFT had to accommodate Boose pursuant to a Justice Department regulation that required "public entities to 'make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.'"[562] The court held that only the Secretary of Transportation may make rules that determine the level of services that are required for paratransit;[563] therefore, the Justice Department's "reasonable modification" regulation did not apply.[564] The court, rejecting the plaintiff's argument that 49 C.F.R. § 37.21(c) incorporated the DOT regulations "by reference,"[565] held that the plaintiff failed to demonstrate a prima facie case of discrimination under the ADA or the Rehabilitation Act.[566]

In *Melton v Dallas Area Rapid Transit*,[567] the plaintiffs argued that DART's failure to modify its paratransit plan violated Title II of the ADA and Section 504 of the Rehabilitation Act.[568] DART's paratransit service previously had picked up Jason Melton in the alley directly behind his house. DART's paratransit plan, which FTA approved, provided for curb-to-curb, shared-ride service for people with disabilities.[569] The plaintiffs sought to compel DART to make a reasonable modification to its paratransit services to require alley pick-up for Jason. The Meltons, who appealed the district court's grant of a summary judgment to DART, argued that the district court should have applied a "'meaningful access' standard to evaluate the Meltons' claims of denial of access."[570]

First, because the Meltons failed to demonstrate that DART discriminated against Jason on the basis of his disability, the Fifth Circuit did not decide whether a meaningful access standard should be applied.[571]

Second, the appeals court held that the ADA does not require public transit agencies providing approved paratransit services to the public to accommodate the individual needs of individuals with disabilities. As long as the FTA approves a transit agency's plan for paratransit service, and the agency provides service in accordance with the approved plan, the transit agency is not discriminating under the ADA when it refuses to modify its plan to accommodate the needs of individual riders with a disability.

2. Alleged Systemwide Pattern of Discrimination

In 2015, in *Martin v. Metropolitan Atlanta Rapid Transit*,[572] the plaintiffs alleged that the defendants had engaged in a systemwide pattern and practice of discrimination against people with disabilities. In 2002, the court granted a preliminary injunction that required the Metropolitan Atlanta Rapid Transit (MARTA) to take a variety of actions to make its services comply with the ADA and the Rehabilitation Act. Regarding paratransit service, the court required MARTA, inter alia, to "make every effort to achieve and maintain an on-time performance rate of 100 percent" and to "provide a sufficient number of prepared Paratransit vehicles and operators so that all eligible persons requesting Paratransit services can receive it on a 'next day' basis."[573]

However, in 2015, the court ruled that the plaintiffs had made a clear case that MARTA was noncompliant by presenting "sufficient evidence that MARTA Paratransit's on-time performance rate has actually decreased since 2002…."[574] Although

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[559] *See* Appendix C, Transit Agencies' Responses to Question 15.

[560] 587 F.3d 997 (9th Cir. 2009).

[561] *Id*. at 999.

[562] *Id*. at 1000 (quoting 28 C.F.R. § 35.130(b)(7)).

[563] *Id*. at 1002.

[564] *Id*. (citation omitted).

[565] *Id*. at 1004-05.

[566] *Id*. at 1006.

[567] 391 F.3d 669 (5th Cir. 2004), *reh'g. en banc denied*, 130 Fed. App'x. 705 (5th Cir. 2005), *cert. denied*, 544 U.S. 1034, 125 S. Ct. 2273, 161 L. Ed. 2d 1061 (2005).

[568] *Id.* at 671.

[569] *Id*. at 670.

[570] *Id*. at 672.

[571] *Id*.

[572] No. 1:01-CV-3255-TWT, 2015 U.S. Dist. LEXIS 154298, at *1 (N.D. Ga. Nov. 16, 2015).

[573] *Id*. at *5.

[574] *Id*. at *6.

> MARTA may have increased its number of Paratransit vehicles and operators, this increase [was] not sufficient to demonstrate that the Defendants are complying with this Court's Order that MARTA provide a sufficient number of Paratransit vehicles and operators so that all eligible persons requesting the Paratransit service can receive it on a "next day" basis.[575]

Even if MARTA had provided accommodations to paratransit riders that are not required by the ADA, the accommodations did not "excuse MARTA paratransit's declining on-time performance rate."[576] The court ordered the defendants to show cause why they should not be held in contempt.

In *Anderson v. Rochester-Genesee Regional Transportation Authority,*[577] the plaintiffs alleged that a substantial number of eligible riders who called the defendant Rochester-Genesee Regional Transportation Authority (RGRTA) to schedule rides one or more days in advance were not accommodated because of the Authority's lack of capacity. Through a subsidiary, the RGRTA operated a fixed route system of bus lines in the Rochester, New York area.[578] RGRTA used a second subsidiary, defendant Lift Line, Inc. (Lift Line), to operate a complementary paratransit system for individuals with disabilities.[579]

The plaintiffs selected a period at random to collect data to support their claims. During the sample period, Lift Line scheduled 94.4% of requests for rides, but the scheduling rate of rides declined when there was less advance notice.[580] The plaintiffs alleged that the defendants failed to provide next-day service to eligible persons in violation of 42 U.S.C. § 12143(a)(2) and 49 C.F.R. § 37.131(b); required riders to call a second time to confirm ride availability; maintained a waiting list for paratransit service in violation of 49 C.F.R. § 37.131(f)(2); engaged in an "operational pattern or practice" that significantly limited the availability of paratransit service in violation of 49 C.F.R. § 37.131(f)(3); and violated 42 U.S.C. § 12143(e)(4) by failing to provide paratransit service in accordance with the plan that the defendants submitted to the Secretary of Transportation.[581]

The court noted that,

> pursuant to the Act, see 42 U.S.C. § 12143(b) and (c), the Secretary of Transportation has issued regulations prescribing minimum service criteria for paratransit service. *See* 49 C.F.R. § 37.121 *et seq*. Two of the Secretary's implementing regulations are of particular relevance here. They are in some tension with each other because one seemingly requires next-day service for every user every time without fail, while the other contemplates a lesser level of service so long as the failures are not substantial in number.[582]

That is, one regulation requires paratransit providers to "'schedule and provide paratransit service to *any* ADA paratransit eligible person at any requested time on a particular day in response to a request for service made the previous day….'"[583] The regulation seems to require providers to meet 100% of all next-day ride requests. The other regulation, by prohibiting only the denial of "substantial numbers" of rides, seems to "contemplate some permissible number of ride denials."[584]

The Second Circuit held that the text of the regulations did not support the district court's opinion that the regulations require "unfailing service."[585] For the Second Circuit, "§ 37.131(b) requires the formulation and implementation of a plan to meet 100% of the demand for next-day ride requests by eligible riders, while § 37.131(f) grants limited leeway for occasional failures of such well-laid plans to meet demand."[586] A provider must "rethink its plan and implement changes whenever a pattern of noncompliance develops."[587] Under § 37.131(f), although a well-conceived and funded paratransit service occasionally may have "trip denials," "'substantial numbers of trip denials can establish that a paratransit service—no matter how well-designed, funded, or implemented in theory—is inadequate as a matter of actual operation.'"[588] The court held that, although the FTA expects paratransit providers to meet their full next-day ride demand, "§ 37.131(f) permits an insubstantial number of trip denials, so long as those denials are unplanned and do not result from the provider's operational decisions."[589] Nevertheless, a service provider's goal must be to achieve a "100% service level."[590]

The issue was whether the defendants violated 42 U.S.C. § 12143(a)(2) and 49 C.F.R. § 37.131(b) by

[575] *Id*. at *7-8.

[576] *Id*. at *8.

[577] 337 F.3d 201 (2d Cir. 2003).

[578] *Id*. at 202 (citation omitted)

[579] *Id*.

[580] *Id*. at 203-04.

[581] *Id*. at 204. In an earlier decision, the district court denied the defendants' motion and granted a summary judgment in favor of the plaintiffs, except for their waiting list claim on which they did not seek judgment as a matter of law and on which the court ordered the parties to conduct discovery. *Id*. at 204-05.

[582] *Id.* at 207.

[583] *Id*. at 208 (quoting 49 C.F.R. § 37.131(b)) (emphasis in original).

[584] *Id*. (citing 49 C.F.R. § 37.131(f)(i)).

[585] *Id*.

[586] *Id*.

[587] *Id*.

[588] *Id*. at 210 (citation omitted).

[589] *Id*.

[590] *Id*. at 212.

failing to provide next-day paratransit rides to all eligible individuals who requested rides. Based on the record, the court ruled that the defendants "declined to institute reforms that would allow them to meet 100% of the eligible next-day ride demand" and "failed to comply with the baseline requirement of § 37.131(b)'s next-day service provision."[591] The court held that the defendants violated 49 C.F.R. § 37.131(f)(3) "by engaging in an 'operational pattern or practice' that significantly limited the availability of paratransit service."[592]

However, because § 37.131(f) provides no guidance on how many trip denials are "substantial," the court ruled that a factual case-by-case determination was required.[593] For such a determination, the "[r]elevant factors … include the time period over which the denials occurred, changes implemented by the provider to address them, the trend and persistence of denials, foreseeability of the denials, causes of the denials, and the reasonableness of the provider's demand estimates and plans."[594]

Based on a review of Lift Line's success rate during the sample period, and on how the success rate declined with the number of days of advance notice, the court held that "the defendants violated § 37.131(f) by maintaining a pattern or practice that significantly limit[ed] the availability of paratransit service for eligible riders."[595]

3. Comparable Service

In *Fell v. Spokane Transit Authority*,[596] the Spokane Transit Authority (STA) adopted a new plan for paratransit service that complied with the ADA. A class action sought an injunction to prohibit the implementation of the new plan on the basis that it discriminated against individuals with disabilities in violation of a state law, RCW 49.60.215. The trial court granted the plaintiffs a summary judgment based on the state law against discrimination in public accommodations[597] and enjoined the STA's paratransit plan because the STA "failed to show its prior service was 'no longer reasonably possible.'"[598]

In reversing, the Supreme Court of Washington, first, held that, because a "'reasonably possible' test for a case of discrimination in public accommodations is without precedent under Washington law,"[599] the trial court applied a "flawed analytical framework…."[600] The court contrasted Washington state's "vague standards" with the "specific" federal standards.[601] Important for the court was that "[t]he ADA addresses discrimination in public transportation by requiring public transit agencies operating fixed route systems to provide paratransit and other special service transportation to disabled persons on a comparable level to the service provided for nondisabled users."[602]

Moreover, "[t]he ADA provides that local transit entities must provide paratransit services to the extent that providing such services would not impose an undue financial burden on such entities" or seek a waiver.[603]

Second, the Washington Supreme Court held that the trial court's "reasonably possible" test was "unworkable."[604] Lacking a comparability test, the trial court's opinion stood "for the proposition that an agency violates RCW 49.60 if it fails to provide services to disabled people in excess of the services it provides to the nondisabled"[605] and that, "[a]bsent the touchstone of comparable treatment, there is no limiting principle to the reach of RCW 49.60.215."[606]

Third, the court ruled that, because Washington's statute does not include the term paratransit or the concept of providing paratransit service for individuals with disabilities, it was not clear how the Washington statute could provide a basis for a discrimination lawsuit when the STA had complied with the ADA.[607]

4. Inability of Individuals with Disabilities to Use Fixed Route Service

In *Storman v. Sacramento Regional Transit District*,[608] the plaintiff challenged the district court's dismissal of his case for failure to state a claim. Storman alleged that on some occasions, because of his disabilities, he could not walk more than one block or walk the mile between one of his treating physicians' offices and the nearest fixed-route bus stop and, thus, had to forgo "trips that he used to make when he was deemed eligible for paratransit

[591] *Id*. at 213.

[592] *Id*. (citation omitted).

[593] *Id*. at 214.

[594] *Id*. (citation omitted) (footnote omitted).

[595] *Id*. at 215.

[596] 128 Wash. 2d 618, 911 P.2d 1319 (1996).

[597] *Id*. at 624, 911 P.2d at 1322.

[598] *Id*. at 624-25, 911 P.2d at 1322 (footnote omitted).

[599] *Id*. at 626, 911 P.2d at 1323.

[600] *Id*. at 626, 911 P.2d at 1322.

[601] *Id*. at 628, 911 P.2d at 1324 (citation omitted) (footnote omitted).

[602] *Id*. (citing 42 U.S.C.A. § 12143(a) (1995)) (emphasis omitted) (footnote omitted).

[603] *Id*. at 629, 911 P.2d at 1324.

[604] *Id*. at 630, 911 P.2d at 1325.

[605] *Id*. at 631, 911 P.2d at 1325.

[606] *Id*.

[607] *Id*. at 644, 911 P.2d at 1332.

[608] 70 Fed. App'x. 439 (9th Cir. 2003).

services."[609] The Ninth Circuit stated that the ADA regulations required the transit district

> to provide such services to Storman if he has "a specific impairment-related condition which prevents [him] from traveling to a boarding location or from a disembarking location" … and … that "a case of 'prevented travel' can be made not only where travel is literally impossible … but also where the difficulties are so substantial that a reasonable person with the impairment-related condition in question would be deterred from making the trip."[610]

The court held that Storman's allegations were "sufficient to state a claim that a reasonable person with his disabilities would be deterred from riding a fixed-route bus for at least some trips."[611]

5. Eligibility for Paratransit Service Because of Inaccessible Key Stations

In *Walter v. Southeastern Pennsylvania Transportation Authority*,[612] the plaintiffs received transportation services via CCT Connect, a paratransit service provided by the defendant Southeastern Pennsylvania Transportation Authority (SEPTA). In July 2004, SEPTA changed its eligibility criteria for paratransit service. As a result, the plaintiffs became eligible for paratransit service only during inclement weather.[613] However, to take a bus to their destinations in Center City, Philadelphia, the plaintiffs had to use and transfer among several different bus routes.[614]

A federal district court in Pennsylvania ruled that, based on the statutory language and its interpretation by the U.S. DOT, the requirement to provide paratransit service applies to public transit entities that operate bus and/or rail systems.[615]

> The DOT's Category 2 definition intentionally broadens the class of persons eligible for paratransit.… While not stated explicitly, it appears that in crafting the paratransit regulatory provisions, the DOT took a statute which was drafted with bus systems in mind and applied it to rail systems by using the "key stations" language found in other parts of the ADA.[616]

The court held that DOT's interpretation of the statutory Category 2 paratransit eligibility was reasonable.[617] The most reasonable construction of the ADA was that "an individual is eligible for paratransit if she cannot use a rail system because key stations necessary for her trip have not been made accessible."[618] Thus, "if an individual wishes to take trips that require her to use key stations which have not been made accessible, she is eligible for paratransit under 49 C.F.R. § 37.123(e)(2)(iii)(B)."[619]

6. Failure to Show Transit Agency's Noncompliance with an Approved Paratransit Plan

In *Anderson v. Rochester-Genesee Regional Transportation*,[620] the plaintiffs alleged that the defendants failed to comply with the paratransit plan that they submitted to the Secretary of Transportation. The Second Circuit, reversing the district court's grant of a summary judgment in favor of the plaintiffs, stated: "The DOT approved the defendants' 1995 plan update even though it included information about trip denial rates that did not materially differ from those now at issue in this litigation."[621] The court ruled that the plaintiffs failed to identify a specific action or procedure in the defendants' submissions to the DOT that the defendants failed to implement. Moreover, the defendants' "affirmations of ADA compliance constituted legal conclusions with which the DOT at one time agreed."[622]

7. Lack of Proper Training and Supervision of Transit Employees

In *Hulihan v. Regional Transportation Commission of Southern Nevada*,[623] a paratransit case, the plaintiff alleged that the Regional Transportation Commission of Southern Nevada (RTC) violated the ADA and Section 504 of the Rehabilitation Act, as well as state law, for failing to train, supervise, and manage its employees.[624] First, a federal district court in Nevada rejected the defendants' argument that the plaintiff lacked standing to seek declaratory and injunctive relief under Title II of the ADA and Section 504 of the Rehabilitation Act.[625] Second, however, the plaintiff's evidence of a "few 'frustrating, but isolated instances' of inadequate service" or improper treatment by a few individual operators

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609 *Id*. at 439.

610 *Id*. (quoting 49 C.F.R. § 37.123(e)(3)).

611 *Id*.

612 434 F. Supp. 2d 346 (E.D. Pa. 2006).

613 *Id*. at 348.

614 *Id*. at 349.

615 *Id*. at 354.

616 *Id*. at 356 (citations omitted).

617 *Id*. at 356-57.

618 *Id*. at 358 (citation omitted).

619 *Id*. at 359 (footnote omitted).

620 337 F.3d 201 (2d Cir. 2003), *on remand, complaint dismissed*, No. 00-CV-6275L, 2004 U.S. Dist. LEXIS 17051 (W.D.N.Y., Aug. 9, 2004).

621 *Id.* at 216.

622 *Id*.

623 No. 2:09-cv-01096-ECR-RJJ, 2012 U.S. Dist. LEXIS 79055 (D. Nev. June 7, 2012), *certificate of appealability denied as moot,* No. 2:09-cv-01096-ECR-RJJ, 2012 U.S. Dist. LEXIS 107198 (D. Nev., Aug. 1, 2012), *aff'd by, motion granted by, motion denied by*, *as moot*, 582 Fed. App'x. 727 (9th Cir. 2014).

624 *Id.* at *3-4.

625 *Id*. at *11.

failed to prove a violation of the ADA or section 504.[626] Third, the court rejected the plaintiff's claim for injunctive relief, because the evidence was insufficient to show that the plaintiff faced "'an immediate threat of substantial injury.'"[627]

8. Restriction on the Use of Mobility Devices

In *Keirnan v. Utah Transit Authority,*[628] the plaintiff, a paratransit rider, did not have a common wheelchair but used one weighing over 600 pounds. The plaintiff alleged that the Utah Transit Authority (UTA) was violating Title II of the ADA because it had restricted the size of mobility devices. A federal district court in Utah denied the paratransit rider's motion for a preliminary injunction. On appeal, the Tenth Circuit affirmed the district court's decision, holding that the UTA did not violate the ADA when it changed its policy regarding wheelchairs.[629] The court relied on DOT Interpretative Guidance that stated that "devices used by individuals with disabilities that do not fit this [common wheelchair] envelope (e.g., many 'gurneys') do not have to be carried."[630]

However, after the *Keirnan* case, in September 2011, the DOT gave notice in the *Federal Register* of a rule change that responded to the *Keirnan* decision. As the DOT notice explains, under the department's then current ADA rule, transportation providers were required to permit wheelchairs on their vehicles that met the definition of a "common wheelchair," i.e., a wheelchair having a weight of not more than 600 pounds, including the occupant, and having a dimension of 30 × 48 inches. The DOT explained that the definition of a common wheelchair was originally a "design concept" that applied to what a lift should be designed to accommodate.[631] However, the definition became an "operational concept" that resulted in some transit operators excluding wheelchairs that did not meet the criteria for weight and dimension, such as happened in *Keirnan*, even when a vehicle could accommodate a passenger's non-conforming wheelchair.[632]

The DOT final rule in 2011 deleted "the operational role of the 'common wheelchair' design standard and delete[d] the sentence concerning 'common wheelchair' from the part 37 definition of wheelchair, as well as from section 37.165(b) and the Appendix D explanatory text."[633] Under the final rule, when a lift is able to accommodate the size and weight of an individual's wheelchair and its occupant, and there is space on the vehicle for the wheelchair, a transportation provider must transport the wheelchair and its user.[634] Nevertheless, legitimate safety requirements may permit a transportation provider not to carry a wheelchair and its user on a lift or in a vehicle.[635]

9. Suspension of Paratransit Service

In *Sway v. Spokane Paratransit*,[636] the plaintiff alleged that the defendants violated Title II of the ADA, inter alia, when they imposed a 20-day suspension of her access to paratransit services based on a pattern of no-shows, on their administering of the appeal process relating to her suspension, and when they provided "a number of rides to the plaintiff that allegedly were problematic on a variety of grounds."[637] In denying the defendant's motion to dismiss, the court ruled that the plaintiff's third amended complaint stated a plausible claim. The paratransit services the plaintiff received were "not comparable to the level of service provided to individuals without disabilities and … the [Spokane Transit Authority] did not appropriately determine the amount of access Plaintiff would have to paratransit services."[638]

10. Transit Agency's Reduction in Paratransit Service

In *Abrahams v. MTA Long Island Bus*,[639] the defendants' paratransit service, Able-Ride, provided door-to-door service to individuals with disabilities to areas outside the defendants' service area,[640] thus exceeding the level of service the ADA requires. However, because of budget shortfalls, service reductions became necessary. Although the proposed changes did not require a public hearing, the MTA distributed notices to the public of the proposed changes to the MTA's level of paratransit service.[641]

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[626] *Id*. at *12-13 (citation omitted).

[627] *Id*. at *15 (citation omitted).

[628] 339 F.3d 1217 (10th Cir. 2003).

[629] *Id*. at 1218-19.

[630] *Id*. at 1222 (quoting 49 C.F.R. pt. 37, app. D (2003)) (internal citation omitted).

[631] U.S. DOT, Final Rule, Transportation for Individuals with Disabilities at Intercity, Commuter, and High Speed Passenger Railroad Station Platforms; Miscellaneous Amendments, 76 Fed. Reg. 57,924, 57,929 (Sept. 19, 2011).

[632] *Id*.

[633] *Id*.

[634] *Id*. at 57,929-30.

[635] *Id*. at 57,930.

[636] No. 2:16-CV-310-RMP, 2017 U.S. Dist. LEXIS 206716 (E.D. Wash. Dec. 15, 2017).

[637] *Id*. at *8.

[638] *Id*.

[639] 644 F.3d 110 (2d Cir. 2011).

[640] *Id*. at 113.

[641] *Id*.

The plaintiff alleged that the defendants implemented substantial reductions in paratransit service without public participation, which the plaintiffs argued that the ADA regulations required, and failed to make reasonable modifications to existing services to "ameliorate" the effect of service reductions.[642] The plaintiffs' argument was that a DOT regulation required "public entities to provide an 'ongoing mechanism for the participation of individuals with disabilities in the continued development and assessment of services to persons with disabilities.'"[643]

First, the Second Circuit held that the plaintiffs did not have a private right of action to enforce the regulation at issue. Congress intended to confer a private right of action to enforce 42 U.S.C. § 12143, including the public participation requirements in § 12143(c)(6). However, the regulation promulgated pursuant to § 12143 imposed obligations not found in the statute. After the approval of a public entity's initial paratransit plan, § 12143 does not require any other ongoing form of public participation.[644] The requirement relied on by the plaintiffs in 49 C.F.R. § 37.137(c) was broader than what is required by § 12143 of the ADA and, therefore, was not enforceable in a private action based on § 12143.[645]

Second, because paratransit services are covered by Part B of Title II, the court held that transit agencies providing such services are not subject to the regulation requiring "reasonable modifications" that the Attorney General issued pursuant to Part A of Title II.[646] The reason is that § 12134 of the ADA states that the DOJ regulations "shall not include any matter within the scope of the authority of the Secretary of Transportation."[647]

IX. DEMAND RESPONSIVE SERVICE UNDER TITLE II OF THE ADA

A. Section 12144 of the ADA

Section 12144 of the ADA states that a public entity discriminates against individuals with disabilities when the public entity operates a demand responsive system and purchases or leases

> a new vehicle for use on such system … that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service such system provides to individuals without disabilities.[648]

A public entity providing transportation service may seek temporary relief from § 12144, but it must demonstrate, for example, that required lifts were unavailable from any qualified manufacturer or for another reason permitted by the statute.[649]

B. Regulations Applicable to Demand Responsive Service

DOT regulations apply to demand responsive transportation systems.[650] The term demand responsive system applies to "designated public transportation service by public entities and the provision of transportation service by private entities, including but not limited to specified public transportation service, which is not a fixed route system."[651] Demand responsive services include dial-a-ride, taxi subsidy, vanpool, and route deviation services.[652] For demand responsive service, riders must request service, such as by telephone.[653]

When public entities that operate demand responsive systems purchase or lease new buses or other new vehicles, they must ensure that the vehicles are readily accessible to and usable by individuals with disabilities, including those who use wheelchairs.[654] However, the regulations allow public entities to purchase new vehicles that are not readily accessible when a system, if "viewed in its entirety, provides a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service it provides to individuals without disabilities…."[655] The FTA states that "[e]quivalent service is an underlying measure of nondiscrimination for demand responsive service with inaccessible vehicles in the fleet."[656]

C. Interpretation of Equivalent Service in the Context of Demand Responsive Service

The FTA Circular discusses how transit agencies may determine equivalency with service

[642] *Id*. at 112.

[643] *Id*. at 113-14 (quoting 49 C.F.R. § 37.137(c)).

[644] *Id*. at 119.

[645] *Id*. at 120-21 (footnote omitted).

[646] *Id*. at 120 (citations omitted).

[647] *Id*. at 121 (citation omitted).

[648] 42 U.S.C. § 12144 (2018). The requirement applies to a solicitation for a vehicle made after the 30th day following the effective date of the section on July 26, 1990.

[649] *Id*. §§ 12145(a)(1)-(4).

[650] FTA Circular, Ch. 7.1 (discussing 49 C.F.R. § 37.3).

[651] *Id*. Ch. 7.1, p. 7-1 (quoting 49 C.F.R. § 37.3) (footnote omitted).

[652] *Id*. Ch. 7.5, p. 7-7.

[653] *Id*. Ch. 7.2, p. 7-1 (discussing 49 C.F.R. § 37.3, app. D).

[654] *Id*. Ch. 7.3, p. 7.2 (discussing 49 C.F.R. § 37.77(a)).

[655] *Id*. Ch. 7.3, p. 7-2 (quoting 49 C.F.R. § 37.77(b)).

[656] *Id*. Ch. 7.4, p. 7-3 (discussing 49 C.F.R. § 37.77(c)).

requirements.[657] The term equivalent service in the demand responsive context means that the service made "available to individuals with disabilities, including individuals who use wheelchairs, is provided in the most integrated setting appropriate to the needs of the individual and is equivalent to the service provided other individuals…."[658] The term equivalent service means that when all aspects of a transportation system are analyzed in their entirely, equal opportunities exist for each individual with a disability to use the transportation system.[659] Although a transit agency's complementary paratransit service is measured against its fixed route service, the comparison for demand responsive service is between riders without disabilities and riders with disabilities for whom the level of service must be equivalent when viewed in its entirety.[660]

Service characteristics for determining service equivalency include response time, fares, geographic area of service, hours and days of service, restrictions or priorities based on trip purpose, availability of information and reservations capability, and any constraints on capacity or service availability.[661] For example, the service characteristic for fares is that "for a given trip, the fare is the same for all riders."[662]

D. Transit Agencies' Responses to the Survey

Thirty-one transit agencies responding to the survey reported that they provide a demand responsive system subject to the ADA; thirteen agencies do not.[663] Of the thirty-one agencies providing demand responsive service, three agencies had claims or cases in the past five years alleging that their agency violated the ADA;[664] however, twenty-eight agencies reported that they had no claims or cases in the past five years.[665]

X. ADMINISTRATIVE AND JUDICIAL ENFORCEMENT OF TITLE II OF THE ADA

A. FTA Oversight, Complaints, and Monitoring

Recipients of federal financial assistance provided by the FTA are subject to administrative enforcement.[666] Public entities are subject to enforcement by the Department of Justice, regardless of whether they receive federal financial assistance.[667] Private entities also are subject to regulations issued by the Department of Justice that implement Title III of the ADA, again regardless of whether they receive federal financial assistance.[668]

The FTA is responsible for ensuring that grantees of FTA's financial assistance are not discriminating against individuals with disabilities.[669] If there is a violation that is not resolved voluntarily, the DOT or the FTA may suspend or terminate FTA financial assistance or refer the matter to the Justice Department.[670]

When it becomes necessary to suspend federal financial assistance, under 49 C.F.R. § 27.125(b), the FTA determines whether compliance may be obtained voluntarily; it advises the grantee of its failure to comply; and the Secretary of Transportation, thereafter, makes "an express finding on the record, after opportunity for hearing, that the grantee has failed to comply."[671]

There is also a process that permits an individual or individuals to file a written complaint with the FTA not later than 180 days from the date of the alleged discrimination unless an extension is granted.[672]

B. Triennial Reviews

In addition to annual reviews,[673] FTA conducts triennial reviews of recipients of federal funding. 49 U.S.C. § 5307(f) provides:

> (2) Triennial review. At least once every 3 years, the Secretary shall review and evaluate completely the performance of a recipient in carrying out the recipient's program, specifically referring to compliance with statutory and administrative requirements and the extent to which actual program activities are consistent with the activities proposed under subsection (c) of this section and the planning

[657] *Id*. Ch. 7.6.1, pp. 7-13–7-13 and tab. 7-2.

[658] *Id*. Ch. 7.4, p. 7-3 (quoting 49 C.F.R. § 37.77(c)).

[659] *Id*. Ch. 7.4.3, p. 7-5 (discussing 49 C.F.R. § 37.77, app. D).

[660] *Id*. Ch. 7.4.2, p. 7-4 and Ch. 7.4.3, p. 7-5 (discussing 49 C.F.R. § 37.77(c)).

[661] *Id*. Ch. 7.4.2, p. 7-4 (discussing 49 C.F.R. § 37.77(c)).

[662] *Id*.

[663] *See* Appendix C, Summary of Transit Agencies' Responses to Question 16.

[664] *See id*. Summary of Transit Agencies' Responses to Question 17.

[665] *See id*.

[666] FTA Circular, Ch. 12.1, p. 12.2 (discussing 49 C.F.R. § 37.11(a)).

[667] *Id*. Ch. 12.2, pp. 12-1–12-2 (discussing 49 C.F.R. § 37.11(b)).

[668] *Id*. Ch. 12.2, p. 12-1 (discussing 49 C.F.R. § 37.11(c)).

[669] *Id*. Ch. 12.2, p. 12-1.

[670] *Id*.

[671] *Id*. Ch.12.4, p. 12-3.

[672] *Id*. Ch. 12.6, pp. 12-4–12-5 (discussing 49 C.F.R. § 27.123(b)).

[673] 49 U.S.C. § 5307(f)(1) (2018).

> process required under sections 5303, 5304, and 5305 of this title [49 U.S.C.S. §§ 5303, 5304, and 5305]. To the extent practicable, the Secretary shall coordinate such reviews with any related State or local reviews.
>
> (3) Actions resulting from review, audit, or evaluation. The Secretary may take appropriate action consistent with a review, audit, and evaluation under this subsection, including making an appropriate adjustment in the amount of a grant or withdrawing the grant.[674]

Forty-five agencies responding to the survey reported that they had a triennial review in the past five years.[675] Thirteen agencies stated that they had an enhanced review in the past five years.[676] Although nineteen agencies reported that a triennial review or an enhanced review resulted in adverse findings against their agency, there were no adverse findings against twenty-six agencies.[677] Some transit agencies with adverse findings described the findings and how they resolved them.[678]

C. Private Right of Action Under Title II of the ADA

Section 12133 of Title II incorporates the remedies, procedures, and rights in Section 505 of the Rehabilitation Act, which, in turn, are the same remedies, procedures, and rights provided in Title VI of the Civil Rights Act.[679] Because it has been held that there is an implied right of action in Title VI, Title II of the ADA likewise is enforceable by a private right of action by individuals with disabilities who allege discrimination that violates Title II.[680]

The fact that there is a private right of action under Title II, however, does not mean that all alleged violations of the regulations may serve as a basis for a private action. For example, in *Donnelly v. Intercity Transit*,[681] the court held that the plaintiff did not have a private right of action based on the regulation that was in dispute. The plaintiff, who had cerebral palsy and was wheelchair-bound, was a qualified individual with a disability under the ADA. The plaintiff, who had used the defendant's paratransit services for many years, claimed that he was injured while a passenger in a Dial-a-Lift van that the defendant Intercity Transit owned and operated.

Although Donnelly alleged that the defendant violated six federal regulations,[682] the court found that the issue was whether Donnelly could enforce 49 C.F.R. § 38.23(d)(7) by a private action.[683] Even though the DOT regulation required the defendant to provide a shoulder harness for wheelchair users, the court stated that the requirement had "nothing to do with whether the Defendant provide[d] an appropriate level of service as defined by the 42 U.S.C. § 12143(a)…."[684] The court held that, because the regulation imposed an obligation that was "nowhere to be found in the plain language of 42 U.S.C. § 12132(a)," the plaintiff could not enforce § 38.23(d)(7) by a private action under § 12132(a).[685]

In *Ability Center of Greater Toledo v. City of Sandusky*,[686] the issues were whether the city failed to make proper accommodations for individuals with disabilities when the city renovated its sidewalks and street curbs and whether it was liable for not having a transition plan to implement ADA requirements.[687] Regarding the first issue, the Sixth Circuit held that 28 C.F.R. § 35.151, which applies to new construction and alterations, is enforceable by a private action because the regulation "effectuates a mandate of Title II."[688] Title II "demands" that public entities do more than simply refrain from intentionally discriminating against individuals with disabilities.[689] Title II "contemplates" that accommodations include the removal of "architectural barriers that impede disabled individuals from securing the benefits of public services."[690] Therefore, to assure than an individual is not denied the benefits of a public service, the city had to remove an architectural barrier of its own creation.[691]

As for the second issue, the court rejected the plaintiffs' claim that 28 C.F.R. § 35.150(d), applicable to transition plans, is enforceable by a private

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[674] *Id*. § 5307(f)(2) and (3). *See also* FTA Circular, Ch. 12.2, pp. 12-1–12-2 (discussing 49 C.F.R. § 37.11).

[675] *See* Appendix C, Transit Agencies' Responses to Question 28(a). Two agencies said they had not.

[676] *See id*. Transit Agencies' Responses to Question 28(b). Enhanced reviews are implemented for triennial review areas that have the highest risk of non-compliance. https://www.transit.dot.gov/regulations-and-guidance/program-oversight/oversight-reviews.

[677] *See id*. Transit Agencies' Responses to Question 28(c). Two agencies did not respond to the question.

[678] *See id*. Transit Agencies' Responses to Question 28(d).

[679] 42 U.S.C. § 12133 (2018) and 29 U.S.C. § 794a(a)(2) (2018). *See* 42 U.S.C. § 2000d-2000d-7. (2018).

[680] King v. Sec'y Ind. Family & Soc. Servs. Admin, 2013 U.S. Dist. LEXIS 20746, at *10 (N.D. Ind. 2013). *See also* Barnes v. Gorman, 536 U.S. 181, 184-85, 122 S. Ct. 2097, 2100, 153 L. Ed. 2d 230 (2002).

[681] No. C12-5650 KLS, 2012 U.S. Dist. LEXIS 163597, (W.D. Wash. Nov. 15, 2012).

[682] *Id*. at *3-4.

[683] *Id*. at *13-14.

[684] *Id*. at *14.

[685] *Id*. at *15.

[686] 385 F.3d 901 (6th Cir. 2004).

[687] *Id*. at 902.

[688] *Id*. at 907.

[689] *Id*. at 910 (citation omitted).

[690] *Id*. at 907.

[691] *Id*. at 911.

action under Title II. Although the regulation procedurally encourages public entities to consider and plan ways to accommodate individuals with disabilities, "there is no indication that a public entity's failure to develop a transition plan harms disabled individuals, let alone in a way that Title II aims to prevent or redress."[692]

D. Stating a Claim Under Title II

For a plaintiff to state a "viable claim" for a violation of Title II, a plaintiff must prove

> (1) that he or she is a qualified individual with a disability;
>
> (2) that he or she was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and
>
> (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.[693]

The Tenth Circuit has identified two types of claims: (1) exclusion from or a denial of benefits and (2) discrimination,[694] both of which require proof that any exclusion from or denial of benefits or any discrimination was because of the plaintiff's disability.[695]

E. Standing

1. Requirements for Article III Standing Under the Constitution

In general, for article III standing under the U.S. Constitution, a plaintiff must establish that he or she

> (1) … suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by the relief requested.[696]

Furthermore, "[t]he 'injury in fact' requirement is satisfied differently depending on whether the plaintiff seeks prospective or retrospective relief."[697] When a plaintiff is seeking prospective relief,

> the plaintiff must be suffering a continuing injury or be under a real and immediate threat of being injured in the future.… Past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury.… The threatened injury must be "certainly impending" and not merely speculative.… A claimed injury that is contingent upon speculation or conjecture is beyond the bounds of a federal court's jurisdiction.[698]

When a plaintiff is seeking retrospective relief, if the plaintiff has suffered a past injury that is "concrete and particularized," the "injury in fact" requirement is satisfied.[699]

2. Whether "Tester" Standing Exists Under the ADA

In *Tandy v. City of Wichita*,[700] the question was whether there was "tester" standing to challenge alleged ADA violations. In *Tandy*, the plaintiff sued the city of Wichita that operates the Wichita Metropolitan Transit Authority (Wichita Transit) for alleged violations of Title II of the ADA and the Rehabilitation Act.[701]

The Topeka Independent Living Resource Center provides both direct and indirect advocacy services to individuals with disabilities in the community. The center had responded to complaints about the accessibility of Wichita Transit's fixed route bus system by holding a training session and advising attendees (i.e., testers) to attempt to ride Wichita Transit's fixed route buses and to document any problems.[702] The standing doctrine requires that a plaintiff have "a sufficient personal stake in a dispute to ensure the existence of a live case or controversy which renders judicial resolution appropriate;"[703] nevertheless, the court held that tester standing exists under Title II of the ADA,[704] as well as under the Rehabilitation Act.[705] Moreover, because several plaintiffs "established that they each suffered a past invasion of their

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[692] *Id*. at 914.

[693] J.V. *ex. rel.* C.V. v. Albuquerque Pub. Sch., 813 F.3d 1289, 1295 (10th Cir. 2016). In Anderson v. City of Blue Ash, 798 F.3d 338, 357 (6th Cir. 2015), the Sixth Circuit stated that for a prima facie case under Title II "a plaintiff must show that: (1) she has a disability; (2) she is otherwise qualified; and (3) she was being excluded from participation in, denied the benefits of, or subjected to discrimination under the program because of her disability."

[694] J.V. *ex. rel.* C.V., 813 F.3d at 1295 (citation omitted).

[695] *See also* Metro Treatment of Me., LP v. City of Bangor, No. 1:16-cv-00433-JAW, 2016 U.S. Dist. Lexis 157619, at *22-23 (D. Me. Nov. 15, 2016)) (stating that section 504 of the Rehabilitation Act "prohibits the same type of discrimination by a recipient of federal funds: 'No otherwise qualified individual with a disability in the United States … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.'") (quoting 29 U.S.C. § 794(a)).

[696] Tandy v. City of Wichita, 380 F.3d. 1277, 1283 (10th Cir. 2004) (citations omitted).

[697] *Id*. (citation omitted).

[698] *Id*. at 1283-84 (citations omitted).

[699] *Id*. at 1284.

[700] 380 F.3d 1277 (10th Cir. 2004).

[701] *Id*. at 1280.

[702] *Id*. at 1281.

[703] *Id*. at 1283.

[704] *Id*. at 1286.

[705] *Id*. at 1287.

statutory rights,"[706] they had standing to seek damages.

3. Non-Profit Corporations' Standing Under the ADA

In *Raver v. Capitol Area Transit*,[707] the plaintiffs included the Center for Independent Living of Central Pennsylvania (CILCP), a non-profit corporation whose clients have disabilities. One of the purposes of CILCP is to assure that individuals with disabilities have equal access to mass transportation facilities.[708] The court held that, although the CILCP is not a person with a disability, the non-profit corporation had standing to bring an action under the ADA on behalf of individuals with disabilities.[709]

4. Standing for Class Actions

As for standing in class actions, in *Disability Rights Council of Greater Washington v. Washington Metropolitan Area Transit Authority,*[710] the plaintiffs alleged that, because WMATA engaged in a variety of "'operational patterns or practices' that significantly limit the availability of paratransit services,"[711] WMATA failed to provide a level of paratransit service comparable to WMATA's fixed route service. A federal district court in the District of Columbia issued several key findings.

First, the court found that the "long-standing rule" is that after a "'class is properly certified, statutory and article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs.'"[712]

Second, to demonstrate that they had standing, the plaintiffs did not have to show that their claims were "legally meritorious."[713]

Third, the regulations implementing the ADA do not limit the "types of 'patterns or practices'"[714] about which the plaintiffs may complain, because the regulations broadly prohibit "'[a]ny operational pattern or practice that significantly limits the availability of service.'"[715] Indeed, the regulations only exclude "from the class of prohibited patterns a narrow set of 'operational problems … attributable to causes beyond the control of the entity.'"[716]

F. Class Actions Under the ADA Against Transit Agencies

1. Certification Under Rule 23, Federal Rules of Civil Procedure

Plaintiffs have brought class actions against transit agencies under the ADA, as well as the Rehabilitation Act. However, transit agencies responding to the survey reported that there were no class actions against their agencies in the past five years for alleged violations of Title II of the ADA.[717]

Rule 23 of the Federal Rules of Civil Procedure applies to the certification of class actions. Certification is permissible only when a class is so numerous that joinder of all members is impracticable; there are questions of law or fact that are common to the class; the claims or defenses of the representative parties are typical of the claims or defenses of the class; and the representative parties will fairly and adequately protect the interests of the class.[718] In addition, the Rules permit certification when "'the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.'"[719]

A class action in *Bacal v. Southeastern Pennsylvania Transportation Authority*[720] sought injunctive relief and compensatory damages for the plaintiffs. The plaintiffs claimed that SEPTA provided inadequate transit services to individuals with disabilities in violation of 42 U.S.C. § 12143(a) and 49 C.F.R. §§ 37.121-.155.[721] The plaintiffs alleged that the

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[706] *Id*. at 1289.

[707] 887 F. Supp. 96 (M.D. Pa. 1995) (cited in Liberty Resources v. Southeastern Pa. Trans. Auth., 155 F. Supp. 2d 242 (E.D. Pa. 2001) (stating that "Congress intended that standing under the ADA be limited only by the minimum constitutional constraints of Article III").

[708] *Raver*, 887 F. Supp. at 97.

[709] *Id*.

[710] 239 F.R.D. 9 (D. D.C. 2006), *motion denied by, motion granted by,* Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth., No. 04-498 (HHK/JMF), 2007 U.S. Dist. LEXIS 39605 (D. D.C., June 1, 2007).

[711] *Id.* at 13 (citation omitted).

[712] *Id*. at 15 (citation omitted).

[713] *Id*. at 17 (citation omitted).

[714] *Id*. at 18.

[715] *Id*. at 19 (quoting 49 C.F.R. § 37.131(f)(3)).

[716] *Id*. (citation omitted).

[717] *See* Appendix C, Summary of Transit Agencies' Reponses to Question 21.

[718] Anderson v. Rochester-Genesee Reg'l. Transp. Auth., 206 F.R.D. 56, 70 (W.D.N.Y. 2001), *supplemental opinion,* 205 F. Supp. 2d 106 (W.D.N.Y. 2002), *aff'd in part, rev'd in part*, *remanded on other grounds* 337 F.3d 201 (2d Cir. 2003) (affirming summary judgment on plaintiffs' claims for injunctive relief but reversing summary judgment on claim for noncompliance with the plan submitted to the Secretary of Transportation).

[719] *Id*. at 70-71 (quoting Fed. R. Civ. P. 23(b)(2)).

[720] No. 94-6497, 1995 U.S. Dist. LEXIS 6609 (E.D. Pa. May 15, 1995).

[721] *Id*. at *1-2.

defendants' paratransit service discriminated against persons with disabilities, inter alia, because requests made a day in advance routinely were not met; requested rides were not scheduled at the requested times; trips were routinely excessively long; and the paratransit fare system was not comparable to the fare system for fixed route riders.[722]

At issue was whether the plaintiffs' claim met the prerequisites in Federal Rule of Civil Procedure 23(a) for a class action.[723] First, the court had no difficulty finding that the number of plaintiffs satisfied the Rule's "numerosity" requirement.[724] Second, because there were questions of law or fact that were common to the class, the plaintiffs met the "commonality" requirement.[725] Third, the plaintiffs satisfied the Rule's "typicality" requirement. That is, the plaintiffs' individual circumstances were not "markedly different from those of the proposed class,"[726] and the plaintiffs' individual legal theories for their claims did not differ from the theories for the claims of the proposed class. Fourth, the plaintiffs' individual interests were not "antagonistic to the interests of the members of the proposed class,"[727] and the plaintiffs' attorneys were "qualified, experienced, and generally able to conduct the litigation."[728] Finally, a denial of class certification would create a risk that the court's orders would "not run to the entire class"; thus, the court rejected the defendants' argument that class certification was an unnecessary "formality."[729]

2. Class Action for Discriminating Against a Person with AIDs

In *Hamlyn v. Rock Island County Metropolitan Mass Transit District*,[730] the plaintiff sued the Rock Island County Metropolitan Mass Transit District (Metro Link) because of its alleged policy denying equal access to its reduced fare program solely because the plaintiff had AIDS.[731] The court, recognizing that AIDS is a disability under federal law, stated that both the ADA and the Rehabilitation Act prohibit discrimination against persons with AIDS.[732] The court observed that, even though having AIDS means that a person has "qualifying factors," MetroLink's Program Application made AIDS a "nonqualifying factor" for the program.[733] The plaintiff belonged "to a group of individuals with AIDS who are being classified for different treatment than other disabled persons by being denied the benefits of a federally funded, public reduced fare program, and his classification utterly fail[ed] to relate to any conceivable legitimate governmental purpose."[734]

The court ruled that the Metro Link Reduced Fare Program, on its face, discriminated against persons with AIDS solely because they have AIDS.[735] The program excluded "persons with the disability of AIDS, inter alia, from participation in the program, without even a rational explanation, let alone a 'rational basis,' for doing so."[736] Even if the program were "assessed under the least exacting standard, the rational basis test," the program failed to satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment.[737] Thus, it did not "require a great leap" for the court to find that Metro Link was liable under the ADA.[738]

3. Class Action for Failure to Provide Next-Day Service

In *Anderson v. Rochester-Genesee Regional Transportation*,[739] a class action, 12 individuals with disabilities and a disability rights organization alleged that the defendants' paratransit service violated the ADA because they failed to provide next-day service. The complaint alleged that the defendants required riders to call to confirm their ride, a practice that limited the availability of paratransit service.[740] The Second Circuit held that the transit agency violated DOT regulations by failing to design a program to provide next-day ride requests for eligible riders and by denying a substantial number of paratransit rides in violation of the ADA.[741]

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[722] *Id*. at *3-4.

[723] *Id*. at *5-6.

[724] *Id*. at *9. The court denied without prejudice the motion for class certification regarding the plaintiffs' proposed subclass. *Id*. at *10-11.

[725] *Id*. at *10 (stating that "[t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class"). *Id*.

[726] *Id*. at *13.

[727] *Id*. at *14.

[728] *Id*.

[729] *Id*. at *22.

[730] 986 F. Supp. 1126 (C.D. Ill. 1997).

[731] *Id*. at 1128.

[732] *Id*. at 1130.

[733] *Id*. at 1131.

[734] *Id*. at 1134 (original emphasis omitted).

[735] *Id*. at 1131.

[736] *Id*. at 1132.

[737] *Id*.

[738] *Id*.

[739] 337 F.3d 201 (2d Cir. 2003), *on remand, complaint dismissed*, 332 F. Supp. 2d 540 (W.D.N.Y. 2004).

[740] *Id*. at 204.

[741] *Id*. at 213, 215.

G. Liability for Compensatory Damages for Intentional Violations of the ADA

As also discussed in Subpart H below, a plaintiff may recover compensatory damages when the plaintiff proves that a defendant's violation of the ADA was intentional.

In *Savage v. South Florida Regional Transportation Authority,*[742] the South Florida Regional Transportation Authority (SFRTA) had an "envelope policy" that provided that individuals with disabilities who did not purchase a ticket in advance, and who were unable to purchase a ticket through a ticket vending machine (TVM), could request a self-addressed envelope from onboard security personnel and mail their payment after their trip.[743] Because Savage, who was legally blind, was not told of the company's envelope policy, and because SFRTA had not made a reasonable accommodation to enable him to pay for his ticket at the end of his trip, Savage sued for "intentional disability discrimination."[744] The plaintiff demonstrated that SFRTA's policy requiring a passenger with a disability to request an envelope was ineffective but failed to provide evidence of SFRTA's intentional discrimination.[745] The Eleventh Circuit held that, because the ticket-purchasing system complied with applicable regulations and guidelines, SFRTA had not excluded the plaintiff or denied the plaintiff the benefits of its transportation services.

In *Ferguson v. City of Phoenix*,[746] the plaintiffs, who were deaf or hearing impaired, alleged that the city's 911 system ineffectively served the deaf in violation of Title II of the ADA, Section 504 of the Rehabilitation Act, and 42 U.S.C. § 1983, and that the defendants treated the plaintiffs differently than they treated non-hearing impaired callers.[747] The plaintiffs argued that under the ADA, the Rehabilitation Act, or § 1983, they were "presumptively entitled" to damages without regard to intent.[748] After the district court's decision on the defendants' first motion for summary judgment, the case continued on the issue of damages. In the meantime, the parties entered into a consent decree that "required the City to eliminate the need for TDD [telecommunications device for the deaf] callers to use a TDD space bar to gain access to the 9-1-1 system."[749] On the defendants' second motion for summary judgment, the district court concluded that the plaintiffs were not entitled to compensatory damages because there was no evidence of the city's intentional discrimination or deliberate indifference.[750]

The Ninth Circuit, which affirmed the district court's judgment, stated that the Justice Department's regulations that were applicable to the case "require that 'telephone emergency services, including 911 services, shall provide direct access to individuals who use [telecommunication devices] and computer modems.'"[751] The court found, however, that there was no evidence of any intentional discrimination, deliberate indifference, or discriminatory animus by the city toward the plaintiffs.[752] Although the plaintiffs were not entitled to damages, the appellate court stated that equitable relief, i.e., the injunction, was sufficient to remedy the plaintiff's "problem" and that, in the meantime, the city's corrective action had solved the problem.[753]

However, in *Munson v. Del Taco, Inc.*,[754] the court held that "[i]ntentional discrimination need not be shown to establish a violation of the ADA's *access requirements*…."[755] In the ADA, Congress "sought to eliminate all forms of invidious discrimination against individuals with disabilities, including not only 'outright intentional exclusion,' but also 'the discriminatory effects of architectural, transportation, and communication barriers and the failure to make modifications to existing facilities.'"[756]

H. Compensatory Damages for Violations of the ADA Because of Deliberate Indifference

Some courts have held that plaintiffs with disabilities may recover compensatory damages whenever a public entity's violation of the ADA was intentional discrimination or occurred because of

[742] 523 Fed. App'x. 554 (11th Cir. 2013).

[743] *Id*. at 554.

[744] *Id*.

[745] *Id*.

[746] 157 F.3d 668 (9th Cir. 1998), *cert. denied*, No, 98-1619, 1999 U.S. LEXIS 3857 (June 7, 1999).

[747] *Id*. at 672.

[748] *Id*.

[749] *Id*. at 673.

[750] *Id*. at 672.

[751] *Id*. (quoting 28 C.F.R. § 35.162). The court relied also on a Justice Department manual entitled *The Americans with Disabilities Act: Title II Technical Assistance Manual* (stating that "[a]dditional dialing or space bar requirements are not permitted"), https://www.ada.gov/taman2.html (last accessed June 20, 2018).

[752] *Id.* at 675.

[753] *Id*.

[754] 46 Cal. 4th 661, 208 P.3d 623, 94 Cal. Rptr. 3d 685 (Cal. 2009).

[755] *Id*. at 669, 208 P.3d at 628, 94 Cal. Rptr. 3d at 691 (emphasis supplied).

[756] *Id.* at 669-70, 208 P.3d at 628, 94 Cal. Rptr. 3d at 691 (citations omitted).

deliberate indifference that "satisfies the requisite showing of intentional discrimination."[757]

In *Stamm v. New York City Transit Authority*,[758] the plaintiff brought claims under Title II of the ADA and Section 504 of the Rehabilitation Act against the New York City Transit Authority (NYCTA) and the Manhattan and Bronx Surface Transit Operating Authority (MaBSTOA). The plaintiff alleged that the defendants' vehicles and facilities were not accessible to her and other persons with disabilities who utilize service animals.[759]

Because "a reasonable jury could find the evidence adduced by Plaintiff sufficient to establish deliberate indifference,"[760] a federal district court in New York denied the defendants' motion for summary judgment. To recover compensatory damages, the plaintiff did not have to show "personal animosity or ill will" to prove intentional discrimination.[761] The court ruled that "a jury could reasonably conclude that at least one NYCTA official with authority to address the alleged discrimination and to institute corrective measures on Plaintiff's behalf had actual knowledge of ongoing discrimination against Plaintiff but failed to respond adequately."[762] The court held that the plaintiff could recover damages for emotional distress.[763]

In *Midgett v. Tri-County Metropolitan Transportaion District*,[764] the plaintiff, a wheelchair user, alleged numerous service failures by TriMet. The plaintiff alleged that during one extremely cold day in January, when he intended to travel to work by bus, the number 45 bus that stopped for him had an inoperable lift; that when he proceeded to another regular bus stop the lift on the number 41 bus also was inoperable; and that when he decided to return home, the bus that arrived had a lift that initially failed to retract fully, thus preventing the bus doors from closing.[765] The plaintiff provided evidence of two other failures, as well as submitted affidavits of several individuals with disabilities "who similarly complain[ed] of instances of lift failure and malfunction."[766]

A federal district court in Oregon held that "compensatory damages are not available under Title II of the ADA absent a showing of discriminatory intent or, at a minimum, deliberate indifference."[767] The court concluded that occasional lift problems, when considered in the larger context of Tri-Met's entire fixed route system, did not violate the ADA.[768] The plaintiff failed to provide "evidence from which a rational inference of discriminatory intent" could be drawn.[769] In addition, evidence of "'bureaucratic inertia as well as some lack of knowledge and understanding' do not satisfy the intent requirement."[770]

In *Paulone v. City of Frederick*,[771] the plaintiff brought an action against the Board of County Commissioners of Frederick County and the state of Maryland, inter alia, for allegedly violating the ADA. The case arose out of plaintiff's arrest in July 2008 by the city of Frederick, Maryland, on the charge that the plaintiff, who was deaf, was driving while impaired by alcohol (DWI).

Before ruling on the parties' cross-motions for summary judgment, the court stated:

> [C]ompensatory damages are available only upon proof of intentional discrimination or disparate treatment, rather than mere disparate impact." … However, "intentional discrimination" and "disparate treatment" in this context are "synonymous.… [A] plaintiff need not show 'discriminatory animus' to prevail on a claim for damages under Title II of the ADA or § 504 of the Rehabilitation Act." Moreover, "damages may be awarded if a public entity 'intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation."[772]

Because there were material facts in dispute, the court denied the parties' cross-motions for summary judgment on Paulone's claims that she was discriminated against because of her disability because an American Sign Language (ASL) interpreter was not provided during her post-arrest detention and later

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[757] S.H. v. Lower Merion Sch. Dist., 729 F.3d 248, 262 (3d Cir. 2013).

[758] No. 04-CV-2163 (SLT)(JMA), 2013 U.S. Dist. LEXIS 8534 (E.D.N.Y. Jan. 18, 2013).

[759] The defendants' motion for summary judgment argued that the plaintiff was not disabled, that she was not entitled to use a "service animal," that she was seeking to bring dogs onboard that did not qualify as service animals, and that she had failed to make a Title II claim or a claim for intentional infliction of emotional distress. *Id*. at *1.

[760] *Id*. at *11.

[761] *Id*. at *3.

[762] *Id*. at *11.

[763] *Id*. at *21.

[764] 74 F. Supp. 2d 1008 (D. Or. 1999).

[765] *Id*. at 1010.

[766] *Id*. at 1013.

[767] *Id*. at 1018. *See* Michael Lewyn, *Thou Shalt Not Put a Stumbling Block Before the Blind: The Americans with Disabilities Act and Public Transit for the Disabled*, 52 HASTINGS L.J. 1037, 1083-84 (2001).

[768] *Midgett*, 74 F. Supp. 2d at 1018. As for an injunction, the court noted "that the desired corrective action [had] already been taken" and that the plaintiff had "not met his burden of demonstrating a threat of irreparable future harm." *Id*.

[769] *Id*. (citation omitted).

[770] *Id*. (citation omitted).

[771] 787 F. Supp. 2d 360 (D. Md. 2011).

[772] *Id*. at 373 (citations omitted). Punitive damages are not recoverable in actions brought under Title II of the ADA and Section 504 of the Rehabilitation Act. *Id*.

at alcohol education classes. On Paulone's claim that the state failed to provide an interpreter for her at her initial appearance before a district court commissioner, the court found that the omission was not intentional. The court granted a summary judgment to the state solely on the issue of liability to the plaintiff for monetary damages.[773] The court granted the plaintiff's motion for a summary judgment on her claim that the state failed to provide an interpreter for her attendance at a victim impact panel, but the court did not determine the issue of damages.[774]

S.H. v. Lower Merion School District[775] was an action by S.H. and her mother against the Lower Merion School District (School District) for alleged violations of the Individuals with Disabilities Education Act (IDEA),[776] Section 504 of the Rehabilitation Act, and Section 202 of the ADA.[777] The appellants' claims were based on the School District's misdiagnosis of S.H. as being learning disabled for several years. The plaintiffs argued that the School District was liable under the IDEA for compensatory education and under the ADA and Rehabilitation Act for compensatory damages.[778]

In brief, beginning in first grade (2000-2001), S.H., an African American, was placed in a "federally funded remedial program designed to improve a student's academic performance in reading and math."[779] At the beginning of S.H.'s fifth-grade year, (2004-2005), a school psychologist, after an evaluation, determined that S.H. had a learning disability in reading and math and recommended that she receive specially designed instruction in those areas.[780] After her designation as learning disabled, an education team developed an Individualized Education Program (IEP) for her.[781] However, in 2009, a nationally certified school psychologist, Dr. Abdullah-Johnson, performed an evaluation and "concluded that S.H.'s designation as learning disabled was, and always has been, erroneous."[782]

On the plaintiff's ADA and Rehabilitation Act claims, the court observed that "[a]ll courts of appeals that have considered this issue have held that compensatory damages are not available under § 504 of the Rehabilitation Act and § 202 of the ADA absent intentional discrimination."[783] Nevertheless, courts have "held that deliberate indifference satisfies the requisite showing of intentional discrimination."[784] "[A] two-part standard for deliberate indifference [requires] both (1) 'knowledge that a harm to a federally protected right is substantially likely,' and (2) 'a failure to act upon that likelihood.'"[785]

The Third Circuit rejected the "discriminatory animus" standard for determining whether there was intentional discrimination. The court held that "the deliberate indifference standard is better suited to the remedial goals" of the ADA and the Rehabilitation Act and that both Acts are "targeted to address 'more subtle forms of discrimination' than merely 'obviously exclusionary conduct.'"[786] After selecting the standard that applied, the court addressed whether the School District was deliberately indifferent.

> To satisfy the deliberate indifference standard, Appellants must present evidence that shows both: (1) knowledge that a federally protected right is substantially likely to be violated (i.e., knowledge that S.H. was likely not disabled and therefore should not have been in special education), and (2) failure to act despite that knowledge.[787]

The appellants argued that the evidence established that the School District had knowledge that S.H. had been misidentified as learning disabled. For example, S.H. had informed her teachers in fifth grade and middle school that she did not belong in special education. Nevertheless, the court ruled that the "[a]ppellants have presented no evidence that would create a genuine dispute as to whether the School District knew, prior to Dr. Abdullah-Johnson's evaluation, that S.H. had likely been misidentified as having a learning disability."[788] Because there was no evidence of deliberate indifference, the court affirmed the district court's grant of a summary judgment for the School District.[789]

I. Applicability of 42 U.S.C. § 1983 to ADA Claims

Although there have been 42 U.S.C. § 1983 actions against transit agencies, only one agency responding to the survey reported having a § 1983 action in the past 5 years for alleged violations of Title II of the ADA.[790]

[773] *Id*. at 399.
[774] *Id*. at 405 and 407.
[775] 729 F.3d 248 (3d Cir. 2013).
[776] Pub. L. No. 101-476, 104 Stat. 1142 (1990).
[777] *S.H.*, 729 F.3d at 250-51.
[778] *Id*. at 251.
[779] *Id*. at 251, n. 1.
[780] *Id*. at 252.
[781] *Id*.
[782] *Id*. at 254.
[783] *Id*. at 262.
[784] *Id*.
[785] *Id*. at 263 (citations omitted).
[786] *Id*. at 264 (citation omitted).
[787] *Id*. at 265 (citation omitted).
[788] *Id*. at 267.
[789] *Id*.
[790] *See* Appendix C, Transit Agencies' Responses to Question 22. The agency did not elaborate on the claim.

Nevertheless, transit agencies are subject to § 1983 actions for violating the ADA. For example, in *Hamlyn v. Rock Island County Metropolitan Mass Transit District*,[791] in which the court held that the defendant Metro Link violated the ADA and the Equal Protection Clause of the U.S. Constitution,[792] the court held also that the plaintiff had a claim under § 1983.

> [F]acial challenges alleging an improper classification involve[] only two steps: (1) [a] plaintiff must first show that the challenged statute or policy, on its face, results in members of a certain group being treated differently from other persons based on membership in that group…. (2) [I]f it is demonstrated that a cognizable class is treated differently, then the court must analyze under the appropriate level of scrutiny whether the distinction made between the groups is justified.[793]

In *Disability Rights Council of Greater Washington v. Washington Metropolitan Area Transit Authority,*[794] the court stated that "Title II of the ADA does not manifest an intent to preclude use of § 1983 to remedy violations of its mandates."[795] Furthermore, the court held that under Section 501(b) of the ADA "'[n]othing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law … that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.'"[796] Based on the legislative history, the foregoing "provision was intended in part specifically to ensure that remedies under § 1983 [are] available to redress violations of the Act."[797]

J. *Respondeat Superior* Liability Under the ADA

In *Paulone v. City of Frederick*,[798] although not a case involving transportation services, the court stated that Title II of the ADA and Section 504 of the Rehabilitation Act "contemplate" *respondeat superior* liability; thus, a principal may be held liable for its agent's violations, as well as for an "official 'policy of discrimination.'"[799]

However, it appears that officials may not be sued in their individual capacities under the ADA[800] and that non-employer individuals may not be held personally liable under either Title I or Title II of the ADA.[801]

K. Immunity of a State or State Agency for Damages for Violations of Title II

In *Miranda B. v. Kitzhaber*,[802] in which the plaintiff sought prospective injunctive relief, the Ninth Circuit held that Oregon was not entitled to sovereign immunity under the Eleventh Amendment, because Congress validly abrogated immunity from suit for claims under Title II of the ADA, and because the state waived immunity for claims under Section 504 of the Rehabilitation Act of 1973 when it accepted federal funds.

Although the court in *Mason v. City of Huntsville*,[803] in addressing whether Title II of the ADA abrogated a state or state agency's sovereign immunity, observed that although "other circuits and districts have narrowed the scope of valid Title II claims solely to those implicating a fundamental right …, the Eleventh Circuit has not followed that path."[804] Accordingly, the court held that "Title II of the ADA is a valid exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment."[805]

In contrast, in *Everybody Counts, Inc. v. Northern Indiana Regional Planning Commission*,[806] the court addressed the issue of whether a fundamental right was at stake in deciding whether the Indiana Department of Transportation (INDOT), as a state agency, has immunity under the Eleventh Amendment, and, if so, whether Congress "properly" abrogated the states' immunity in the ADA.[807]

The plaintiffs alleged that the defendants, including INDOT, deprived them of access to public transportation services in violation of Title II of the ADA

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[791] 986 F. Supp. 1126 (C.D. Ill. 1997).

[792] *Id*. at 1332-33.

[793] *Id*. at 1134 (citations omitted).

[794] 239 F.R.D. 9 (D.D.C. 2009).

[795] *Id.* at 22.

[796] *Id*. (quoting 42 U.S.C. § 12201(b)).

[797] *Id*. However, the court dismissed the plaintiffs' § 1983 claims that alleged violations of the Rehabilitation Act. *Id*. at 23. The private right of action provided by Section 505 is exclusive, because the Rehabilitation Act does not include a provision similar to Section 501(b) of the ADA. *Id.*

[798] 787 F. Supp. 2d 360 (D. Md. 2011).

[799] *Id*. at 372 (citations omitted).

[800] Sway v. Spokane Paratransit, No. 2:16-CV-310-RMP, 2017 U.S. Dist. LEXIS 206716, at *8 (E.D. Wash. Dec. 25, 2017).

[801] Smith v. Aldridge, No. 3:17-cv-01485-HZ, 2018 U.S. Dist. LEXIS 47021, at *16 (D. Or. March 22, 2018) (holding that "[c]laims under Title II of the ADA—which applies to state and local governments—similarly cannot be brought against individual state actors").

[802] 328 F.3d 1181 (9th Cir. 2003).

[803] No. CV-10-5-02794-NE, 2012 U.S. Dist. LEXIS 145698 (N.D. Ala. Oct. 10, 2012).

[804] *Id*. at *21-22.

[805] *Id*. at *42.

[806] No. 2:98-CV-97, 2006 U.S. Dist. LEXIS 39607 (N.D. Ind. March 30, 2006), *motion granted by* No. 2:98-CV-PPS-APR, 2010 U.S. Dist. LEXIS 94235 (N.D. Ind., Sept. 9, 2010).

[807] *Id.* at *2-3.

and § 504 of the Rehabilitation Act. The plaintiffs argued that the municipal defendants provided a level of transportation services to individuals with disabilities that "was not comparable to the services provided to non-disabled riders in violation of the ADA."[808] The plaintiffs further alleged that the municipalities that were violating the ADA and the Rehabilitation Act received federal grant funds and that INDOT was violating the ADA because the Act prohibits public entities from aiding other organizations that are discriminating.[809] Although the court stated that the claim against INDOT was not "immediately apparent," the plaintiffs' argument was that INDOT had not adequately overseen the cities' compliance with the ADA.[810] Because INDOT was "responsible for ensuring that the [Metropolitan Planning Organizations] comply with the ADA, the Rehabilitation Act, and other relevant federal statutes,"[811] INDOT's role was "limited to an oversight function and [to] being a pass-through funding entity."[812]

The court explained that § 5 of the Fourteenth Amendment empowers Congress to abrogate the states' sovereign immunity "as necessary to enforce the substantive guarantees of the Fourteenth Amendment,"[813] but "the power to determine what constitutes a constitutional violation" is "for the Supreme Court—not Congress—to decide…."[814] Even though Congress "unequivocally expressed" its intent in the ADA to abrogate the states' sovereign immunity, whether Congress acted pursuant to a valid grant of congressional authority was "not quite as straight-forward."[815] For an act of Congress to abrogate Eleventh Amendment immunity, a court must identify the constitutional right at issue and then "determine whether a 'relevant history' and 'pattern of constitutional violations' exists."[816] The question, thus, was "whether the legislative 'fix' that Congress suggests is an appropriate response (or, in other words is 'congruent and proportional') to the history and pattern of unequal treatment."[817] When fundamental rights, such as access to the courts, are not at stake, it is much more difficult for Congress to abrogate Eleventh Amendment immunity.[818] The issue, therefore, was whether under § 5 there was "'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[819]

An Indiana federal district court held, first, that there was no "clear fundamental constitutional right to public transportation."[820] Second, Title II of the ADA was not a congruent and proportional remedy in cases that "implicat[e] only the right to be free from irrational disability discrimination in the provision of public transportation."[821]

> Title II and its implementing regulations go beyond merely protecting disabled individuals from irrational disability discrimination. Instead, they expose states to money damages for violations of the ADA by creating a number of affirmative obligations that the state can only avoid by establishing undue financial hardship. This does not allow the state enough room to make classifications that are rationally related to some legitimate governmental purpose.[822]

The court held that the Title II regulations impose various "affirmative actions in the form of 'reasonable modifications' which place a heavy burden on transportation providers."[823]

> In this particular case, the burden on the state is exaggerated by a statutory scheme that essentially attempts to hold the state vicariously liable for disability discrimination even where the state is not the actual entity providing the transportation.… INDOT is merely a funding entity…. This regulation purports to place a significant oversight burden on INDOT by making INDOT responsible for any discrimination by any transportation provider to which INDOT has ever administered funds.[824]

Thus, the court held that INDOT, as a state agency, had Eleventh Amendment immunity from actions for damages under Title II of the ADA.[825] Moreover, for the plaintiffs to prove that INDOT "violated the ADA by aiding or perpetuating discrimination by providing assistance to an agency that discriminates on the basis of disability, there

[808] *Id*. at *5.
[809] *Id*. at *10.
[810] *Id*. at *5.
[811] *Id*. at *7.
[812] *Id*. at *6.
[813] *Id*. at *16 (citation omitted).
[814] *Id*. at *17.
[815] *Id*. at *15.
[816] *Id*. at *16.
[817] *Id*. (citation omitted).
[818] *Id*. at *21.
[819] *Id*. at *18 (citation omitted).
[820] *Id*. at *29 (citing Anthony v. Franklin Cnty., 799 F.2d 681, 666 (11th Cir. 1986)).
[821] *Id*. at *32.
[822] *Id*. at *32-33. (citing Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 367-68, 121 S. Ct. 955, 964, 148 L. Ed. 2d 866, 879 (2001)).
[823] *Id*. at *33.
[824] *Id*. at *35-36 (citations omitted).
[825] *Id*. at *40. As for whether there was immunity under Section 504 of the Rehabilitation Act, the court stated that Section 504 differs from the ADA because Section 504 is "'a condition on the receipt of federal funds.'" *Id*. at *41 (citations omitted). *See also* Monroe v. Indiana, No. 1:14-cv-00252-SEB-DML, 2016 U.S. Dist. LEXIS 43842, at *16 (S.D. Ind. March 31, 2016) (stating that the plaintiff's claims against the state defendants for damages under Title I of the ADA are barred by the Eleventh Amendment).

must first be proof that the agencies receiving grant money are actually discriminating against individuals with disabilities."[826]

In *Disability Rights Council of Greater Washington v. WMATA,*[827] involving the adequacy of paratransit services, the court agreed with the United States, which intervened in the case, that it was not necessary to address the abrogation of immunity issue. Because DOT regulations that require WMATA to comply with the Rehabilitation Act also require WMATA to comply with all ADA requirements, WMATA had waived its immunity to the plaintiffs' claims under the Rehabilitation Act. The court held that any violations by WMATA of the ADA and the DOT regulations were "necessarily violations of the Rehabilitation Act."[828] The court, therefore, deemed the plaintiff's ADA claims as claims having been brought pursuant to the Rehabilitation Act.[829]

L. Statute of Limitations

It has been held that in the absence of a statute of limitations in the ADA, the courts apply the appropriate state statute of limitations to ADA claims. The limitation period, accordingly, may differ from state to state. In *Disabled in Action v. SEPTA*,[830] the Third Circuit held that discrimination claims under the ADA based on SEPTA's failure to include elevators in its renovations of two subway stations were not barred by the statute of limitations. Claims under § 12147(a) of the ADA accrue only on the completion of alterations to public transportation facilities. The fact that an action could have been brought for a preliminary injunction prior to completion of the alterations did not trigger the applicable statute of limitations, which was the two-year statute of limitations that applied to personal injury actions in Pennsylvania.

In contrast, in *Stamm v. New York City Transit Authority*,[831] the court ruled that the plaintiff's Title II and Rehabilitation Act claims were both governed by the three-year statute of limitations that applies to personal injury actions in New York.[832] The plaintiff's Title II claim survived under New York's "continuing violation" doctrine;[833] however, the continuing violation doctrine did not apply to the plaintiff's retaliation claim under the ADA.[834]

M. Attorney's Fees

A court has jurisdiction under the ADA to award attorney's fees to a "'prevailing party' other than the United States."[835] In litigation against the federal government, however, the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, authorizes a private litigant to recover attorney's fees incurred when the litigant has prevailed in the lawsuit, and the government cannot prove that its position in the lawsuit was substantially justified.[836] The Third Circuit has held that whether a plaintiff is a prevailing party depends, first, on whether the plaintiff achieved some of the benefit it sought by initiating the action, and, second, on whether the "'litigation constituted a material contributing factor in bringing about the events that resulted in the obtaining of the desired relief.'"[837]

In *Collins v. Southeastern Pennsylvania Transportation Authority*,[838] the plaintiffs recovered legal fees. The plaintiffs had alleged that SEPTA violated the ADA and the Due Process clause of the Fourteenth Amendment by denying the plaintiffs' access to paratransit services.[839] Eventually, the parties negotiated a consent decree.[840] SEPTA opposed the plaintiffs' application for attorney's fees, in part, because the plaintiffs did not prevail on all claims.[841] A federal district court in Pennsylvania stated that the plaintiffs in the settlement received "relief of the 'same general type' they requested in the complaint, regardless of what legal theory led to that result."[842] The court also found that the amount of the attorney's fees claimed was reasonable.

Likewise, in *Brinn v. Tidewater Transportation District Commission*,[843] the Fourth Circuit affirmed a district court's award of $29,506.24 in attorney's

[826] *Everybody Counts, Inc.,* 2006 U.S. Dist. LEXIS 39607, at *50.

[827] 239 F.R.D. 9 (D.D.C. 2006).

[828] *Id*. at 14.

[829] *Id*. at 15.

[830] 539 F.3d 199 (3d Cir. 2008).

[831] No. 04-CV-2163 (SLT)(JMA), 2013 U.S. Dist. LEXIS 8534 (E.D.N.Y. Jan. 18, 2013).

[832] *Id*. at *22.

[833] *Id*. at *25.

[834] *Id*. at *30-31.

[835] Am. Council of the Blind v. Wash. Metro. Area Transit Auth., 133 F. Supp. 2d 66, 71 (D.D.C. 2001) (citing 42 U.S.C §12205).

[836] *Id.*

[837] Collins v. Se. Pa. Transp. Auth., 69 F. Supp. 2d 701, 703 (E.D. Pa. 1999) (quoting Metro. Pittsburgh Crusade for Voters v. Pittsburgh, 964 F.2d 244, 250 (3d Cir. 1992)).

[838] 69 F. Supp. 2d 701 (E.D. Pa. 1999).

[839] *Id*. at 702.

[840] *Id*.

[841] *Id*.

[842] *Id*. at 704, (quoting Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897, 911 (3d Cir. 1985)).

[843] 242 F.3d 227 (4th Cir. 2001).

fees after the plaintiffs' "advantageous settlement" of their claims brought under the ADA and the Rehabilitation Act against the Tidewater Transportation District Commission (Tidewater).[844] The plaintiffs had complained first to the Department for Rights of Virginians with Disabilities (DRVD) concerning Tidewater's failure to provide plaintiffs with next-day paratransit services. The DRVD is part of Virginia's state system "to protect the legal and human rights of individuals with disabilities" that made the state eligible for federal funding under the Rehabilitation Act.[845]

Tidewater, which did not dispute the reasonableness of the award for attorney's fees, argued on appeal that Virginia and federal law prohibited the award of any fees in the case.[846] The court rejected the argument, holding that Virginia law on which Tidewater relied did not impose limitations on cases brought under federal law, because such an interpretation would violate the Supremacy Clause of the Constitution.[847] Furthermore, the court held that "entities providing *pro bono* representation may receive attorney's fees where appropriate, even though they did not expect payment from the client and, in some cases, received public funding."[848]

Although not a transit agency case, *K.M. v. Tustin Unified School District*[849] included a Title II ADA claim relating to ineffective communications. The court held that

> [p]ursuant to 42 U.S.C. § 12205, a federal court may award reasonable attorneys' fees to the prevailing party in an action under the ADA. A prevailing party under the ADA "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." … Under federal law, a "prevailing party" is one that effects "a material alteration of the legal relationship between the parties [whereby] the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant."[850]

In *Falls v. Board of Commissioners of the New Orleans Regional Transit Authority*,[851] although the plaintiffs did not obtain a judgment on the merits or a consent decree, the parties' voluntary settlement agreement approved by the court created the requisite kind of material alteration in the parties' legal relationship that was required for an award of attorney's fees.[852]

XI. TITLE III AND DISCRIMINATION IN PUBLIC ACCOMMODATIONS

A. Prohibition of Discrimination by Places of Public Accommodation

Title III prohibits discrimination against individuals with disabilities by places of public accommodation. The term public accommodation includes "a terminal, depot, or other station used for specified public transportation…."[853] Private entities operating a fixed route system,[854] a demand responsive system,[855] or over-the-road buses are subject to Title III.[856]

It may be noted that only three transit agencies responding to the survey reported that they had any claims or cases in the past five years that alleged that their agency had violated Title III of the ADA.[857]

B. What Constitutes Discriminatory Action Under Title III

Section 12182(a) of the ADA mandates 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.[858]

Section 12182(b) sets forth general prohibitions, stating that is discriminatory

> (1) to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, … to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services,

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[844] *Id*. at 230.

[845] 29 U.S.C. § 794e(a)(1) (2018). "To receive federal funding, a state system must have the authority to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of individuals [with disabilities] within the State." *Brinn*, 242 F.3d at 230 (citation omitted).

[846] *Brinn*, 242 F.3d at 231.

[847] *Id*. at 232 and 233.

[848] *Id*. at 234-35.

[849] 78 F. Supp. 3d 1289 (C.D. Cal. 2015).

[850] *Id*. at 1297 (citations omitted). *See also* Dillery v. City of Sandusky, 398 F.3d 562, 569 (6th Cir. 2005) (stating that a "plaintiff may be considered a prevailing party if the plaintiff 'succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.' … 'The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties,' … such that 'the defendant's behavior [is modified] in a way that directly benefits the plaintiff,' [but] a 'technical victory may be so insignificant … as to be insufficient to support prevailing party status'") (citations omitted).

[851] No. 16-2499, 2017 U.S. Dist. LEXIS 98071 (E.D. La. June 21, 2017).

[852] *Id*. at *27-28.

[853] 42 U.S.C. § 12181(7)(G) (2018).

[854] *Id.* § 12182(b)(2)(B)(i) and (ii).

[855] *Id.* § 12182(b)(2)(C).

[856] *Id.* § 12182(b)(2)(D).

[857] *See* Appendix C, Transit Agencies' Responses to Question 23.

[858] 42 U.S.C. § 12182(a) (2018).

> facilities, privileges, advantages, or accommodations of an entity.
>
> (ii) … to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, … with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.
>
> (iii) … to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, … with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.[859]

It is discriminatory regardless of whether any of the foregoing actions are accomplished directly or through contracts, licenses, or other arrangements.[860] Likewise, it is unlawful to use administrative methods that discriminate against individuals with disabilities or "that perpetuate the discrimination of others who are subject to common administrative control."[861]

C. Transportation Services Subject to Title III

Under § 12184(a) of the ADA, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce."

Part 36 of the regulations issued by the Attorney General state that

> [a] public accommodation that provides transportation services, but that is not primarily engaged in the business of transporting people, is subject to the general and specific provisions in subparts B, C, and D of this part for its transportation operations, except as provided in this section.[862]

The term transportation services includes, for example,

> shuttle services operated between transportation terminals and places of public accommodation, customer shuttle bus services operated by private companies and shopping centers, student transportation systems, and transportation provided within recreational facilities such as stadiums, zoos, amusement parks, and ski resorts.[863]

Title III and the regulations also impose requirements in respect to architectural and other barriers.[864]

> A public accommodation subject to this section shall remove transportation barriers in existing vehicles and rail passenger cars used for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift) where such removal is readily achievable.[865]

The regulations state that "[a] public accommodation subject to this section shall comply with the requirements pertaining to vehicles and transportation systems in the regulations issued by the Secretary of Transportation pursuant to section 306 of the Act."[866]

D. Title III and Taxis, Transportation Network Companies, and Microtransit

The question has arisen whether taxis and other providers and/or facilitators of a transportation or "travel service," such as a transportation network company (TNC) or microtransit, are subject to Title III. It appears that the ADA's definition of a public accommodation may be broad enough to include these kinds of transportation services.

First, in regard to taxis, the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce."[867] As confirmed by the regulations, "[p]roviders of taxi service are subject to the requirements of this part for private entities primarily engaged in the business of transporting people which provide demand responsive service."[868] Thus, taxi companies come within the coverage of the ADA.[869]

Second, in regard to TNCs, "[t]he ADA lists twelve categories of private establishments that are considered a 'public accommodation' if they

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[859] *Id*. § 12182(b)(1)(A)(i)-(iii).

[860] *Id*. § 12182(b)(1)(A)(i)-(iv).

[861] *Id.* § 12182(b)(1)(D)(i) and (ii).

[862] 28 C.F.R. § 36.310(a)(1) (2018).

[863] *Id.* § 36.310(a)(2).

[864] 42 U.S.C. § 12182(b)(2)(A)(iv) (2018). The section does not include barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift. *Id*. *See also* 28 C.F.R. § 36.310(b) (2018).

[865] 28 C.F.R. § 36.310(b) (2018).

[866] *Id*. § 36.310(c).

[867] 42 U.S.C. § 12184(a) (2018).

[868] 49 C.F.R. § 37.29(a) (2018).

[869] *See* Rachel Reed, *Disability Rights in the Age of Uber: Applying the Americans with Disabilities Act of 1990 to Transportation Network Companies,* 33 GA. ST. U. L. REV. 517, 519 (2017), [hereinafter Reed].

affect interstate commerce."[870] When the operations of a private entity that is a "travel service" affect commerce, the private entity is a public accommodation subject to Title III.[871] The term TNC refers to "an organization that provides prearranged transportation services for compensation using an online-enabled platform to connect passengers with drivers using the driver's personal vehicle. TNC's include companies such as Lyft, UberX, and Sidecar…."[872]

Although not a definitive ruling on the applicability of the ADA to TNCs, in *National Federation of the Blind of California v. Uber Technologies, Inc*.,[873] the plaintiffs, the National Federation of the Blind of California and three blind individuals, alleged that Uber Technologies, Inc. (Uber) discriminated against them in violation of Title III of the ADA by allowing UberX drivers to deny access to blind individuals and their guide dogs.[874] Uber moved to dismiss on the basis that it is not a public accommodation under Title III. The plaintiffs argued that Uber's operations come within the "travel service" category of public accommodations.[875]

A federal district court in California stated that "'Congress clearly contemplated that service establishments include providers of services which do not require a person to physically enter an actual physical structure.'"[876] The defendants failed to cite to "any binding law that Uber's service is precluded from regulation as a 'travel service' under § 12182(b)."[877] The court ruled that the plaintiffs' allegations "demonstrate a plausible claim for Uber's ADA liability under § 12182" and denied Uber's motion to dismiss.[878] In a later proceeding, the court approved the parties' settlement agreement and awarded attorney's fees to the plaintiffs.[879]

Although Uber and Lyft have argued that they are technology companies, rather than transportation companies, whose operations do not come within the meaning of Title III, the courts arguably could find that TNCs are subject to the ADA in the same manner as "their most direct competitors: taxi companies."[880]

Third, regarding micotransit, the term refers to

> IT-enabled private multi-passenger transportation services, such as Bridj, Chariot, Split, and Via, that serve passengers using dynamically generated routes, and may expect passengers to make their way to and from common pick-up or drop-off points. Vehicles can range from large SUVs to vans to shuttle buses. Because they provide transit-like service but on a smaller, more flexible scale, these new services have been referred to as microtransit.[881]

An article on microtransit and urban mobility provides some examples of microtransit: "[c]ommuter buses like Leap Transit or Chariot in San Francisco or Bridj in Boston…. Dynamic vanpools like Via in New York. Carpool start-ups like Carma. True cab-share options like UberPool (now claiming millions of trips) or LyftLine (now with fixed-point pick-ups)."[882]

Although no cases were located for this digest that address whether microtransit is a travel service that Title III covers, once more, 42 U.S.C. §§ 12181(7) and 12184(a) arguably are broad enough to cover microtransit.

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[870] 103 F. Supp. 3d 1073, 1083 (N.D. Cal. 2015) (citing 42 U.S.C. § 12181(7)).

[871] 42 U.S.C. § 12181(7) (2018).

[872] California Department of Insurance, Notice to Transportation Network Company Drivers, http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/TransNetwkDrvrs.cfm (last accessed June 20, 2018).

[873] 103 F. Supp. 3d 1073.

[874] *Id*. at 1077.

[875] *Id*. (citing 42 U.S.C. § 12181(7)(F)).

[876] *Id*. (quoting Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 13 (1st Cir. 1994) (some internal quotation marks omitted)).

[877] *Id*.

[878] *Id*. at 1083-84.

[879] Nat'l Fed'n of the Blind of Cal. v. Uber Techs., Inc., No. 14-cv-04086 NC, 2016 U.S. Dist. LEXIS 192176, *6 (N.D. Cal. Dec. 6, 2016) ("[T]he Court finds that plaintiffs sought to enhance Uber's policies to protect blind riders, which can provide a model for other businesses in the sharing economy. Additionally, plaintiffs faced a significant hurdle in overcoming the motion to dismiss[] and took on the risk associated with raising novel legal issues in complex areas of jurisdictional, employment, and discrimination law. Thus, the Court finds that here, a multiplier of 1.5 is appropriate to fully award plaintiffs for the fair market value of their work in taking on this case.")

[880] Reed, *supra* note 869, at 551. *See also* Ray A. Mundy, Why TNCs Will Be Regulated Like Taxis—Historically Speaking: Final Report, at 12 (U.S. Dep't. of Transp. & Iowa State Univ., May 2018). (Although not an ADA-analysis, the author concludes that, ultimately, "TNCs will be included within the local regulatory framework," the same as taxis.), http://www.intrans.iastate.edu/research/documents/research-reports/why_TNCs_regulated_like_taxis_w_cvr.pdf (last accessed June 20, 2018).

[881] Department of Transportation, Federal Transit Administration, Shared Mobility Definitions, https://www.transit.dot.gov/regulations-and-guidance/shared-mobility-definitions (last accessed June 20, 2018).

[882] Eric Jaffe, *How the Microtransit Movement Is Changing Urban Mobility*, CityLab (Apr. 27, 2015), https://www.citylab.com/transportation/2015/04/how-the-microtransit-movement-is-changing-urban-mobility/391565/ (last accessed June 20, 2018).

E. Investigations and Compliance Reviews by the Attorney General

The ADA authorizes the Attorney General to investigate alleged violations of Title III.[883] When an individual or a specific class of persons has been subjected to discrimination that is prohibited by Title III or part 36, the individual may request the Justice Department to institute an investigation.[884] Whenever the Attorney General believes that there is a violation of part 36, the Attorney General may initiate a "compliance review."[885]

After a compliance review or investigation under 28 C.F.R. § 36.502, or at any other time, the Attorney General may commence an action in a federal district court whenever the Attorney General has "reasonable cause" to believe that

> (a) [a]ny person or group of persons is engaged in a pattern or practice of discrimination in violation of the Act or this part; or
>
> (b) [a]ny person or group of persons has been discriminated against in violation of the Act or this part and the discrimination raises an issue of general public importance.[886]

F. Private Actions Under Title III

Title III also is enforceable through private actions. As stated in the regulations implementing Title III,

> [a]ny person who is being subjected to discrimination on the basis of disability in violation of the Act or this part or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303 of the Act or subpart D of this part may institute a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order.[887]

To make a prima facie case of discrimination under Title III, a plaintiff must demonstrate that he or she has a disability within the meaning of the ADA; that the defendant is a private entity that owns, leases, or operates a place of public accommodation; and that the defendant denied the plaintiff a public accommodation because of the plaintiff's disability.[888] If a plaintiff is alleging discrimination because of an architectural barrier, the plaintiff must show that the ADA prohibits the architectural barrier at the defendant's place of business and that the barrier's removal is "readily achievable."[889]

Under the ADA, a party does not have to exhaust his or her administrative remedies before bringing an action.[890] However, Title III does not provide for a private right of action to recover compensatory damages.[891] Rather, the Act authorizes individuals who are subjected to discrimination, or who have reasonable grounds to believe they are about to be subjected to discrimination, to use the remedies and procedures in 42 U.S.C. § 2000a-3. Section 2000a-3(a) states:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by [42 U.S.C. § 2000a-2], a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved….

G. Injunctive Relief

Under Title III, individuals are only entitled to seek injunctive relief.[892] When granting injunctive relief, "[i]n the case of violations of § 36.304, § 36.308, § 36.310(b), § 36.401, § 36.402, § 36.403, and § 36.405 of this part, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by the Act or this part."[893] Furthermore, "[w]here appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by the Act or this part."[894]

H. Attorney's Fees

Attorney's fees are recoverable under § 12205 of the ADA.

> In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may

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[883] 28 C.F.R. § 36.502(a) (2018).

[884] *Id*. § 36.502(b).

[885] *Id*. § 36.502(c).

[886] *Id*. § 36.503(a) and (b).

[887] *Id*. C.F.R. § 36.501(a).

[888] Johnson v. Dhami, No. 2:14-cv-1150 KJM AC, 2014 U.S. Dist. LEXIS 122862, at *4 (E.D. Cal. Sept. 2, 2014).

[889] *Id.* at *3 and *4.

[890] Coal. of Montanans Concerned with Disabilities, Inc. v. Gallatin Airport Auth., 957 F. Supp. 1166 (D. Mont 1997) (requiring airport authority to install an elevator). *See* 42 U.S.C. § 12188 (2018) and 28 C.F.R. § 35.172(a) (2018) (the latter stating that "[t]he designated agency shall investigate complaints for which it is responsible under § 35.171").

[891] Sigros v. Walt Disney World, Co., 190 F. Supp. 2d 165, 169 (D. Mass. 2002) and Anonymous v. Goddard Riverside Cmty. Ctr., No. 96 Civ. 9190 (SAS), 1997 U.S. Dist. LEXIS 9724, at *4 (S.D.N.Y. July 8, 1997).

[892] Deck v. Am. Haw. Cruises, 121 F. Supp. 2d 1292, 1297 n.5 (D. Haw. 2000). *See also* Corless v. Cole, No. 13-00700 ACK-BMK, 2014 U.S. Dist. LEXIS 86677, at *13 (D. Haw. June 25, 2014) (stating that "[t]he only remedy available under Title III of the ADA is injunctive relief") (citing 42 U.S.C. § 12188; Wander v. Kaus, 304 F.3d 856, 858 (9th Cir. 2002); and Deck v. Am. Haw. Cruises, Inc. 121 F. Supp. 2d 1292, 1297 n.5)).

[893] 28 C.F.R. § 36.501(b) (2018).

[894] *Id.*

> allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.[895]

XII. RELATIONSHIP BETWEEN THE ADA AND THE CIVIL RIGHTS LAWS

A. Claims Against Transit Agencies for Disparate Impact and Disparate Treatment

This part of the digest discusses disparate impact and disparate treatment. Disparate impact occurs when an action or policy that is neutral on its face results in discriminatory effects on or consequences for individuals, whereas disparate treatment is the intentional, non-neutral discriminatory treatment of individuals.[896] Only one transit agency responding to the survey reported that it had any Title I, II, or III ADA claims in the past five years that alleged d*isparate impact* discrimination by the agency.[897] Four agencies stated that their agency had Title I, II, or III ADA claims in the past five years alleging *disparate treatment* discrimination by their agency.[898]

B. The ADA as a Civil Rights Statute

One scholar has written that the ADA "guarantees the civil rights of individuals with disabilities."[899] The FTA Circular describes the ADA as a "civil rights law" and as a "civil rights statute."[900] Although there are "conceptual similarities" between the ADA's reasonable accommodation requirement and disparate impact,[901] some commentators disagree with "the characterization of the ADA as a civil rights statute."[902] One reason is that, in contrast to the Civil Rights Act, as amended, individuals with disabilities "have not suffered … broad, systemic, and legally enforced exclusion from social, political, and economic participation."[903] Arguably, "disparate impact is a form of affirmative action and not simply an antidiscrimination device."[904]

Congress borrowed the definition of disability for the ADA from Section 504 of the Rehabilitation Act, as well as "some of the substantive provisions and defenses developed under that section,"[905] and adopted the remedies in Title VII of the Civil Rights Act in Title I of the ADA.[906] Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.[907] Title II of the ADA requires equal access to most public transportation for persons with disabilities.[908] Both Title II of the Civil Rights Act[909] and Title III of the ADA prohibit discrimination by public accommodations.[910]

One basis for assessing whether the ADA is a civil rights statute is whether the disparate impact theory of discrimination applies to the ADA as it does to the enforcement of the Civil Rights Laws. One source argues that, because "some people with disabilities need more than the ADA's protections against discrimination," there is a role for disparate impact theory in enforcing the ADA.[911] Since 1971, the courts have interpreted Title VI of the Civil Rights Act as prohibiting disparate treatment (i.e., intentional discrimination), as well as disparate impact discrimination.[912] In 1991, the Civil Rights Restoration Act codified the proscription against

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[895] *See also id*. § 36.505 (stating that "[i]n any action or administrative proceeding commenced pursuant to the Act or this part, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual").

[896] Mary Crossley, *Reasonable Accommodations as Part and Parcel of the Antidiscrimination Project,* 35 Rutgers L. J. 861, 902 (2004) [hereinafter Crossley].

[897] *See* Appendix C, Transit Agencies' Responses to Question 24. The Detroit Department of Transportation reported that the case was still pending at the time of the survey.

[898] *See id*., Transit Agencies' Responses to Question 25. The agencies' responses did not distinguish clearly between claims or cases against their agency for disparate impact or disparate treatment from other claims or cases alleging violations of the ADA.

[899] Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 Ga. L. Rev. 27, 44 (2000) [hereinafter McGowan].

[900] FTA Circular, Ch. 2.2, p. 2.1 and Ch. 9.2, p. 9.1.

[901] Crossley, *supra* note 896, at 793.

[902] *Id*. at 867 and James Leonard, *The Equality Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 Case W. Res. *28 (2005) [hereinafter Leonard].

[903] Crossley, *supra* note 896, at 868.

[904] Leonard, *supra* note 902, at *27 (footnote omitted).

[905] Bonnie Poitras Tucker, *Symposium: Facing the Challenges of the ADA: The First Ten Years and Beyond: The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 Ohio St. L. J. 335, 341 (2001) (referencing 42 U.S.C. § 2000d (1994) [hereinafter Tucker].

[906] *Id*.

[907] 42 U.S.C § 2000d (2018).

[908] *See, e.g*., McGowan, *supra* note 899 at 39.

[909] Title II of the Civil Rights Act of 1964 prohibits discrimination because of race, color, religion, or national origin in certain places of public accommodation, such as hotels, restaurants, and places of entertainment. *See* https://www.justice.gov/crt-22.

[910] Tucker, *supra* note 905, at 341-42.

[911] Crossley, *supra* note 896, at 955.

[912] Tucker, *supra* note 905, at 364-65.

disparate impact discrimination in the Civil Rights Act.[913] Title VII, besides prohibiting disparate treatment, also bars disparate impact discrimination.[914]

C. Relationship of Title I of the ADA and the Civil Rights Act

Congress intended to incorporate disparate impact theory in Title I of the ADA. A conference committee on the Civil Rights Act of 1990 stated that the disparate impact provisions of the ADA were to be interpreted consistently with Title VII of the Civil Rights Act.[915]

Several provisions of Title I of the ADA, in effect, prohibit disparate impact. Section 12112(a) states the general rule that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

Section 12112(b)(3) prohibits discrimination against a qualified individual on the basis of disability including the use of "standards, criteria, or methods of administration … *that have the effect of discrimination* on the basis of disability … or … that perpetuate the discrimination of others who are subject to common administrative control…."[916]

Section 12112(b)(6) prohibits the use of

> qualification standards, employment tests or other selection criteria that *screen out or tend to screen out* an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity….[917]

Section 12112(b)(7) forbids the failure to select or administer tests that accurately measure the tested skill rather than a sensory or other impairment.[918]

Thus, Title I "fit[s] comfortably within the established Title VII framework for disparate impact claims."[919] It appears, however, that when one compares the use of disparate impact theory and class actions that "flourished" after the enactment of Title VII of the Civil Rights Act with Title I of the ADA,[920] the ADA's requirement of accommodations for employees with disabilities has "eclipsed" the need for separate or distinct disability claims based on disparate impact.[921] In contrast to "the disparate impact model [that] views equality as a matter of removing innocent structural barriers to group participation in the workplace,"[922] Title I of the ADA focuses almost exclusively "on an individual plaintiff's particular circumstances and the specific accommodation that was requested."[923] As one commentator argues, Title I of the ADA and Title VII of the Civil Rights Act are different. The reasons are that the ADA's "reasonable accommodation rules impose affirmative obligations on employers to act rather than to refrain from discriminatory actions. The concept of accommodation [in the ADA] is, in fact, radically different from the concepts of the disparate treatment and disparate impact models."[924]

Furthermore, "[t]he individualized nature of disabilities … often strains the resemblance between Title I and Title VII disparate impact claims."[925] Because

> [a]n individuated Title I disparate impact claim … is difficult to distinguish from a reasonable accommodation claim …, most plaintiffs will find it impractical to identify a sufficiently large enough group of legally disabled persons who share her particular impairment and manifestations to meet the comparative requirements of a traditional disparate impact claim.[926]

In sum, although the principle of the prohibition of disparate impact appears in Title I of the ADA, for the reasons discussed, scholars suggest that there may not be a significant likelihood of many disparate impact claims in Title I cases.

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[913] *Id*. at 365.

[914] United States v. Brennan, 650 F.3d 65, 90 (2d Cir. 2011).

[915] Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279, 1342 (2001) (quoting H.R. REP. NO. 101-755, at 15 (1990 Conf. Rep.)).

[916] 42 U.S.C. § 12112(b)(3)(A) and (B) (emphasis supplied). *See* Leonard, *supra* note 902, at *28 (footnote omitted).

[917] 42 U.S.C. § 12112(b)(6) (2018) (emphasis supplied). *See* Leonard, *supra* note 902, at *28 (footnote omitted).

[918] 42 U.S.C. § 12112(b)(7) (2018). *See* Leonard, *supra* note 902, at *28 (footnote omitted). *See also* McGowan, *supra* note 899, at 150 (stating that in the field of employment "[t]he prohibitions against tests and requirements with disparate impact on the basis of disability appear in Section 12112(b) of the ADA").

[919] Leonard, *supra* note 902, at *28 (footnotes omitted).

[920] Michael Ashley Stein and Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L. J. 861 (2006) [hereinafter Stein and Waterstone].

[921] *Id*. at 864. The authors argue that there is still a role for disparate impact theory and class actions to remedy "harder-to-reach embedded norms that require job and policy modifications." *Id*.

[922] Leonard, *supra* note 902, at *11.

[923] Stein and Waterstone, *supra* note 920, at 879. As of the time of the article, there were no published federal decisions that had "specifically determined a single failure to accommodate [an] employment claim under disparate impact analysis." *Id*. at 882.

[924] Leonard, *supra* note 902, at *31.

[925] *Id*. at *28.

[926] *Id*. at *29.

D. Relationship of Title II of the ADA and the Civil Rights Act

There is some authority for the view that Title II of the ADA incorporates disparate impact theory as a basis for recovery. One scholar has argued that in "most cases" in which a court has held that a public entity violated Title II of the ADA, the claim "involve[d] disparate impact discrimination, rather than intentional discrimination."[927]

For example, in *Wisconsin Community Services, Inc. v. City of Milwaukee*,[928] the issue was whether the city had to modify its zoning standards to prevent the city's standards from discriminating against individuals with disabilities. The Seventh Circuit observed that courts have held that "municipal zoning qualifies as a public 'program' or 'service, as those terms are employed in the ADA.…"[929] The court stated that, although the absence of a "'[r]easonable accommodation is a theory of liability separate from intentional discrimination,'"[930] Title II of the ADA, unlike Titles I and III of the ADA, "does not contain a specific accommodation requirement."[931] Nevertheless, in remanding the case to the district court, the appeals court held that a Title II claim under the ADA may be established by evidence (1) that the defendant intentionally acted on the basis of the disability, (2) that the defendant refused to provide a reasonable modification; or (3) that "'*the defendant's rule disproportionally impacts*'" individuals with disabilities.[932]

In *Crowder v. Kitagawa*,[933] a class of visually impaired persons challenged Hawaii's quarantine requirement that applied equally to all persons entering the state with a dog. Hawaii's law effectively prevented persons who relied on guide dogs from enjoying the benefits of state services and activities in violation of the ADA. The district court ruled that because the quarantine requirement was not a service or benefit provided by the state, the requirement did not deny the plaintiff of any benefits and, thus, did not violate the ADA.[934]

In reversing the district court, the Ninth Circuit stated that Congress declared its intent in § 12101(a)(5) of the ADA "to address 'outright intentional exclusion' as well as 'the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and] failure to make modifications to existing facilities and practices.'"[935] Therefore, "Congress intended the ADA to cover at least some so-called disparate impact cases of discrimination, for the barriers to full participation listed above are almost all facially neutral but may work to effectuate discrimination"[936] against individuals with disabilities.

The appellate court relied on the U.S. Supreme Court's analysis in *Alexander v. Choate,*[937] in which the Supreme Court held, in a case arising under the Rehabilitation Act, that "[r]ather than attempt to classify a type of discrimination as either 'deliberate' or 'disparate impact," it was "more useful to assess whether disabled persons were denied 'meaningful access' to state-provided services."[938] In *Crowder*, the Ninth Circuit held "that Hawaii's quarantine requirement is a policy, practice or procedure which discriminates against visually-impaired individuals by denying them meaningful access to state services, programs and activities by reason of their disability in violation of the ADA."[939]

The only case located for this digest involving Title II of the ADA and a disparate impact claim against a transit agency is *Abrahams v. MTA Long Island Bus*.[940] In *Abrahams,* the plaintiffs alleged that MTA and its paratransit provider Able-Ride had given notice that Able-Ride would no longer be providing paratransit service to people with disabilities who lived more than three-quarters of a mile from a fixed route regular bus line or more than three-quarters of a mile from the end of a fixed route bus line. Moreover, Able-Ride would no longer offer door-to-door service in the area within three-quarters of a mile from a fixed route bus line but would transport those users to the closest bus stop.

The court ruled against the plaintiffs' claim under Title II of the ADA. In addition, the court ruled against the plaintiff's separate disparate impact claim based on service reductions that were caused by budget restrictions. The plaintiffs alleged that

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927 Tucker, *supra* note 905, at 370 (footnote omitted).

928 465 F.3d 737 (7th Cir. 2006).

929 *Id*. at 750 (footnotes omitted).

930 *Id*. at 753 (citation omitted).

931 *Id*. at 750 (footnotes omitted).

932 *Id*. at 753 (citation omitted) (emphasis supplied).

933 81 F.3d 1480 (9th Cir. 1996).

934 *Id*. at 1483.

935 *Id*. (citation omitted).

936 *Id*.

937 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985) (holding that even if there are some claims of disparate impact discrimination that would arise under Section 504 of the Rehabilitation Act or its implementing regulations, disparate impact theory did not apply to Tennessee's reduction in annual inpatient coverage by its Medicaid program), *superseded by statute as stated in* Prakel v. Indiana, 100 F. Supp. 3d 661, 683 (2015).

938 *Crowder*, 81 F.3d at 1484 (citations omitted).

939 *Id*. at 1485.

940 No. 10-CV-1535 (SJF)(ARL), 2010 U.S. Dist. LEXIS 51582 (E.D.N.Y. May 25, 2010), *aff'd*, 644 F.3d 110 (2d Cir. 2011).

the budget cuts had a disparate impact on individuals with disabilities as compared to individuals without disabilities. For a plaintiff to have a prima facie case of discrimination based upon disparate impact, "a plaintiff must allege: '(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices.'"[941]

The court held that, although the plaintiffs did not need to show discriminatory intent under a disparate impact theory, they had to prove that a practice actually or predictably resulted in discrimination, as well as prove a "'causal connection between the policy at issue and the discriminatory effect.'"[942] However, the plaintiffs did not allege that the defendants had a facially neutral policy or procedure that had or will have a disproportionate impact on individuals with disabilities; rather, the plaintiffs challenged a single action taken by the defendant—the budget cuts that caused a reduction in service.[943]

Although the plaintiffs in *Abrahams* argued that the budget cuts would effectively eliminate service entirely in Nassau County for some people with disabilities, the court concluded that "'the DOT regulations implementing the ADA do not contemplate perfect service'"[944] for individuals with disabilities. In dismissing the plaintiffs' disparate impact claim, the court ruled that the plaintiff's "argument would effectively … extend the ADA's paratransit requirements to include any and all services that have ever been provided, thus penalizing Defendant for voluntarily providing additional paratransit services in the past[] and discouraging other public entities from going beyond the requirements of the ADA."[945]

In *Chaffin v. Kansas State Fair Board*,[946] portions of the state fair's grandstand, twenty-two restrooms, and many buildings were not wheelchair accessible. The Tenth Circuit affirmed a district court's ruling that the defendants violated the ADA because they failed to comply with the ADAAG regulations and failed to prepare a transition plan. The court, rejecting the assertion that the ADA "requires no more than mere physical access," reaffirmed that the ADA requires public entities to provide individuals with disabilities "'meaningful access' to their programs and services."[947] In affirming the district court's decision, the Tenth Circuit stated that the ADA prohibits disparate impact discrimination:

> [A]lthough the conduct regulated by Title VI of the Civil Rights Act of 1964 is limited to intentional discrimination, … Congress sought with § 504—and consequently with Title II of the ADA—to remedy a broad, comprehensive concept of discrimination against individuals with disabilities, including disparate impact discrimination.[948]

E. Relationship Between Title III of the ADA and the Civil Rights Act

No case has been located for this digest involving a disparate impact claim against a provider of a transportation service covered by Title III. However, in *Independent Living Resources v. Oregon Arena Corp.*,[949] a federal district court in Oregon found that the ticket sale and infilling policies utilized at the Rose Garden effectively precluded wheelchair users from obtaining the same benefits available to ambulatory patrons. The court stated:

> *Title III of the ADA outlaws not just intentional discrimination but also certain practices that have a disparate impact upon persons with disabilities even in the absence of any conscious intent to discriminate*. Thus, a public accommodation may not "utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control." … Within reason, a public accommodation may be required to modify its policies, practices, or procedures to mitigate any disparate impact upon persons with disabilities. 28 CFR § 36.302(a). Public accommodations must also take affirmative measures to ensure that such persons have an equal opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations that are available from that public accommodation.[950]

In *Goonewardena v. North Shore Long Island Jewish Health System*,[951] in which the plaintiff's amended complaint alleged violations of Titles I and III of the ADA, a federal district court in New York stated that "'Title III and Rehabilitation Act claims include claims for intentional discrimination, disparate impact, and failure to accommodate.'"[952]

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[941] *Id.* at *16 (citation omitted).

[942] *Id*. at *17 (citation omitted).

[943] *Id*. (citation omitted).

[944] *Id*. (citation omitted).

[945] *Id*. at *18.

[946] 348 F.3d 850 (10th Cir. 2003). The courts in Iverson v. City of Boston, 452 F.3d 94, 101-02 (1st Cir. 2006) and Californians for Disability Rights, Inc. v. Caltrans, 249 F.R.D. 334, 341-42 (N.D. Cal. 2008) rejected the *Chaffin* court's interpretation of the Supreme Court's decision in *Alexander v. Sandoval,* 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[947] *Chaffin*, 348 F.3d at 857 (citations omitted).

[948] *Id*. at 859-60 (citations omitted).

[949] 1 F. Supp. 2d 1159 (D. Or. 1998).

[950] *Id*. at 1169 (citations omitted) (emphasis supplied).

[951] No. 11-CV-2456, 2014 U.S. Dist. LEXIS 41659 (E.D. N.Y. March 26, 2014).

[952] *Id*. at *23 (quoting Cardona v. Cmty. Access, Inc., No. 11-CV-4129, 2013 U.S. Dist. LEXIS 10778, *20 (E.D.N.Y. Jan. 25, 2013) and citing Fulton v. Goord, 591 F.3d 37, 43 (2d Cir. 2009) ("A qualified individual can base a discrimination claim on any of 'three available theories:

XIII. LIABILITY OF TRANSIT AGENCIES IN TORT FOR CLAIMS BY INDIVIDUALS WITH DISABILITIES

In addition to potential liability under the provisions of the ADA, there is some scholarly and judicial authority for the proposition that public entities may be held liable in tort for violations of the ADA.[953] There is also some judicial authority to the contrary.[954]

Five transit agencies responding to the survey in the past 5 years have had cases by individuals with disabilities based on their state's common law of tort liability.[955] One commentator argues there are at least three situations in which a tort claim may succeed when an ADA claim would fail:

> (1) the defendant's conduct is considered insufficiently severe or pervasive under a standard borrowed from Title VII to establish a hostile environment claim under the ADA; (2) the plaintiff does not pass the test of whether he or she is a person with a disability under the ADA; and (3) the causal link between the disability and the discrimination is insufficient.[956]

Plaintiffs may sue in tort, for example, "when a facility is designed in such a way that it creates a danger to an individual with a mobility impairment and that person is harmed"[957] or when an individual with a disability is harmed emotionally because of the inability to use a facility's features, such as a restroom. In such cases, a plaintiff may bring an action at common law for negligence and/or for negligent or intentional infliction of emotional distress.[958]

In *Stephens v. Shuttle Associates, L.L.C.*,[959] a bus rider sued the defendants, including two transit authorities and a bus operator, inter alia, for intentional infliction of emotional distress, failure to train, and violations of the ADA and the Rehabilitation Act.[960] The plaintiff's disability, which impaired her ability to walk and to speak, required her to use a power wheelchair.[961] After Stephens had boarded a bus, she did not comply with the operator's request to "power-off" her wheelchair. Later, a supervisor arrived and secured the wheelchair to the bus without having to power it off.[962]

First, the court observed that "[t]o state a claim for intentional infliction of emotional distress, a plaintiff must plead "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress."[963]

However, because the plaintiff did not allege any facts showing that the operator's conduct was "'extreme and outrageous,'" Stephens failed to plead a sufficient claim for intentional infliction of emotion distress.[964]

Second, the plaintiff failed to succeed on her claim for failure to train, in part, because she did not allege that the transit defendants owed a specific duty to her.[965]

Third, the plaintiff failed to plead adequately that the defendants denied her the benefits of a service or otherwise discriminated against her because of her disability.[966] The court ruled that, although the bus operator may have been rude or insensitive, "'legislation such as the ADA cannot regulate individuals' conduct so as to ensure that they will never be rude or insensitive to persons with disabilities.'"[967] The plaintiff's case did not involve a pattern of repeated conduct.[968]

XIV. SUMMARY AND CONCLUSIONS

The ADA sought to eliminate discrimination against individuals with disabilities.

Part II of this digest provides an overview of the history, purposes, and five titles of the ADA.

However, as analyzed in Part III of this digest, in 2008, Congress enacted the ADAAA to reject certain Supreme Court decisions that had narrowed the intended breadth of the ADA, as well as make key

(1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation.'") (citation omitted)).

[953] Laura Rothstein, *Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment?* 75 Ohio St. L. J. 1263, 1266-67 (2014) [hereinafter Rothstein].

[954] Williams v. Chicago Transit Auth., No. 16 C 9072, 2017 U.S. Dist. LEXIS 166191, *10 (N.D. Ill. Sept. 30, 2017). The court stated that "'[i]solated acts of negligence by a city employee,' assuming that the alleged acts were in fact negligent, 'do not come within the ambit of discrimination against disabled persons proscribed by the ADA.'" *Id.* (citation omitted).

[955] *See* Appendix C, Summary of Transit Agencies' Responses to Question 26.

[956] Mark C. Weber, *The Common Law of Disability Discrimination*, 2012 Utah L. Rev. 429, 467 (2012).

[957] Rothstein, *supra* note 953, at 1279.

[958] *Id*. at 1283.

[959] 547 F. Supp. 2d 269 (S.D.N.Y. 2008).

[960] *Id*. at 273.

[961] *Id*.

[962] *Id*.

[963] *Id*. at 274 (citation omitted).

[964] *Id*. (citation omitted).

[965] *Id*. at 276.

[966] *Id*. at 277.

[967] *Id*. at 278 (citations omitted).

[968] *Id*.

changes to the ADA, such as amending the definition of the term disability and adding a list of major life activities for which an impairment shall be considered a disability.

Part IV discusses Title I of the ADA and discrimination in employment against individuals with disabilities. Since the ADAAA, an individual meets the "being regarded as" prong of the definition of the term disability when the individual establishes that he or she has been subjected to an action prohibited by the ADA "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[969]

Under the ADA, a qualified individual is one who, with or without reasonable accommodation, is able to perform the essential functions of a job that the individual holds or seeks. An entity subject to the ADA may not discriminate against a qualified individual on the basis of a disability in the entity's application procedures for a job; in the hiring, advancement, or discharge of employees; employee compensation; job training; or other terms, conditions, and privileges of employment.

Claims arising under Title I have involved individuals with disabilities as applicants for employment or as employees and the meaning of the term disability, what constitutes a qualified disability, when an employer must make a reasonable accommodation for an applicant or an employee with a disability, how employers may respond to an employee's use of illegal drugs, how employers may deal with employees who use or are under the influence of alcohol in the workplace, and when an employer may make medical inquiries or require medical exams or drug tests.

To establish a violation of Title I of the ADA, an applicant or employee has to demonstrate that he or she is an individual with a disability within the meaning of the ADA, that the employer had notice of the person's disability, that the applicant or employee could perform the essential functions of the employment position with a reasonable accommodation, and that the employer refused to provide such an accommodation. In its defense, a transit agency may show, inter alia, that its use of qualification standards, tests, or selection criteria are job related and consistent with business necessity; that qualification standards, tests, or selection criteria are not being used to screen out or deny a job or a benefit to an individual with a disability; and that job performance cannot be accomplished by a reasonable accommodation. A transit agency may deny employment to an individual who poses a direct threat to the health or safety of other individuals in the workplace.

Part V of this digest discusses Title II of the ADA. Title II applies to almost all providers of transportation service, regardless of whether they are public or private and regardless of whether they receive federal financial assistance. As provided in § 12132 of the ADA, a qualified individual with a disability shall not, because of a 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 DOT regulations in part 37 implement Titles II and III of the ADA. Compliance with 49 C.F.R. part 37 and Section 504 of the Rehabilitation Act is a condition to receiving federal financial assistance. However, part 37 of the regulations applies to the following entities, regardless of whether they receive federal financial assistance: any public entity that provides designated public transportation or intercity or commuter rail transportation; any private entity that provides public transportation; and any private entity that that operates a fixed route or demand responsive system but that is not primarily engaged in the business of transporting people. Contractors and subcontractors usually are subject to the same obligations as the public transit agencies with whom they contract. As the FTA states, "[a]lmost all types of transportation providers are obligated to comply with Federal nondiscrimination regulations in one form or another."[970]

Under parts 37 and 38 of the regulations, an entity must ensure that vehicle operators and other personnel make use of accessibility-related equipment or features, which must be in good working order, such as lifts and ramps, lighting, mobility aid, securement areas and systems, public address and other communications equipment, seat belts and shoulder harnesses, if required, and signage. For facilities, accessibility features include accessible paths to and within facilities, communications equipment, elevators, fare vending equipment, gates, platforms, handrails, ramps, and signage.

Public entities must make reasonable modifications of policies, practices, or procedures when the modifications are necessary to avoid discrimination against individuals with a disability. A provider of transportation services may deny a requested modification when the requested modification would fundamentally alter the provider's services; it would create a direct threat to the health or safety of others; or the modification is not necessary for a passenger to be able to use the entity's services, programs, or activities fully for their intended purpose. FTA recipients

[969] 42 U.S.C. § 12102(3)(A) (2018).

[970] FTA Circular, Ch. 1.4, p. 1-8.

may deny a request for a modification when the requested modification would create an undue financial or administrative burden.

To make a claim against a transit agency for a violation of Title II, a plaintiff must show that he or she is a qualified individual with a disability; that the plaintiff was either excluded from or otherwise denied the benefits of the agency's services, programs, or activities, or was otherwise discriminated against by the agency; and that the exclusion, denial of benefits, or discrimination was because of the plaintiff's disability.

Part VI of this digest addresses how transportation facilities must comply with the accessibility requirements in Title II. A transit agency must operate or conduct a designated public transportation program or activity in an existing facility so that, when viewed in its entirety, the program or activity is readily accessible to and usable by individuals with disabilities.

Transit agencies must comply with DOT Standards when constructing new facilities or altering existing ones so that they are readily accessible to individuals with disabilities, including those who use wheelchairs. Section 12146 of the ADA states that it is discriminatory for a public entity to construct a new facility to be used to provide designated public transportation services unless the facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. A transportation facility is considered to be readily accessible when it meets the requirements of part 37 and appendices B and D to 36 C.F.R. part 1191 that apply to buildings and facilities subject to the ADA, as modified by appendix A to part 37. The ADA applies also to alterations of existing facilities that affect a facility's usability by persons with disabilities, including those who use wheelchairs.

Section 12162(e) of the ADA applies to new and existing stations for use in intercity or commuter rail transportation. For example, it is a violation of the ADA if a new station is constructed for use in intercity or commuter rail transportation that is not readily accessible to and usable by individuals with a disability, including those who use wheelchairs. As for existing intercity and commuter rail stations, the stations must be made accessible to and usable by persons with disabilities. When altering intercity or commuter rail stations, they must be altered to the maximum extent feasible so that the altered portions of the stations are readily accessible to and usable by individuals with disabilities.

Under Title II of the ADA, a public entity providing designated public transportation must make key stations in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including those who use wheelchairs. With some exceptions, key stations have to comply with DOT Standards to the same extent as other new or altered stations.

Part VII of this digest discusses the ADA requirements for fixed route service. Under § 12142(a) of the ADA, a public entity is discriminating against individuals with a disability when the public entity purchases or leases a new bus, a new rapid rail vehicle, a new light rail vehicle, or any other new vehicle to be used on such system if the vehicle is not readily accessible to and usable by individuals with disabilities, including those who use wheelchairs. The ADA's accessibility requirements apply to purchases or leases of used or remanufactured vehicles. The ADA applies also to private entities who have contracts or other arrangements with public entities. New rapid rail cars and light rail vehicles must be accessible; remanufactured rapid or light rail vehicles must be made accessible to the maximum extent feasible. Notably, as of 2013, according to the FTA Circular, nearly 100% of transit buses and rapid rail cars and 87% of commuter rail and light rail cars were accessible.

Chapter 5 of the FTA Circular discusses the equivalent facilitation process for transportation vehicles and transportation facilities, a process that may permit departures from the specifications in 49 C.F.R. part 38 for vehicles and the DOT Standards for facilities and allow the use of alternative designs or technologies that provide equal or greater accessibility. That is, innovations must provide equal or greater accessibility in comparison to the specific technical and scoping requirements in the regulations. A party requesting equivalent facilitation must submit, inter alia, documentation of public participation when the party was developing an alternative method of compliance with the ADA.

As discussed in Part VIII of this digest, because some individuals with disabilities are unable to use a fixed route system, Congress created a safety net in the form of complementary paratransit service. Pursuant to the ADA, transit agencies must provide individuals with disabilities with transportation service on the same basis as other individuals who use fixed route systems. The paratransit obligations do not apply to commuter bus, commuter rail, or intercity rail systems.

An individual with a disability is eligible for paratransit service if the individual is unable, because of a physical or mental impairment (including a vision impairment), and without the assistance of another individual (except the operator of a wheelchair lift or other boarding assistance device), to board, ride,

or disembark from any vehicle on a system that is readily accessible to and usable by individuals with disabilities. Individuals are eligible for paratransit service who have intellectual or cognitive disabilities that prevent them from navigating a fixed route system. Individuals with a temporary or episodic disability may be protected by the ADA from discrimination. Under 42 U.S.C. § 12102(4)(D), an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Part IX of this digest discusses demand responsive service. When public entities operate demand responsive systems and purchase or lease new buses or other new vehicles, they must ensure that the vehicles are readily accessible to and usable by individuals with disabilities, including those who use wheelchairs. The level of service for individuals with a disability must be "equivalent" to the level of service provided to individuals without disabilities when the service is viewed in its entirety.

Part X of this digest discusses administrative and judicial enforcement of Title II. The FTA is responsible for ensuring that grantees of federal financial assistance are not discriminating against individuals with disabilities. If there is a violation that is not resolved voluntarily, the DOT or the FTA may suspend or terminate federal financial assistance or refer the matter to the Justice Department. FTA also conducts triennial reviews of recipients of federal funding pursuant to 49 U.S.C. § 5307(f)(2) and (3) and monitors transit agencies' compliance with the ADA.

As for judicial enforcement, § 12133 of Title II incorporates the remedies, procedures, and rights in Section 505 of the Rehabilitation Act, which, in turn, are the same remedies, procedures, and rights provided in Title VI of the 1964 Civil Rights Act. Because it has been held that there is an implied right of action in the Civil Rights Act's Title VI, Title II of the ADA likewise is enforceable by a private right of action by individuals with disabilities who allege discrimination that violates Title II. It has been held that an action may not be predicated on a regulation that imposes an obligation that is not found in the "plain language" of the ADA.

As discussed in Part XI of this digest, Title III prohibits discrimination by places of public accommodation against individuals with disabilities. Section 12182(a) of the ADA mandates that no individual shall be discriminated against on the basis of a 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. The term public accommodation includes a terminal, depot, or other station used for specified public transportation. Private entities operating a fixed route system, a demand responsive system, or over-the-road buses are subject to Title III.

As analyzed in Part XII, scholars have analyzed the relationship between the ADA and the Civil Rights laws, including whether disparate impact and disparate treatment claims are cognizable under the ADA. Disparate impact occurs when an action that is neutral on its face results in discriminatory effects on or consequences for individuals, whereas disparate treatment is the intentional, non-neutral discriminatory treatment of individuals. There is some judicial authority for the proposition that Title II of the ADA incorporates disparate impact theory as a basis for recovery. Likewise, some courts have stated that claims for disparate impact are cognizable under Title III of the ADA.

Finally, as discussed in Part XIII, there is some scholarly and judicial authority for the proposition that an individual with a disability may bring an action for negligence for a violation of the ADA.

APPENDIX D

TRANSIT AGENCIES' POLICIES, PROCEDURES, AND OTHER MATERIALS

Appendix D is available online at www.trb.org by searching for TCRP LRD 54.

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