

## **Responsibilities of State and Local Government Agencies Under Title II of the ADA**

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Deaf and hard of hearing people are entitled to effective communication with state and local government agencies. Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§12131-12134, forbids discrimination by any public entity. This federal law applies to all types of state and local government agencies, including courts, schools, social service agencies, legislatures, commissions and councils, recreational facilities, libraries, and state/county/city departments and agencies of all kinds. It applies to activities that are administered directly by government agencies, and to activities that are carried out by private subcontractors.

The U.S. Department of Justice has issued regulations explaining the requirements of that Act, 28 C.F.R. Part 35, 56 Fed. Reg. 35694 (July 26, 1991) (U.S. Department of Justice Final Rule: Nondiscrimination on the Basis of Disability in State and Local Government Services).

Under the ADA, local and state agencies are required to give equal access and equally effective services to people with disabilities. 28 C.F.R. 35.130. They may not deny people an opportunity to participate in their programs, or give them an opportunity that is less effective than the opportunity given to others. Often, the public entity must provide qualified interpreters, TTYs, visible warning devices, or captioned materials and other auxiliary aids to ensure effective communication with deaf and hard of hearing people. The Department of Justice regulation specifically states:

- (a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.
- (b)
  - (1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.
  - (2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

28 C.F.R. §35.160 (emphasis added).

There are many types of auxiliary aids and services that may be necessary for effective communication. Furthermore, an auxiliary aid that is effective for one person might not be effective for another person. The Department of Justice regulation defines the term "auxiliary aid" comprehensively:

[q]ualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunication devices for deaf persons [TTY's], videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments.

28 C.F.R. 35.104.

The appropriate auxiliary aid depends on many factors, such the type of communication used by the individual and the situation in which communication occurs. An auxiliary aid that is appropriate for one person, or in one context, may be useless in another setting or for a person with a different type of hearing loss.

The individual with disabilities should be deferred to in the choice of what auxiliary aid or service is appropriate:

In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

28 C.F.R. §35.160(b)(2).

The Analysis of the ADA regulation states:

The public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice. This expressed choice shall be given primary consideration by the public entity. . . The public entity shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would [constitute an undue burden].

56 Fed. Reg. at 35711, 35712. The deaf individual's own assessment of the necessary type or level of service is entitled to "primary consideration."

For a deaf person who relies on sign language, the ADA usually requires provision of qualified sign language interpreter services when that service is needed to ensure effective communication. The U.S. Department of Justice has defined "qualified interpreter", for purposes of Title II, to mean:

. . . an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary.

28 C.F.R. 35.104. Although the definition does not require "certified" interpreters, it does require interpreters with the necessary skill to interpret accurately in the particular context.

The agency may not charge the individual for providing auxiliary aids and services.

If services are available by telephone, the agency must either have a TTY device, and/or accept and make telephone calls using a relay service. The goal of having the TTY equipment and using relay service is to provide equally effective telephone services to deaf individuals.

In addition to providing auxiliary aids and services, public entities must modify their policies and practices when necessary to prevent discrimination. For example, a facility with a "no pets" requirement must modify that requirement to permit a blind or deaf person to use an assistance animal.

In a few judicial regions, courts have held that Title II of the ADA is not constitutional as applied to state government agencies. This issue is currently being litigated in a number of federal courts of appeal and federal district courts, as well as cases before the U.S. Supreme Court. Any person bringing a claim under Title II of the ADA should consult with a local attorney to determine the current status of the law in your state.

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