

# What Rights do Prisoners have Under the Americans with Disabilities Act?

Signed by President George H.W. Bush and passed by Congress in 1990, the Americans with Disabilities Act (ADA) has evolved over the past 30 years to take on issues not specifically addressed in its inaugural enactment. One such issue is how the ADA applies to incarcerated persons. Additional language has been added to specifically address how the provisions of the ADA apply to detention and correctional institutions, and many courts have been called on to help shape the definitions and applicability of the ADA to prisoners. After a review of current legal and institutional policy, along with relevant legal opinions, this document addresses what rights prisoners have under the ADA.

## Public Entities

Title II of the ADA ensures no persons with disabilities are denied the benefits of, or are discriminated by, a public entity on the basis of disability.<sup>1</sup> Public entities include all State or local governments, their departments and agencies, and any other instrumentalities or special purpose districts of State or local governments.<sup>2</sup> Title II of the ADA extended the prohibition on discrimination established by the Rehabilitation Act of 1973 to all activities of State and local governments regardless of whether these entities receive Federal financial assistance.<sup>3</sup> The ADA is not intended to limit any procedures and rights of any other Federal, State, or local laws that allow for equal or greater protection of the rights of individuals with disabilities.<sup>4</sup>

## Correctional Facilities

In 1998, the Supreme Court held that the ADA applies to state prisons and incarcerated persons.<sup>5</sup> After an inmate with a history of hypertension was refused admission to a prison boot camp program that would have resulted in his early parole, the inmate sued the Pennsylvania Department of Corrections and several department officials under the ADA.<sup>6</sup> Justice Scalia

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<sup>1</sup> 28 CFR § 35.130(a)

<sup>2</sup> 28 CFR § 35.104 – Definition of Public Entity

<sup>3</sup> The Rehabilitation Act of 1973 established that no disabled individual shall, solely by reason of 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...” 29 U.S.C. § 794(a)

<sup>4</sup> 28 CFR § 35.103(b)

<sup>5</sup> *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998)

<sup>6</sup> *Id.* at 208.

determined that the ADA “unmistakably includes State prisons and prisoners within its coverage.”<sup>7</sup>

### New Provisions are Enacted

The initial language of the ADA did not contain specific standards for detention and correctional facilities, either in terms of the physical amenities of the facility or in terms of access to programs and services by prisoners. However, in the final rule of the ADA, the drafters detailed specific provisions relating to the design, construction, and alteration of detention and correction facilities.<sup>8</sup> Further, language was established relating to placement policies and program accessibility for prisoners in detention and correctional facilities.<sup>9</sup>

As a result, all adult or juvenile detention and correctional facilities, either directly or through a contract with public or private entities, including private correctional facilities, are subject to the ADA.<sup>10</sup> No qualified inmate or detainee shall be denied the benefits or services of, or be discriminated by, a public entity on the basis of disability because a facility is inaccessible to or unusable by individuals with disabilities.<sup>11</sup> Thus, prisoners are afforded the same protections from discrimination based on disability as those who are not incarcerated.

### Private Correctional Facilities

Despite language in 28 CFR § 35.152(a), some courts have held private correctional facilities are not “instrumentalities of the State” and therefore, are not public entities subject to the ADA.<sup>12</sup>

The United States Court of Appeals for the Eighth Circuit, consisting of North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, and Arkansas, held similarly in a case involving medical and mental health services provided by private providers in a correctional facility.<sup>13</sup> The Court agreed that the private contractors were not covered by Title II of the ADA just by contracting with a governmental entity to provide governmental services.<sup>14</sup>

The United States Court of Appeals for the Ninth Circuit, consisting of Montana, Idaho, Washington, Oregon, California, Nevada, Arizona, Alaska, and Hawaii, has not had the

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<sup>7</sup> Id. at 209

<sup>8</sup> 28 CFR § 35.151(k)

<sup>9</sup> 28 CFR § 35.152

<sup>10</sup> 28 CFR § 35.152(a)

<sup>11</sup> 28 CFR § 35.152(b)

<sup>12</sup> E.g. *Edison v. Doublerly*, 604 F.3d 1307, 1310 (11th Cir.2010)(holding that “merely contracting with the State to provide governmental services, essential or otherwise” does not make a private prison liable under the ADA.

<sup>13</sup> *Johnson v. Neiman*, 504 F. App'x 543 (8th Cir. 2013)

<sup>14</sup> Id. at 545

opportunity to address this issue directly. However, they were presented with a similar issue of whether a private prison is a public entity under the Religious Land Use and Institutionalized Persons Act (RLUIPA),<sup>15</sup> which also uses the language of “instrumentality of the state.”<sup>16</sup> The Court held that because Crossroads Correctional Center’s (CCC) activities were operations of the Montana Department of Corrections (DOC), statutory provisions prevented the operation of a private prison without a license from the DOC, the DOC was responsible for key decision making, the State was able to step in if CCC was out of compliance with laws and guidelines, and the prisoners remained State prisoners subject to transfer, CCC had more than just a contractual relationship with the State. As such, the prisoners could pursue claims under RLUIPA.<sup>17</sup>

The United States Court of Appeals for the Tenth Circuit, consisting of Wyoming, Colorado, Utah, New Mexico, Kansas, and Oklahoma, relied on the *Green*<sup>18</sup> court’s application of the “canon of statutory construction known as noscitur a sociis (“a word is known by the company it keeps”)” to the defining characteristics of the “company” kept by “instrumentality.”<sup>19</sup> The Tenth Circuit agreed that “instrumentality” refers to a traditional government unit or one created by a government unit, and accordingly, does not apply to private prisons.<sup>20</sup>

Although the Ninth Circuit appears to contradict the Eighth and Tenth Circuits’ rulings that the ADA doesn’t apply to private prisons, each case is based on the individual relationship between the private and governmental entities. The determination of whether a private prison is an “instrumentality of the State” may depend on whether that private entity “takes the place of the state in performing a function within the exclusive province of the state.”<sup>21</sup> Cases in which a private entity only contracted to provide services may be distinguished from cases in which the State’s involvement was essential to perform the function at issue.<sup>22</sup> Therefore, a private prison in the 9th Circuit may be excluded from ADA requirements if the relationship between the prison and the government is merely a contractual relationship with little oversight from the government.

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<sup>15</sup> 42 U.S.C.A. § 2000d-4a

<sup>16</sup> *Knows His Gun v. Montana*, 866 F. Supp. 2d 1235, 1245 (D. Mont. 2012)

<sup>17</sup> *Id.* at 1247

<sup>18</sup> *Green v. City of New York*, 465 F.3d 65, 79 (2d Cir. 2006)

<sup>19</sup> *Phillips v. Tiona*, 508 F. App'x 737, 748 (10th Cir. 2013)

<sup>20</sup> *Id.* at 754

<sup>21</sup> *Edison v. Douberly*, 604 F.3d 1307, 1312 (11th Cir. 2010)

<sup>22</sup> *Id.* at 1311

## Disability Defined

There is no differentiation between disability for those who are incarcerated and those who are not, and the federal ADA definition of disability applies equally to individuals regardless of their legal status. A disability can be 1) a physical or mental impairment that substantially limits one or more major life activities, 2) a record of such an impairment, or 3) being regarded as having such an impairment.<sup>23</sup> Physical or mental impairment can include any physiological disorder or condition affecting one or more body systems or any mental or psychological disorder such as intellectual disability, emotional or mental illness, and specific learning disability.<sup>24</sup> The ADA allows for a broad interpretation of disability to advance the maximum coverage authorized by its terms.<sup>25</sup> This broad interpretation applies equally to all persons with disabilities.

## Facility Design

Detention and correctional facilities must comply with the structural standards of the ADA. All public entity facilities constructed after 1992 must ensure at least part of their facility is accessible by individuals with disabilities.<sup>26</sup> In detention and correctional facilities, at least 3% of the total number of cells must provide accessible mobility features.<sup>27</sup> Further, each classification level must have at least one cell that provides mobility features.<sup>28</sup> Public entities are required to implement reasonable policies to ensure that all incarcerated persons with disabilities are provided the accessible elements necessary to ensure the individual has access to safe and appropriate housing.<sup>29</sup> Safety requirements may be imposed in detention and correctional facilities to ensure that its services, programs, or activities are safely operated as long as those safety requirements are based on actual risks to prisoners with disabilities rather than mere speculation, stereotypes, or generalizations.<sup>30</sup>

In addition, medical and long-term care facilities in jails, prisons, and other detention and correctional facilities must comply with the 2010 Standards technical and scoping requirements irrespective of whether those facilities are licensed.<sup>31</sup>

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<sup>23</sup> 28 CFR § 35.108(a)(1)

<sup>24</sup> 28 CFR § 35.108(b)(1)

<sup>25</sup> 28 CFR § 35.108(a)(2)(i)

<sup>26</sup> 28 CFR § 35.151(a)(1)

<sup>27</sup> 28 CFR § 35.151(k)(1)

<sup>28</sup> *Id.*

<sup>29</sup> 28 CFR § 35.152(b)(3)

<sup>30</sup> 28 CFR § 35.130(h)

<sup>31</sup> 28 CFR § 35.151(k)(3)

## Prisoners with Disabilities

Prisoners with disabilities shall not be isolated or segregated on the basis of disability.<sup>32</sup> Incarcerated persons must be integrated into the most appropriate housing while meeting the individual's needs.<sup>33</sup> Prisoners with disabilities must not be placed in inappropriate security classifications or designated medical areas due to a lack of available accessible cells or beds in the individual's appropriate classification.<sup>34</sup> Prisoners with disabilities must be placed in facilities providing the same programs and services as other detention and correctional facilities they may otherwise be housed.<sup>35</sup> Additionally, a public entity shall not place a prisoner with disabilities in a distant facility they would not otherwise be housed if that placement has the effect of depriving them of visitation with family.<sup>36</sup>

Congress, in its findings and purpose for implementing the ADA, recognized that the isolation and segregation of individuals with disabilities was a "serious and pervasive social problem,"<sup>37</sup> and that the "outright intentional exclusion"<sup>38</sup> of persons with disabilities was "unfair and unnecessary discrimination and prejudice."<sup>39</sup> Thus, all detention and correctional facilities must place prisoners with disabilities in a setting that allows as much interaction as possible with non-disabled prisoners.<sup>40</sup> "Unjustified isolation, we hold, is properly regarded as discrimination on the basis of disability."<sup>41</sup>

In 2013, the Department of Justice's investigation into a state correctional facility resulted in a finding that unlawful segregation of prisoners with intellectual disabilities and/or serious mental

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<sup>32</sup> *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999). *Olmstead* involved two developmentally disabled women also suffering from mental health disorders who were voluntarily admitted to a hospital for psychiatric care. The women brought suit under Title II after the hospital failed to facilitate their placement in a community-based program as recommended by their treating professionals. This confinement in a segregated environment was found to be a form of discrimination based on the disability status of the women.

<sup>33</sup> 28 CFR § 35.152(b)(2)

<sup>34</sup> 28 CFR § 35.152(b)(2)(i) and (ii)

<sup>35</sup> 28 CFR § 35.152(b)(2)(iii)

<sup>36</sup> 28 CFR § 35.152(b)(2)(iv)

<sup>37</sup> 42 U.S.C.A. § 12101(a)(2)

<sup>38</sup> 42 U.S.C.A. § 12101(a)(5)

<sup>39</sup> 42 U.S.C.A. § 12101(a)(8)

<sup>40</sup> 28 CFR § 35.152(b)(2)

<sup>41</sup> *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597

illness in isolation units and a failure to conduct individual risk assessments on prisoners to determine the actual risk posed to others was a violation of the ADA.<sup>42</sup>

### Services, Programs, or Activities

The ADA does not distinguish between the programs, services, and activities provided by prisons from those provided by public entities that are not prisons.<sup>43</sup> “Modern prisons provide inmates with many recreational “activities,” medical “services,” and educational and vocational “programs,” all of which at least theoretically “benefit” the prisoners.”<sup>44</sup> Title II extends to all services, programs, and activities of a detention or correctional facility, which may include housing, classification, medical/mental health treatment, and recreation services.

Like all public entities, detention and correctional facilities providing services, programs, or activities must ensure those services are readily accessible to and usable by prisoners with disabilities.<sup>45</sup> As necessary to avoid discrimination, all public entities must make reasonable modifications in policies, practices, or procedures unless it can demonstrate that the modifications would fundamentally alter the nature of the service, program, or activity.<sup>46</sup> Further, detention and correctional facilities must utilize eligibility criteria that do not have the effect of screening out or preventing individuals with disabilities from equally participating in the service, program, or activity unless the service, program, or activity necessarily requires that such eligibility criteria be imposed.<sup>47</sup>

The ADA also requires detention and correctional facilities to communicate as effectively with prisoners with disabilities as it would with prisoners without disabilities.<sup>48</sup> This may include providing certain equipment and aids as referenced below.

### Equipment

Detention and correctional facilities must furnish appropriate auxiliary aids and services that enable persons with sensory, manual, or speaking disabilities an equal opportunity to

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<sup>42</sup> Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation, at 31, available at [https://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson\\_findings\\_5-31-13.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson_findings_5-31-13.pdf)

<sup>43</sup> Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 210 (1998)

<sup>44</sup> Id.

<sup>45</sup> 28 CFR § 35.150(a)

<sup>46</sup> 28 CFR § 35.130(b)(7)

<sup>47</sup> 28 CFR § 35.130(b)(8)

<sup>48</sup> 28 CFR § 35.160(a)(1)

participate in a service, program, or activity provided by the facility.<sup>49</sup> Such aids include, but are not limited to, qualified interpreters, transcription services, assistive listening devices, closed caption decoders, videotext displays, or “other effective methods of making aurally delivered materials available to individuals with hearing impairments.”<sup>50</sup> Detention and correctional facilities may need to update auxiliary aids and services as technology advances.<sup>51</sup>

A public entity is not, however, required to provide prisoners with disabilities equipment such as wheelchairs, eyeglasses, or hearing aids.<sup>52</sup> “Of course, if personal services or devices are customarily provided to the individuals served by a public entity, such as a hospital or nursing home, then these personal services should also be provided to individuals with disabilities.”<sup>53</sup>

Although a Title III case, the Supreme Court held “an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person.”<sup>54</sup> At least one court applied this rule to a Title II claim by requiring that “once a disabled prisoner requests a non-frivolous accommodation, the accommodation should not be denied without an individualized inquiry into its reasonableness.”<sup>55</sup> The court held a prison “denied meaningful access to benefits and services” by failing to allow a prisoner with disabilities use of his personal motorized wheelchair, and that this allowance would not unduly burden the prison.<sup>56</sup> “This decision does not purport to conclude that [this prison] must provide a motorized wheelchair to all inmates

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<sup>49</sup> 28 CFR § 35.160(b)(1); E.g. *McBride v. Michigan Dep't of Corr.*, 294 F.Supp.3d 695 (E.D.Mich.2018)(holding prison officials' failure to provide interpreter services for deaf and hard of hearing inmates during their health care visits would violate their obligation under Title II of ADA and prison was also required to provide deaf and hard of hearing inmates with American Sign Language (ASL) interpreters during religious services that took place inside prison.)

<sup>50</sup> 28 CFR § 35.104(1)

<sup>51</sup> *McBride v. Michigan Dep't of Corr.*, 294 F. Supp. 3d 695, 707 (E.D. Mich. 2018) (old technology such as teletypewriters, or “TTYs” may not be effective methods of communication for deaf and hard of hearing prisoners, and more advanced video-based communication technology may be required.)

<sup>52</sup> 28 CFR § 35.135; E.g. *Low v. McGinness*, 2012 WL 1131534, at 2 (E.D. Cal. Mar. 30, 2012) (holding that plaintiff did not state an ADA claim in alleging that the county jail failed to provide him with prescription eyeglasses); *McCauley v. Winegarden*, 60 F.3d 766, 767 (11th Cir.1995) (“in view of § 35.135, the court finds that Plaintiff has failed to state a claim under the ADA” for its failure to provide a “personal device.”)

<sup>53</sup> Americans with Disabilities Act Title II Technical Assistance Manual, § II-3.6200, available at <http://www.usdoj.gov/crt/ada/taman2.html>

<sup>54</sup> *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001)

<sup>55</sup> *Wright v. New York State Dep't of Corr.*, 831 F.3d 64, 78 (2d Cir. 2016)

<sup>56</sup> *Wright v. New York State Dep't of Corr. & Comm. Supervision*, 242 F.Supp.3d 126, 141 (N.D.N.Y., 2017)

who request such an accommodation. It is tailored only to Plaintiff in this case.”<sup>57</sup> Detention and correctional facilities must individually evaluate a need for accommodation.<sup>58</sup>

### Retaliation

Detention and correctional facilities shall not discriminate against prisoners for opposing any act made unlawful under the ADA, or because the prisoner filed a complaint or assisted in an investigation into any act made unlawful under the ADA.<sup>59</sup> Similarly, a detention and correctional facility shall not coerce, intimidate, threaten, or interfere with any prisoner because that prisoner exercised or enjoyed any right granted or protected by the ADA.<sup>60</sup>

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<sup>57</sup> Id.

<sup>58</sup> *Pierce v. District of Columbia*, 128 F.Supp.3d 250, 254 (D.D.C. 2015) (finding that state denied a deaf prison inmate “meaningful access to prison services” where prison employees “did *nothing* to evaluate [plaintiff’s] need for accommodation” and did not “engage in any meaningful assessment of his needs”)

<sup>59</sup> 28 CFR § 35.134(a)

<sup>60</sup> 28 CFR § 35.134(b)