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Disability Rights Education & Defense Fund

Legal Advocacy for Unhoused People with Disabilities

A Toolkit to Challenge California Laws Criminalizing Homelessness

January 2025

Disability Rights Education and Defense Fund (DREDF) is a leading national civil rights law and policy center directed by individuals with disabilities and parents who have children with disabilities. Founded in 1979, DREDF works to advance the civil and human rights of people with disabilities through legal advocacy, training, education, and public policy and legislative development.

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Introduction

Across California, cities are passing laws criminalizing homelessness in response to the rising numbers of unhoused people. Over 770,000 people are unhoused in the United States with 187,084 of those people living in California.[1] People with disabilities are disproportionately represented among the unhoused population and face greater burdens under criminalization laws.[2] The situation has grown worse since the Supreme Court decision in City of Grants Pass, *Oregon v. Johnson* which overturned Ninth Circuit precedent that held that under the 8th Amendment fining and arresting a person forced to live outside because shelter was unavailable was cruel and unusual punishment.[3] Emboldened by this decision, several California cities have passed, and are actively enforcing laws subjecting unhoused people to fines, arrest, and incarceration for life-sustaining activities, such as sleeping, camping, eating, or sitting in public spaces, regardless of the availability of shelter. Many unhoused people with disabilities are unable to meet the demands of criminalization laws, such as requirements to relocate quickly or multiple times a day.

State and federal disability laws like the Americans with Disabilities Act (ADA) can mitigate the impact of criminalization laws and protect unhoused people with disabilities from discrimination. The ADA prohibits laws that have a disparate impact on people with disabilities and requires public entities provide disabled people with reasonable modifications. Under these laws, unhoused disabled people can ask for a reasonable modification of an anti-camping ordinance, such as extending the time to move, to enable them to comply with the law and avoid citations and arrest.

This toolkit is for legal services attorneys and advocates for unhoused disabled people in California. It reviews how ordinances and policies that target unhoused people with criminal penalties may violate disability laws like the ADA. It describes how to challenge the failure of municipalities to respect the rights of disabled people when enforcing laws, including how to seek and enforce reasonable modifications. While this manual focuses on California, much of the focus is on the ADA,

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[1] Tanya de Sousa et al., The 2024 Annual Homelessness Assessment Report to Congress, U.S. Dep't of Hous. and Urb. Dev., Off. of Cmty. Plan, 2, 16 (Dec. 2024), *https://www.huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part-1.pdf*.
[2] Margot Kushel & Tiana Moore, Toward a New Understanding: The California Statewide Study of People Experiencing Homelessness, UCSF Benioff Homelessness and Hous. Initiative, 27 (June 2023), https://homelessness.ucsf.edu/sites/default/files/2023-06/CASPEH_Report_62023.pdf.
[3] *City of Grants Pass, Oregon v. Johnson*, 144 S. Ct. 2202 (2024).

which applies nationally, and the case law derives predominately from the Ninth Circuit Court of Appeals so will also be helpful to people in Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and Northern Mariana Islands.

Chapter 1: Background

Disability and Homelessness

Protecting the rights of unhoused people is a disability rights issue. A study of a representative sample of unhoused people in California found that 82% had a mental health condition or related symptoms.[4] According to the U.S. Department of Housing and Urban Development (HUD), nearly one in three unhoused individuals nationwide experience a chronic pattern of homelessness, meaning that they have experienced homelessness for extended periods of time and have a disability.[5] The number of unhoused people who are chronically unhoused has grown significantly across the country, with a 27% increase since data collection started in 2007.[6] California has the largest number of chronically unhoused individuals in the country with approximately 66,548 people who are chronically homeless, of which 74% are unsheltered.[7] Among unhoused people with disabilities, approximately 30-40% of people have an intellectual/developmental disability (I/DD) which includes autistic people.[8]

People with disabilities often experience more than double the poverty rate as compared to those without disabilities, putting them at a considerably higher risk of homelessness.[9] Many disabled

[4] Kushel & Moore, *supra* note 2, at 27.
[5] Sousa et al., *supra* note 1, at ix, vi; under 24 C.F.R. § 578.3, HUD defines an "individual experiencing chronic homelessness" as a person "with a disability who has been continuously experiencing homelessness for one year or more or has experienced at least four episodes of homelessness in the last three years where the combined length of time experiencing homelessness on those occasions is at least 12 months." HUD does not count people with disabilities separate from chronically homeless individuals, thus these numbers is an undercount of disabled people among unhoused communities.
[6] *Id.* at vi.
[7] *Id.* at 62-63. Unsheltered refers to people living on the streets, in cars, parks, or other location that is not designated for living. Whereas "unhoused" includes unsheltered people and people living in shelters, transitional housing, etc.
[8] Michael Brown & Edward McCann, Homelessness and people with intellectual disabilities: A systematic review of the International Research Evidence, 34 Journal of Applied Research in Intellectual Disabilities 390–401 (2020).
[9] Emily A. Shrider, Poverty in the United States, U.S. Census Bureau (2023), https://www2.census.gov/library/publications/2024/demo/p60-283.pdf (table A-1).

people—over 4 million nationwide—rely on Supplemental Security Income (SSI) benefits to meet their basic needs.[10] In an ongoing study of the housing market for people living on SSI, the Technical Assistance Collaborative found that "there is no United States housing market in which a person living solely on [SSI] can afford a safe, decent apartment without rental assistance."[11] This is particularly true in California, where the average rent for a basic one-bedroom apartment is $1,399 per month, which far exceeds the $943 monthly maximum for an individual receiving SSI income.[12] Low wages and income instability leads to housing insecurity and homelessness.

Many unhoused people with disabilities are older adults, which is one of the fastest growing age groups among people experiencing homelessness.[13] Increasingly, more people are experiencing homelessness for the first time after the age of 50 often due to the death of the family caregiver.[14] The growth of this older group means that more of the unhoused population has disabilities and chronic health problems associated with aging.[15] Older adults who are unhoused have a higher prevalence and severity of memory loss, falls, difficulty performing daily tasks, cognitive impairments, functional impairments, and higher rates of mental health and substance use disorders, as compared to similarly aged individuals who are housed.[16] As compared to younger adults who are unhoused, those over 50 years of age have higher rates of chronic illnesses, cognitive impairments, high blood pressure, arthritis, and functional disability.[17] The population of older adults who are unhoused is expected to triple by 2030 in several major U.S. cities.[18]

Mental illness is an independent risk factor for homelessness. The two are linked by what some psychiatrists call a "never-ending loop" in which the two reinforce each other.[19] For instance, having

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[10] Tech. Assistance Collaborative, Priced Out: The Housing Crisis for People with Disabilities, https://www.tacinc.org/resources/priced-out/ (last visited Sept.17, 2024).
[11] *Id.*
[12] *Id.*; Soc. Sec. Admin., How Much You Could Get From SSI, https://www.ssa.gov/ssi/amount (last visited Nov. 6, 2024). Even if you include the California supplement ($239.94) in the calculations, the average rent for a basic 1-bedroom would still exceed an individual's monthly benefit amount (constituting 118% of the individual's monthly income).
[13] Kathryn A. Henderson et al., Addressing Homelessness Among Older Adults: Final Report, Off. of the Assistant Sec'y for Plan. and Educ. 4 (Oct. 26, 2023).
[14] Michael Brown, *supra* note 9, at 390–40.
[15] Henderson, *supra* note 14, at 5–6.
[16] *Id.*
[17] Henderson, *supra* note 14, at 6.
[18] Henderson, *supra* note 14, at 4 (citing *Dennis Culhane et al.*, The Emerging Crisis of Aged Homelessness, 2–5 (2019), https://aisp.upenn.edu/wp-content/uploads/2019/01/Emerging-Crisis-of-Aged-Homelessness-1.pdf.
[19] Lilanthi Balasuriya et al., The Never-Ending Loop: Homelessness, Psychiatric Disorder, and Mortality, 37 Psychiatric Times 12, 12 (2020).

a psychiatric disability increases a person's risk of eviction for a variety of compounding reasons. Mental illness can make it challenging to keep track of logistics like when rent is due.[20] Certain mental illnesses may result in "hallucinations or other sensory distortions" that may be misinterpreted by both landlords and other tenants as aggressive or threatening behavior, resulting in a lease violation.[21] The eviction process itself poses further challenges. "[A] person with a psychiatric disorder may be less able to attend a court hearing or hire an attorney . . . or to adequately defend their case."[22]

While a disproportionate number of the unhoused population are disabled, research also shows that rates of mental health disabilities do not correspond to rates of homelessness.[23] In other words, higher numbers of people with mental health disabilities does not result in higher numbers of homelessness. Rather, rates of homelessness directly correlate to area housing prices, thus cities with the highest rent and low availability of housing have higher numbers of unhoused people.[24] While disability may determine *who* becomes unhoused, it is not a determinative factor in creating homelessness as a whole. Rather, the high cost of housing is driving vulnerable populations, such as those with physical and mental health disabilities, into homelessness.

Criminalization of Homelessness

Rather than addressing homelessness with services and housing, cities throughout California are passing harsh laws to criminalize homelessness. Prior to the Supreme Court's decision in *Grants Pass*, the Ninth Circuit held that criminally punishing a person who is involuntarily unhoused is cruel and unusual punishment because it criminalized people for their status of being unhoused.[25] Therefore, a city could not cite or arrest an individual involuntarily sleeping outside because shelter beds were not available. This prevented cities from criminalizing unhoused people and put pressure on cities to produce an adequate number of shelter spaces. However, in *Grants Pass*, the

[20] Ashley C. Bradford & Johanna Catherine Maclean, Evictions and Psychiatric Treatment, J. Pol. Analysis & Mgmt. 5 (2024).
[21] *Id.*
[22] *Id.* at 6.
[23] Gregg Colburn & Clayton Page Aldern, Homelessness is a Housing Problem, University of California Press (Mar. 15, 2022).
[24] *Id.*
[25] *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023) (overturned by *City of Grants Pass, Oregon v. Johnson*, 144 S. Ct. 2202 (2024)); see also *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) (overruled in part by *City of Grants Pass, Oregon v. Johnson*, 144 S. Ct. 2202 (2024)).

Supreme Court held 6-3 that the ordinances in question prohibited *conduct*, not the status of being unhoused, and their enforcement did not violate the 8th Amendment.[26]

Without the restrictions previously imposed by the Ninth Circuit, municipalities can now cite, arrest, and criminalize unhoused people for sleeping outside, even when there is nowhere for them to go. Almost immediately after the decision came out, California cities started criminalizing unhoused people regardless of whether shelter was available.[27] California Governor Gavin Newsom issued an executive order calling for the clearing of unhoused encampments and threatened to withhold funding from cities that did not comply.[28]

Criminalization laws often restrict where, when, and how an unhoused person can exist outside, which often imposes a disproportionate burden on people with disabilities. Ordinances may ban camping or sleeping on public or private property, or in areas considered sensitive, such as near schools or "critical infrastructure". Laws may also bar camping in close proximity to other tents. Criminalization laws may also include temporal limitations, such as daytime camping bans or limits on how long someone can stay in one place. For example, San Joaquin County passed an ordinance prohibiting the use of tents or bedding in one place for more than 60 minutes.[29] Meanwhile, Fresno passed a municipal code that makes it unlawful to "…sit, lie, sleep, or camp on a public place at any time."[30] Other common restrictions include prohibitions on the use of sleeping bags; limits on the number of people who can camp together; limits on the amount of space a person can occupy; and limits on how many items, such as tents, one person may have.

The failure to comply with these laws can lead to steep fines and prison sentences. For instance, a violation of San Joaquin's ordinance comes with a fine of up to $1,000 and/or six months in jail.[31] An unhoused person who does not relocate for a few days can easily accumulate tens of thousands of

[26] *Grants Pass*, 144 S. Ct. 2202.
[27] Marisa Kendall, No Sleeping Bag, Keep Moving: California Cities Increase Crackdown on Homeless Encampments, Cal Matters, September 12, 2024 https://calmatters.org/housing/homelessness/2024/09/camping-ban-ordinances/#:~:text=More%20than%20two%2Ddozen%20California,issues%20that%20affect%20all%20Californians.
[28] Exec. Order N-1-24 (July 25, 2024), https://www.gov.ca.gov/wp-content/uploads/2024/07/2024-Encampments-EO-7-24.pdf.
[29] SAN JOAQUIN COUNTY, CAL., ORDINANCES tit. 6, div. 3, ch.7, § 6-3701 (2024).
[30] FRESNO, MUN. CODE art. 21, § 10-2101(a) (2024).
[31] SAN JOAQUIN COUNTY, CAL., ORDINANCES tit. 6, div. 3, ch.7, § 6-3703 (2024).

dollars in fines and/or be imprisoned. Because it may be more difficult for people with disabilities to comply with these laws, they may be more likely to be incarcerated and fined, thus making it even harder to break out of homelessness. The experience of criminalization may also exacerbate a person's disabilities or even cause an unhoused person to acquire disabilities. Criminalization laws rarely, if ever, taken into consideration disabled people and the difficulties they may face in complying with the law.

The criminalization of unhoused people includes encampment sweeps, the process whereby cities physically displace unhoused people and remove their personal belongings. In October 2024, ProPublica investigated encampment sweeps happening across the country, including in Sacramento, San Diego, San Francisco, San Jose, and Los Angeles.[32] The investigation found cities routinely dispose of possessions essential to people with disabilities, including medications, inhalers, insulin, nebulizers, mood stabilizers, eyeglasses, oxygen tanks, CPAP (continuous positive airway pressure) machines, wheelchairs, and walkers.[33] The loss of these essential items may prevent a person from managing their disability and exacerbate their condition. People also lost government identification and other essential documents that may be needed to obtain Social Security and other benefits. Replacing these items is difficult, costly, and time-consuming.

Chapter 2: Disability Law

Americans with Disabilities Act

The ADA prohibits discrimination against individuals with disabilities in various areas, including employment, public accommodations, transportation, and telecommunications. Under Title II of the ADA, state and local governments may not discriminate against people with disabilities.[34] Title II of the ADA is an important tool for challenging local anti-camping ordinances that discriminate against unhoused disabled people.

[32] Talbot et al., Swept Away, ProPublica (Oct. 29, 2024), https://projects.propublica.org/homeless-encampment-sweeps-taken-belongings/.
[33] *Id.*
[34] 42 U.S.C. § 12131 (2024) *et seq*.

To state a claim for disability discrimination under the Title II of the ADA, an individual must show:

1. They have a disability,
2. They are eligible to receive services or to participate in programs or activities of a public entity,
3. They are excluded from participation in or denied the benefits of the public entity's services, programs, or activities or are otherwise discriminated against by the public entity
4. by reason of their disability.[35]

Disability discrimination includes a policy or practice that denies the disabled person access to the program or its benefits; provides the disabled person services and programs that are unequal; or disproportionately burdens the disabled person. Disability discrimination also includes an unlawful denial of a reasonable modification. Title II allows for injunctive relief, and for the recovery of damages upon a showing that the discrimination was intentional.[36] Title II is expanded upon in Chapter 3.

Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act (Section 504) prohibits recipients of federal funding from discriminating against people with disabilities.[37] Title II of the ADA was modeled after Section 504, as such, they are evaluated coextensively because the elements and analysis of the laws are generally the same.[38] For example, the court in *Bloom v. City of San Diego* considered plaintiffs ADA and Section 504 claims together, holding that, "A facially neutral program can violate the ADA and RA [Rehabilitation Act] if it disparately impacts or places a disproportionate burden on the disabled."[39] The main difference is that a claim brought under Section 504 must show that the relevant municipal department or agency receives federal financial assistance. Like Title II of the

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[35] 42 U.S.C § 12132 (2024); *McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004) (quoting *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002) overruled in part on other grounds in *Castro v. County of L.A.*, 833 F.3d 1060 (9th Cir. 2016) (en banc)).
[36] 42 U.S.C. § 12133 (2024); *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001), as amended on denial of reh'g (Oct. 11, 2001); *but see*, *Cummings v. Premier Rehab Keller*, P.L.L.C., 596 U.S. 212 (2022) (holding that emotional distress damages are precluded under Section 504. The decision has been cited as authority in some circuits for precluding emotional distress damages under Title II of the ADA.).
[37] 29 U.S.C. § 794(a) (2024).
[38] *Payan v. Los Angeles Cnty*. Coll. Dist., 11 F.4th 729, 737 (9th Cir. 2021) (quoting *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1098 (9th Cir. 2013)); see also, *Tyson v. City of San Bernardino*, No. EDCV 23-01539 TJH (Ma), 2024 U.S. Dist. LEXIS 138743, at *15 (C.D. Cal. Jan. 12, 2024) (citing *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 (9th Cir. 1999)).
[39] *Bloom v. City of San Diego*, No. 17-cv-2324-AJB-NLS, 2018 U.S. Dist. LEXIS 243767, at *11 (S.D. Cal. June 7, 2018).

ADA, Section 504 allows for injunctive relief, and for the recovery of damages upon a showing that the discrimination was intentional.[40]

Because the analysis of Title II of the ADA and Section 504 are generally the same, when a violation of Title II exists, and the relevant government or department receives federal funds, then a violation of Section 504 should be included as a cause of action.[41] Federal funds need not go directly to a homelessness program, rather, Section 504 applies when the program is housed in a department or agency that receives federal funds.[42]

California Disabled Persons Act

California's Disabled Persons Act (DPA) is a state law designed to protect the rights of individuals with disabilities by prohibiting discrimination and ensuring accessibility in various areas, including public services, employment, housing, and public accommodations. A violation of the ADA constitutes a violation of the DPA.[43] The DPA provides for injunctive relief and damages.[44] However, the DPA allows attorney's fees to the prevailing party, which can include a defendant who successfully defends against at DPA claim.[45] For this reason, including a DPA claim requires careful consideration.

California Government Code Section 11135

Section 11135(a) of the California Government Code prohibits disability discrimination by "any program or activity that is funded directly by the state or receives any financial assistance from the state." California Government Code § 11135(b) incorporates the protections and prohibitions contained in the ADA and its implementing regulations.

[40] 29 U.S.C. § 794a (2024); *see also, Duvall*, 260 F.3d at 1138, as amended on denial of reh'g (Oct. 11, 2001); *but see, Cummings*, 596 U.S. 212.
[41] *Payan*,11 F.4th at 737.
[42] 29 U.S.C. § 794(b)(1) (2024).
[43] Cal. Civ. Code § 54.1(d) (2024).
[44] Cal. Civ. Code §§ 55 ; 54.3 (2024).
[45] *Jankey v. Lee*, 55 Cal. 4th 1038, 1046, (2012) (holding that Cal. Civ. Code § 55 does not limit attorney's fees to a successful plaintiff, rather any successful party can obtain fees).

Chapter 3: Title II of the Americans with Disabilities Act

Basics of Title II

Title II covers the "services, programs, or activities" of city and state government, law enforcement, and other government departments and agencies. The definition of "services, programs, or activities" under Title II is broad and "bring[s] within its scope anything a public entity does."[46] This includes anything that is a "normal function of a governmental entity."[47] The enforcement of municipal codes, such as anti-camping laws, and encampment sweeps are deemed a service, program or activity of the government.[48] Therefore, the enforcement of laws that criminalize homelessness may be challenged under Title II of the ADA.

Public entities must ensure their program are accessible in multiple areas. Title II has rules about physical access barriers in buildings and other facilities to ensure people with disabilities can obtain services in these buildings.[49] Under Title II, public entities must also "ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others."[50] Government entities must provide "auxiliary aids and services" such as sign language interpreters as needed to allow people with disabilities to communicate.[51] Effective communication requires that the government communicate effectively with people with intellectual and developmental disabilities, including people who may need plain language or alternative forms of communication such as pictures or verbal explanations.[52]

Discrimination is prohibited under Title II of the ADA including disparate treatment, disparate impact, and failure to make a reasonable modification.[53] Establishing disparate treatment typically requires showing that a disabled person was treated differently or less favorably than a non-

[46] 28 C.F.R. § 35.102 app. B (2024); *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002) (quotation marks omitted) (quoting *Lee v. City of L.A.*, 250 F.3d 668, 691 (9th Cir. 2001)).
[47] *Barden*, 292 F.3d at 1076 (quoting *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999)).
[48] *See*, e.g., *McGary*, 386 F.3d at 1269.
[49] 28 C.F.R. §§ 35.150; 35.151 (2024).
[50] 28 C.F.R. § 35.160(a)(1) (2024).
[51] 28 C.F.R. § 35.160(b)(1) (2024).
[52] *See e.g. Clark v. California*, 739 F. Supp. 2d 1168, 1179-1180 (N.D. Cal. 2010).
[53] *Payan*, 11 F.4th at 738 (quoting *Davis v. Shah*, 821 F.3d 231, 260 (2d Cir. 2016)).

disabled person.[54] A disparate impact claim challenges a government policy or practice that denies people with disabilities meaningful access to public services or disproportionately burdens them based on disability.[55] Finally, a reasonable modification claim challenges an unlawful denial of a request to change a policy or practice to enable a person with a disability to use a service or program of a public entity.[56] An unhoused person with a disability may have a claim against a public entity under one or more of these Title II theories.

Disparate Impact

Title II prohibits the administration of programs in a way that has a discriminatory effect on people with disabilities or that has the "effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities."[57] The statute also prohibits the use of eligibility criteria that "screen out or tend to screen out" a person or group of people with disabilities.[58] To bring a disparate impact claim a plaintiff must allege that a "facially neutral government policy or practice has the 'effect of denying meaningful access to public services' to people with disabilities."[59] This includes a facially neutral policy that disproportionately burdens people with disabilities.[60] For example, in *Crowder v. Kitagawa,* the court found that a facially neutral Hawaiian law that required the quarantine of all dogs upon arrival discriminated against visually-impaired people who relied on guide dogs because it denied them meaningful access to the state's services, programs, and activities.[61]

A person with a disability has the burden of proof to show that, as a result of their disability, they were excluded from participating in or denied the benefits of services, programs, or activities.[62] A

[54] 28 C.F.R. §§ 35.130(a), (b)(3); *McGary*, 386 F.3d at 1266.
[55] *Payan*, 11 F.4th at 738 (citing *Tustin Unified Sch. Dist.*, 725 F.3d at 1102 (citing *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996)).
[56] 28 C.F.R. § 35.130(b)(7)(i) (2024).
[57] 28 C.F.R. § 35.130(b)(4)(ii) (2024).
[58] 28 C.F.R. § 35.130(b)(8) (2024).
[59] *Payan*, 11 F.4th at 738 (citing *Tustin Unified Sch. Dist.*, 725 F.3d at 1102 (citing *Crowder*, 81 F.3d at 1484)).
[60] *McGary*, 386 F.3d at 1265.
[61] *Crowder*, 81 F.3d at 1485.
[62] *Wilkey v. Cnty. of Orange*, 295 F. Supp. 3d 1086, 1092 (C.D. Cal. 2017) (internal citation omitted).

plaintiff does not need to allege a "discriminatory animus" to establish this claim.[63] Rather, alleging denial of benefits may be based on “thoughtlessness,” “indifference”, or “benign neglect.”[64]

Practice Tip: Avoid characterizing a disparate impact claim as a result of being homeless or indigent. These are not protected characteristics or directly covered by the ADA.[65]

Disparate Impact and Anti-Camping Laws

Unhoused people with disabilities may challenge anti-camping laws based on disparate impact prohibited by Title II of the ADA. Requirements to move frequently, limitations on camping in certain locations, short notice periods, and bans on sleeping outside are harder for people with disabilities to comply with and are likely to exacerbate the health and well-being of people with disabilities. People with disabilities are more likely to rely on others, like service providers, family, and community members to support and assist them. Thus, requirements to move often make it harder for people with disabilities to receive help. Below are common provisions in criminalization laws and how they may disproportionately impact people with disabilities.

Anti-Camping Provision	Impact on Disability
Temporal limitations. Example: A person may only camp in one location for 24 hours.	People with mobility disabilities may not be able to move frequently, and doing so may exacerbate their physical condition. People with mental health disabilities or I/DD may become increasingly distressed and confused when they are forced into an unfamiliar environment or forced to constantly move and follow complex rules.

[63] *Salmon v. Ventura*, No. 2:19-cv-01878-AC, 2021 U.S. Dist. LEXIS 128302 at *9 (D. Or. Feb. 8, 2021) (quoting Crowder, 81 F.3d at 1484).
[64] *Id.* (quoting *Alexander v. Choate*, 469 U.S. 287, 295, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985)).
[65] *See e.g. Weinreich v. L.A. Cnty. Metro. Transp. Auth.*, 114 F.3d 976 (9th Cir.), *cert. denied*, 522 U.S. 971, 139 L. Ed. 2d 324, 118 S. Ct. 423 (1997) (declining to find discrimination under the ADA when an individual sought to be exempted from recertifying their disability for reduced transit fares because he could not afford to see a doctor to confirm his disability).

Anti-Camping Provision	Impact on Disability
Geographic limitations. Example: Prohibition of camping on public property, private property, commercial areas, government buildings, critical infrastructure, etc.	Disabled people may be prevented from living near services, treatment, or medical centers where they receive services. Being near a grocery store or other commercial area may be important for a person who cannot travel long distances because of their disability or need quick access to resources. Location limitations may also prevent people with mobility disabilities from accessing public transportation. Pushing people into different locations can also be detrimental for people with mental health disabilities or I/DD because they are repeatedly forced into unfamiliar environments. Further, varied rules on available locations to camp can be hard to understand and follow, causing confusion and distress.
Short notice periods before an encampment sweep. Example: Post a notice to vacate at an encampment 24 to 72 hours before a sweep.	It is harder for people with mobility or other physical disabilities to move on short notice because they may need assistance in moving items or need more time to adequately move. Short notice periods are also stressful and can exacerbate mental health disabilities. Short notice periods also make request reasonable modifications harder because there is only a short time to process the request.
Limitations on the distance between tents, the space a person can occupy, and the number of people camping together. Example: Tents must be 200 feet apart and cannot take up more than 100 square feet of space. No more than two people can camp together.	Prevents disabled people from being near people who are caregivers, assist with daily needs, or provide emotional support. Disabled people may need to live with others to get food and necessities. Being near others also provides safety and can help people with mental health disabilities like PTSD. Limitations on space also prevents people from responding to the health emergencies of others, such as a heart attack or seizure. Limitations on the amount of space a person can occupy may also prevent people with medical equipment, like a wheelchair, from having adequate space for themselves and their equipment.
Limitations on items that can be in a camp. Example: No sleeping bags, tents, bikes, pets, and bedding.	This may prevent a person with a disability from keeping an assistance animal and/or items essential to daily living and survival. Without tents and bedding, people with disabilities, such as those who are immunocompromised, are at risk of getting sick or exacerbating their disability.

Anti-camping laws may violate the ADA if they disparately impact or burden people with disabilities.[66] In *Bloom v. City of San Diego,* people with disabilities challenged a law that prohibited people from living in RVs. San Deigo sought to dismiss the case, but the court declined, holding that although the RV parking ordinance at issue applied to disabled and non-disabled people equally, the enforcement of the law burdened disabled "persons in a manner different and greater than it burdens others."[67] Because people with disabilities were uniquely dependent on RVs to live, the City's ordinances "effectively denie[d] these persons. . . meaningful access to the City's services, programs, and activities, which are easily accessible by others."[68]

To enforce criminalization laws or disburse encampments, municipalities conduct sweeps, which also have a disparate impact on people with disabilities. During an encampment sweep, law enforcement or other public entities indiscriminately dispose of most, if not all property in an encampment. It is common for people with disabilities to lose items essential to living with their disabilities such as medical equipment and medication.[69] In this way, local laws and policies that govern encampment sweeps may be facially neutral but have a disparate impact on people with disabilities.

Chapter 4: Reasonable Modifications under Title II of the Americans with Disabilities Act

To alleviate the impact of anti-camping laws, reasonable modifications or reasonable accommodations[70] may be necessary to change how a law is implemented.[71] A reasonable modification can include changes in a public entity's policy or practice to remedy systemic barriers.[72] Reasonable modifications may also include individualized changes in practices for people

[66] *Bloom*, 2018 U.S. Dist. LEXIS 243767 at *11 (citing *Alexander v. Choate*, 469 U.S. at 299, 309).
[67] *Id.* at *15 (citing Alexander, 469 U.S. at 299, 309).
[68] *Id.*
[69] Talbot et al., *supra* note 34.
[70] In the context of the ADA and Section 504, "reasonable accommodation" and "reasonable modification" are often used interchangeably, although modification may sometimes refer to a broader change that impacts more people while accommodation sometimes refers to a change for an individual. However, these distinctions are not consistently applied by courts. Note, in other contexts such as the Fair Housing laws, the two terms have distinct definitions. For simplicity, reasonable modification is used in this manual.
[71] 28 C.F.R. § 35.130(b)(7)(i) (2024); *McGary*, 386 F.3d at 1265–66.
[72] *Prado v. City of Berkeley*, No. 23-cv-04537-EMC, 2024 U.S. Dist. LEXIS 139836, at *60-61 (N.D. Cal. Aug. 6, 2024) (quoting *Payan*, 11 F.4th at 738-739).

with disabilities, so they can access the benefits of a government program or activity. The government has an affirmative obligation to make a reasonable modification. "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability...."[73] A person with a disability can request a reasonable modification or a public entity may need to assess whether a person needs a reasonable modification when the need is: "(1) Obvious, or should have been obvious…or (2) Required by a statute or regulation."[74]

Once a need for a modification is known, assessing the merits of a reasonable modification "requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards."[75] A public entity may also engage in an interactive communicative process with the disabled person to discuss the request. However, this is not required.[76] A public entity need not give someone the exact reasonable modification requested, but can provide an alternative that still meets the needs of the requester. For example, in *Prado v. City of Berkeley*, the court held, "while provision of single-bed shelter rooms might (on a factual record) be a fundamental alteration of the City's program that is not required, provision of quieter spaces or areas otherwise separated from the larger congregate setting within an existing shelter arrangement might be a reasonable accommodation."[77]

An unhoused person has the burden of proof to show that a reasonable modification is possible and reasonable.[78] Once this burden is met, the burden shifts to the government entity to rebut reasonableness.[79] The government may assert that it does not have to grant a reasonable modification if it is a fundamental alteration, undue financial burden, undue administrative burden,

[73] 28 C.F.R. § 35.130(b)(7) (2024).
[74] *Tyson*, 2024 U.S. Dist. LEXIS 138743, at *16-17 (citing *Duvall*, 260 F.3d at 1139).
[75] *Wong v. Regents of the Univ. of Cal*., 192 F.3d 807, 818 (9th Cir. 1999).
[76] The interactive process is an interaction between the requester and public entity to clarify the individual needs of the requester and determine the appropriate accommodation. The interactive process is required in certain contexts, such as claims under the Fair Employment and Housing Act or Title I of the ADA, however, it is not required under Title II.
[77] *Prado*, 2024 U.S. Dist. LEXIS 139836, at *77 (citing *Crowder*, 81 F.3d at 1484 (9th Cir. 1996)).
[78] Id. at *76 (quoting *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002) (a public employment case), and "seems reasonable on its face"; Dark v. Curry Cnty., 451 F.3d 1078, 1088 (9th Cir. 2006) (an employment case)).
[79] *Prado*, 2024 U.S. Dist. LEXIS 139836, at *76 (quoting *Vinson*, 288 F.3d at 1154).

or direct threat to the health and safety of others.[80] Government defenses are expanded on in Chapter 5.

Case Highlight: Reasonable Modification of Anti-Camping Law
Boyd v. San Rafael

In *Boyd v. City of San Rafael*, the City passed an anti-camping law that, among other provisions, prohibited unhoused people from camping within 200 feet of each other and from occupying a space larger than 100 square feet.[81] The law effectively prevented unhoused people from camping near each other. Unhoused people with disabilities requested reasonable modification to camp near each other.[82] One individual had PTSD and could not sleep unless she was near others.[83] Another unhoused person had a physical disability and needed caretakers to get food and necessities.[84] The unhoused people filed a lawsuit against San Rafael, claiming discrimination under the ADA, and filed a preliminary injunction.

The court granted the preliminary injunction and held that increasing the camping space to 400 square feet to enable four people to camp together was not a fundamental alteration, and it still maintained the City's purpose of breaking up large and highly concentrated encampments.[85] The court further held that the ordinance had no "real procedures to determine who needs to be accommodated and how their need to be free from serious danger can be met. The Ordinance ignores the realities facing each individual and instead imposes a blanket restriction on density which effectively isolates unhoused campers regardless of their needs."[86]

Reasonable Modifications of Encampment Clearings

To enforce anti-camping laws, cities, and law enforcement typically sweep large encampments. This process can have a disproportionate burden on people with disabilities. Title II applies to everything local government does, including encampment sweeps.[87] According to the Department

[80] *Where Do We Go Berkeley v. Dep't of Transp.*, 32 F.4th 852, 861 (9th Cir. 2022).
[81] *Boyd v. City of San Rafael*, No. 23-cv-04085-EMC, 2023 U.S. Dist. LEXIS 188335, at *5 (N.D. Cal. Oct. 19, 2023).
[82] *Id.* at 71.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 75.
[86] *Id.* at 69.
[87] *Cooley v. City of L.A.*, No. 2:18-cv-09053-CAS-PLA, 2019 U.S. Dist. LEXIS 135877 (C.D. Cal. Aug. 5, 2019); accord 42 U.S.C. § 12132 (2024) (unlawful discrimination for disabled person to be "denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity"); 28 C.F.R. § 35.130(a)(2024) (same); 28 C.F.R. app. at § 35.102 (2024) ("title II applies to anything a public entity does")

of Justice's commentary on the ADA "the general regulatory obligation to modify policies, practices, or procedures *requires law enforcement* to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities."(emphasis added)[88] Police departments and other agencies are required to provide reasonable modifications to unhoused people with disabilities, such as more time to move from an encampment, assistance with moving items, or preserving disability-related items such as medical equipment.

Practice Tip: When bringing a cause of action for failure to make a reasonable modification, you do not need to allege either disparate treatment or disparate impact.[89]

In *Cooley v. the City of Los Angeles,* the plaintiff had a physical disability and requested a reasonable modification for assistance to remove her belongings before an encampment sweep.[90] The court held that facially neutral encampment clearing policies may violate the ADA if they are unduly burdensome for people with disabilities. The court also found the plaintiff adequately stated a claim under Title II because the city "failed to reasonably accommodate her disability by not allowing her an opportunity to comply with the City's requirements during the area cleaning in a manner consistent with her disabilities".[91]

When bringing a claim for an unlawfully denied reasonable modification, provide a clear and concrete description of the benefit denied and ensure the requested modification fits within the benefit. For example, in *Prado v. City of Berkeley*, plaintiffs identified, "outreach and housing navigation services" as the government benefit and requested the assistance of mental health professionals as a reasonable modification.[92] The court noted that the City had a an unhoused outreach program that provided services to unhoused people and the reasonable modification

[88] *McGary*, 386 F.3d at 1269 (quoting 28 C.F.R. pt. 35, app. A, subpart B); see also *Sheehan v. City & Cnty. of S.F.*, 743 F.3d 1211, 1217 (9th Cir. 2014) (holding Title II of the ADA applies to arrests) (reversed on different grounds by *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765 (2015)).
[89] *Prado*, 2024 U.S. Dist. LEXIS 139836, at *62 (quoting *McGary*, 386 F.3d at 1266).
[90] *Cooley*, 2019 U.S. Dist. LEXIS 135877, at * 4.
[91] *Id.*; *see also Langley v. City of San Luis Obispo*, No. CV 21-07479-CJC (ADSx), 2022 WL 18585987, at *12 (C.D. Cal. Feb. 7, 2022) (finding that the plaintiffs "had sufficiently alleged that the City's sweeps and property seizures discriminate against people with mental and physical disabilities because such people are likely to suffer aggravated effects from the City's sweeps and property seizures, and because the City fails to provide reasonable accommodations based on disabilities.").
[92] *Prado*, 2024 U.S. Dist. LEXIS 139836, at *69.

request fit within this program.[93] The plaintiffs in this case identified a concrete service and the requested reasonable modification fit within it. The court noted that a similar request may not be a reasonable modification where the scope of an encampment clearing program is narrower.[94]

By contrast, in *Glover City of Laguna Beach*, the court rejected permanent supportive housing as a reasonable modification, finding it was a fundamental alteration.[95] In this case, the local shelter was inaccessible to people with disabilities.[96] Plaintiffs identified "the provision of a safe, legal place to sleep" as the government benefit denied to them and requested permanent supportive housing as a reasonable modification.[97] The court rejected plaintiffs' argument, holding, "[p]laintiffs' lengthy list of grievances with the City's homelessness program, however well-founded, reaffirm that Plaintiffs are not likely focusing their ADA claim on any particular service provided by the City, but instead on the amorphous aim of "the provision of a safe, legal place to sleep."[98] The court further held that permanent supportive housing was not a reasonable modification, but a fundamental alteration of the City's services.[99]

Practice Tip: A successful preliminary injunction should be accompanied by pleadings that are specific enough to be actionable under the ADA. The requested injunction must remedy the ADA claim. [100]

[93] *Id.* at 71.
[94] *Id.* at 70-71 (noting that in *Where Do We Go Berkeley* (32 F.4th 852) the city did not provide social services or relocation assistance, thus those services did not constitute part of the program).
[95] *Glover v. City of Laguna Beach*, No. SACV 15-1332 AG (DFMx), 2016 U.S. Dist. LEXIS 197837, at *21 (C.D. Cal. Feb. 10, 2016).
[96] *Id.* at 20.
[97] *Id.*
[98] *Id.* at *21.
[99] *Id.*; *see also Alexander v. Choate*, 469 U.S. 287, 303, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985) (finding that plaintiffs failed to identify a particular service as the "benefit" provided under Medicaid, but rather identified an amorphous general aim of providing "adequate health care"); see also *Rose v. Rhorer*, No. 13-cv-03502-WHO, 2014 U.S. Dist. LEXIS 64550, at *12-13 (N.D. Cal. May 9, 2014) (holding that converting an emergency shelter into long-term housing for persons with disabilities was a fundamental alteration); *Rodriguez v. City of N.Y.*, 197 F.3d 611, 618 (2d Cir. 1999) (finding that appellees failed to focus on "particular services provided by appellants"); Cf. *Disability Rights Cal. v. Cty. of Alameda*, No. 20-cv-05256-CRB, 2021 U.S. Dist. LEXIS 11553, at *32 (N.D. Cal. Jan. 21, 2021) (holding *Olmstead* does not provide a remedy for when government entities could generally do more to keep people from being institutionalized.).
[100] *Glover*, 2016 U.S. Dist. LEXIS 197837, at *25; *see also LA All. for Human Rights v. Cty. of L.A.*, 14 F.4th 947, 960-61 (9th Cir. 2021) (finding no connection between L.A.'s failure to keep sidewalks in compliance with the ADA and offering unhoused people on Skid Row shelter).

Damages

To seek damages, under Title II or Section 504, a person must show that the public entity acted or failed to act, with deliberate indifference.[101] Deliberate indifference has a two-prong test the first prong "requires…knowledge that a harm to a federally protected right is substantially likely" and the second prong requires a showing that the public entity "fail[ed] to act upon that likelihood."[102] Deliberate indifference may be shown in disparate treatment, disparate impact, or reasonable modification claims. Making a reasonable modification request may be enough to show that a public entity knew of the substantial likelihood of harm.[103] "When the plaintiff has alerted the public entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the public entity is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the deliberate indifference test."[104]

To satisfy the second prong of the deliberate indifference test, the failure to act must be deliberate, rather than negligent.[105] "[D]eliberate indifference does not occur where a duty to act may simply have been overlooked, or a complaint may reasonably have been deemed to result from events taking their normal course."[106] For instance, in *Updike v. Multnomah County,* the court found the state did not act with deliberate indifference when it failed to provide an ASL interpreter for a court hearing because it was the result of "bureaucratic slippage" rather than deliberate action.[107]

The failure to properly respond to a request for reasonable modification may be an indicator of deliberate indifference.[108] This includes failing to investigate whether a requested accommodation is necessary. In *Duvall v. County of Kitsap*, the court declined to dismiss a case where the plaintiff alleged deliberate indifference after an ADA coordinator failed to provide videotext display for a court date.[109] The court noted that the ADA coordinator did not engage in a fact-specific investigation and made no effort to determine whether videotext displays were available in the

[101] *Bax v. Drs. Med. Ctr. of Modesto, Inc.*, 52 F.4th 862, 866 (9th Cir. 2022); *Duvall*, 260 F.3d at 1139.
[102] *Csutoras v. Paradise High Sch.,* 12 F.4th 960, 969 (9th Cir. 2021) (quoting *Duvall*, 260 F.3d at 1139).
[103] *Id.* at 969; *Updike v. Multnomah Cnty.*, 870 F.3d 939, 951 (9th Cir. 2017).
[104] *Duvall*, 260 F.3d at 1139.
[105] *Updike*, 870 F.3d at 951.
[106] *Id.*
[107] *Id.* at 952.
[108] *Duvall*, 260 F.3d at 1124.
[109] *Id.* at 1139-1140.

court rooms or contact any court reporting firms to see if they had videotext displays.[110] Instead, the ADA coordinator merely transferred the plaintiff to another court room designed for people who were hearing impaired, but which did not accommodate the plaintiff's specific disability.[111]

Public entities often fail to respond to the reasonable modification requests of unhoused people with disabilities. This includes failing to do a fact-specific investigation to determine whether the request is necessary. Often the failure to respond is widespread and systemic, rather than the occasional neglect of a request. Showing a clear paper trial of reasonable modification requests and the failure to respond may show deliberate indifference to the substantial likelihood of harm to a disabled unhoused person. Pursuing damages may or may not be the right strategy in a particular case. One benefit is that plaintiffs seeking damages maintain their standing even if they later become housed in the course of the case.

Case Highlight: Pleading Deliberate Indifference

James Tyson et al. v. City of San Bernardino

Plaintiffs in this case made three separate allegations under the ADA on behalf of unhoused people with disabilities, including intentional discrimination with deliberate indifference. In the complaint, plaintiffs alleged the first prong of the deliberate indifference test by asserting that the City of San Bernardino knew there was a substantial likelihood of harm to plaintiffs' rights under the ADA. To show this knowledge, the complaint explains the city received the plaintiffs' requests for reasonable modifications, they had obvious disability-related needs because they used wheelchairs, and the attorney for the plaintiffs sent a letter to the city describing the need for reasonable modification before clearing an encampment. Plaintiffs satisfied the second prong of the test by alleging that the city failed to investigate or respond to plaintiffs' reasonable modification requests and did not offer to modify any encampment clearing policies.

[110] *Id.* at 1140-1141.
[111] *Id*. at 1140.

Chapter 5: Government Responses to Title II of the Americans with Disabilities Act

To rebut claims that a reasonable modification request was unlawfully denied, a public entity can claim the request would be a fundamental alteration or an undue financial or administrative burden.[112] The public entity has the burden of proof to show that granting the request would be a fundamental alteration or undue burden.[113] However, even if a request is a fundamental alteration or undue burden, the public entity must still take action to enable people with disabilities to receive the benefits and services of the public entity.[114] Each of these is described further below.

Fundamental Alteration

A proposed reasonable modification would impose a fundamental alteration if it would fundamentally change the nature of the program.[115] Cities are not required to "make modifications that would fundamentally alter existing programs and services administered pursuant to policies that do not facially discriminate against the disabled."[116] A public entity is not required to create a new program to provide services to people with disabilities.[117] The head of the public entity or their designee determines whether a request is a fundamental alteration after "considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion."[118]

The distinction between a reasonable modification and fundamental alteration is "fact-specific, requiring case-by-case inquiry."[119] A modification's reasonableness depends on how it impacts the goals of an agency's program. For programs designed to address risks to the public, for example, reasonableness depends on "the nature of the risk, whether the proposed modification would affect the agency's ability to address the risk, and the probability of worsening the risk if the agency

[112] 28 C.F.R. § 35.150(a)(3) (2024).
[113] *Id.*; *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 845 (9th Cir. 2004).
[114] 28 C.F.R. § 35.150(a)(3) (2024).
[115] *Where Do We Go Berkeley*, 32 F.4th 852.
[116] *Hous. is A Human Right Orange Cty. v. Cty. of Orange*, No. SA CV 19-388 PA (JDEx), 2019 U.S. Dist. LEXIS 210837 at*41 (C.D. Cal. Aug. 12, 2019) (quoting *Townsend v. Quasim*, 328 F.3d 511, 518 (9th Cir. 2003)).
[117] *Glover*, 2016 U.S. Dist. LEXIS 197837, at *22 (holding that the creation of permanent supportive housing was a fundamental alteration).
[118] 28 C.F.R. § 35.150(a)(3) (2024).
[119] *Crowder*, 81 F.3d at 1486.

is forced to alter its programs."[120] Courts also "take into account financial and other logistical limitations on [the program]."[121]

Practice Tip: A well-pled complaint on reasonable modifications should survive a motion to dismiss/demurrer. Whether an accommodation is reasonable or would fundamentally alter a public entity's program or services is fact-specific and cannot be resolved through a motion to dismiss or demurrer.[122]

A proposed modification may be a fundamental alteration in one context and not another. In *Where Do We Go Berkeley*, the Ninth Circuit held that the California Department of Transportation's (CalTrans) duties included providing notice prior to clearing an encampment and coordination with partners and services, but did not include providing housing or social services.[123] As such, the appellate court found that the six-month injunction ordered by the lower court against removing an encampment and providing an alternate location to camp was a fundamental alteration. "Precluding Caltrans from addressing a level 1 encampment's urgent threat to public safety and infrastructure—and suggesting that the risk is mitigated because Caltrans might reopen Seabreeze for campers' use—essentially requires Caltrans 'to create new programs that provide heretofore unprovided services.'"[124] Thus, in this case, a request for additional services was not reasonable because it was not within the scope of CalTrans' duties. Contrast this with *Prado,* described in Chapter 3, where the court held that adding mental health professionals to the existing outreach team was a reasonable modification. The court reasoned that this was not a new program but a modification of the existing outreach program.[125]

Undue Financial or Administrative Burden

A public entity may also reject a reasonable modification if it is an undue financial or administrative burden. When determining whether a request is an undue financial burden, the public entity must

[120] *Where Do We Go Berkeley*, 32 F.4th at 862 (citing *Crowder,* 81 F.3d at 1486).
[121] *Townsend*, 328 F.3d at 519.
[122] *Prado*, 2024 U.S. Dist. LEXIS 139836, at *77 (citing *Crowder*, 81 F.3d at 1486); see also, *Reed v. City of Emeryville*, 568 F. Supp. 3d 1029, 1044 (N.D. Cal. 2021) (holding that at the pleadings stage, the court could not determine whether single rooms might be a fundamental alteration).
[123] *Where Do We Go Berkeley*, 32 F.4th at 861-862.
[124] *Id.* at 862.
[125] *Prado*, 2024 U.S. Dist. LEXIS 139836.

take into account all resources available for use in the funding and operation of the service, program, or activity in question.[126] A decision that a reasonable modification is an undue burden must be made by the head of a public entity in writing.[127] Even when a reasonable modification request is an undue burden, a public entity must "take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity."[128] The program access requirement of Title II should allow individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in "all but the most unusual cases."[129]

Direct Threat

A public entity may assert, as an affirmative defense, that a person is a direct threat, which is a "heavy burden" to prove.[130] To determine whether a person is a direct threat, a public entity must "make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; [and] the probability that the potential injury will actually occur…"[131] The assessment usually does not require a physician's assessment but can be based on the opinion of public health authorities.[132]

The public entity must also consider whether reasonable modifications would mitigate the risk of a direct threat.[133] "[A]n individual who poses a significant risk to the health or safety of others that cannot be ameliorated by means of a reasonable modification is not a qualified individual under § 12131."[134] A public entity, including law enforcement, does not need to permit a person to participate in the benefits of a government program if the "individual poses a direct threat to the

[126] 28 C.F.R. pt. 35 app. B (2024).
[127] 28 C.F.R. § 35.150(a)(3) (2024).
[128] *Id.*
[129] 28 C.F.R. pt. 35 app. B. (2024).
[130] *Witt*, 2021 U.S. Dist. LEXIS 216758, at *12 (quoting *Lockett v. Catalina Channel Exp., Inc.*, 496 F.3d 1061, 1066 (9th Cir. 2007).
[131] 28 C.F.R. § 35.139(b) (2024).
[132] *Witt v. Bristol Farms*, No. 21-cv-00411-BAS-AGS, 2021 U.S. Dist. LEXIS 216758, at *13 (S.D. Cal. Nov. 9, 2021).
[133] 28 C.F.R. § 35.139(b) (2024).
[134] *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 735 (9th Cir. 1999).

health or safety of others."[135] However, if an additional reasonable modification would eliminate the direct threat, then the disabled person should be accommodated.

Conclusion

It is essential that litigation challenging laws that criminalize homelessness includes disability claims to preserve the rights of unhoused people with disabilities. Cases that have litigated these claims have won preliminary injunctions to stop sweeps and strong settlement agreements. For questions or guidance, you can contact DREDF at info@dredf.org.

[135] 28 C.F.R. § 35.139(a) (2024); *Est. of Shafer v. City of Spokane*, No. 2:22-CV-0220-TOR, 2023 U.S. Dist. LEXIS 201057 (E.D. Wash. Nov. 8, 2023).

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