An ethical need but also a practical demand for jurisdictions to invest in emergency preparedness initiatives that address the functional needs of people with disabilities. Moreover, the Americans with Disabilities Act (ADA) and other similar antidiscrimination laws, which have been in force for more than 20 years, have always required that comprehensive emergency preparedness programs implemented by government emergency management agencies be inclusive of the functional needs of people with disabilities. Despite this, inclusive preparedness initiatives have not been fully implemented, resulting in potential liability under the ADA. This paralysis within the emergency management community is perhaps a reflection of confusion over the type and nature of services that are legally required and frustration over the perception that federal emergency preparedness guidelines set unrealistic and unattainable standards. Emergency managers should not interpret these guidelines as threshold requirements. Rather, they should use the guidelines as interactive tools for better understanding the nature and variety of functional needs presented by people with disabilities who live within their jurisdictions and how those needs can be accommodated before, during, and after an emergency. The purpose of the guidelines, which are based on the ADA, is to enable emergency managers to make meaningful investments in resources that address the needs of people with disabilities before an emergency so that those needs are addressed both during and following an emergency.

This article discusses the general legal standards of the ADA and examines two recent cases in which local emergency management agencies allegedly violated the ADA by failing to consider people with disabilities in the administration of their emergency preparedness.
programs. Although neither of these cases provide binding legal precedent, they indicate a trend in the types of claims likely to be brought against emergency management agencies. Moreover, they can inform the approach that emergency managers take to address the functional needs of people with disabilities. This article hopes to lay the foundation for a better understanding of the purpose and function of the ADA and related emergency preparedness guidelines so that emergency managers can more confidently implement practical and deliberate emergency preparedness initiatives.

**LEGAL BACKGROUND: TITLE II OF THE ADA**

The general goal of the ADA, and specifically Title II, is to attempt to “level the playing field” for people with disabilities by requiring public entities to afford them an equal opportunity to participate in or benefit from the services, programs, or activities offered by public entities. Title II applies to all programs and services provided directly or indirectly by state and local governments. In addition, public entities must “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” In other words, services, programs, and activities that tend to unjustifiably segregate people with disabilities from the general population on the basis of disability do not satisfy the nondiscrimination mandate of Title II. To that end, public entities must make reasonable modifications to policies, practices, or procedures and take necessary steps to ensure that services, programs, or activities are readily accessible to and usable by people with disabilities. A public entity may be exempt from making reasonable modifications only if the entity establishes that doing so would fundamentally alter the nature of a service, program, or activity or would impose undue financial and administrative burdens.

To successfully bring a claim under Title II, a plaintiff must show the following three elements: 1) that he or she is a “qualified individual with a disability,”

2) he or she was excluded from participating in or denied the benefits of services, programs, or activities or was otherwise discriminated against by the public entity, and 3) such exclusion, denial of benefits, or discrimination was by reason of his or her disability. If those elements are met, and if the plaintiff presents sufficient evidence that a reasonable modification was available, the public entity may defend itself by presenting evidence that shows why it did not make the reasonable modifications, that is, why the modification would have either fundamentally altered the nature of the service or program or caused an undue financial or administrative burden. However, this can be an extremely difficult showing to make.

*Title II requires inclusive emergency preparedness programs*

It should come as no surprise that an emergency preparedness program implemented by a state or local emergency management agency must comply with the nondiscrimination mandate of Title II. Assistance offered by a state or local emergency management agency in preparing for, responding to, and recovering from an emergency or disaster constitutes a program, benefit, and service that is offered by a public entity. Moreover, the nondiscrimination and integration mandates set out in Title II have existed for more than 20 years and the Department of Justice and the Federal Emergency Management Agency (FEMA) have issued extensive guidance regarding the application of Title II to emergency preparedness initiatives. Emergency managers should expect to be held liable under Title II in the development and administration of their emergency preparedness programs.

Nonetheless, some emergency managers have not undertaken inclusive preparedness initiatives due to lingering confusion and frustration over how preparedness measures that comply with the ADA can be practically implemented. This confusion and frustration may be in part due to the misconception that compliance with the ADA can only be achieved by meeting all standards set out in federal guidance documents, such as the 2010 FEMA Guidance on Planning for Integration of Functional Needs Support Services in
General Population Shelters (2010 FEMA Guidance). These guidelines provide an exhaustive list of accommodations, procedures, and policies for making emergency support services fully accessible to people with disabilities. Many emergency managers might consider it aspirational at best to provide the myriad modifications that the 2010 FEMA Guidance suggests are necessary. It is conceivable that emergency managers would choose to avoid making modifications or initiating comprehensive inclusive preparedness measures if they believe that the services they are realistically able to offer will not adequately satisfy Title II and that they will nonetheless be exposed to liability.

However, this approach, reflects a misunderstanding of the nature of federal guidance and the practical legal application of the ADA. Although federal guidance documents do not carry the force of law and are not legally binding, the “best practices” outlined therein are based on the ADA’s legal standards and represent modifications that emergency managers could take to address the needs of people with disabilities and thereby comply with the law. Be this as it may, there is no “one size fits all” template that must be followed to achieve compliance with Title II. It is unlikely that a decision by the Department of Justice to bring an enforcement action against a jurisdiction or a court’s determination of liability will hinge exclusively on whether the jurisdiction implemented every modification presented in the guidelines. Rather, what will likely be of primary significance is whether emergency managers made a demonstrable effort to use available resources to engage people with disabilities and to address disability-related functional needs in the planning process—the guidelines present a variety of nonexclusive methods for doing this. This is because courts and the Department of Justice—the agency charged with enforcing the ADA—judge the accessibility of an emergency preparedness program on an ad hoc, case-by-case basis and only after conducting a fact specific inquiry into all surrounding circumstances.

As is illustrated by the cases discussed below, in making this determination, courts and the Department of Justice will likely also consider whether emergency managers used the finances and resources available in their respective jurisdictions to learn about local populations of people who have disability-based functional needs, to identify gaps in services for those people during emergencies, and to engage people with disabilities in developing creative and appropriate solutions for filling those gaps—again, which solutions might include implementing some of the modifications set out in the guidelines. Emergency managers can engage people with disabilities within their jurisdictions by, for example, inviting people with disabilities to participate in training exercises or programs, reaching out to providers of disability-related functional needs support services or to local community interest groups who serve people with disabilities, and seeking input and feedback on emergency plans and policies from people with disabilities and stakeholders who are familiar with issues specific to certain types of disabilities. It is important for emergency managers to determine what is available and what is actually needed before determining what modifications and accommodations can and cannot be implemented.

LESSONS LEARNED FROM THE CALIFORNIA AND NEW YORK CASES: HOW PROACTIVE EMERGENCY MANAGERS MIGHT AVOID FUTURE DISCRIMINATION

As discussed earlier, liability under the ADA can be largely circumstantial. Therefore, emergency managers should appreciate how allegations based on the failure of an agency to implement and administer inclusive preparedness programs will be treated differently under the ADA than those based on the failure to make reasonable accommodations during an actual emergency. Two recent cases, one in California and one in New York, illustrate the importance of this distinction. The first case was filed in 2009 against the City of Los Angeles and was dismissed on summary judgment in favor of the plaintiffs, whereas the second case was filed in September 2011 against the city of New York and is still in the initial phases of litigation. Although neither of these cases have been fully litigated and thus do not provide concrete legal precedent, they are relevant to emergency planners and agencies because they suggest a trend in the types of claims being brought against emergency management agencies and may provide insight into how emergency managers can administer comprehensive and inclusive emergency management programs.
preparedness programs so as to avoid future disability-based discrimination.

**California: Communities Actively Living Independent & Free v City of Los Angeles**

In the California case, the plaintiffs, Communities Actively Living Independent and Free filed a class action lawsuit in federal district court against the City of Los Angeles alleging, among other things, that the City discriminated against individuals with disabilities in its emergency management programs in violation of Title II of the ADA. The court found in favor of the plaintiffs, holding that as a matter of law the City failed to provide individuals with disabilities meaningful access to the City’s emergency preparedness program because the program did not address or provide for their unique needs. In addition, the court held that evidence of modifications as set out in official guidance documents, including the Department of Justice’s ADA Checklist for Emergency Shelters, was sufficient to establish that reasonable modifications were available. Significantly, and for reasons that are unclear, the City of Los Angeles did not defend itself by presenting evidence that those modifications would have fundamentally altered the nature of the emergency preparedness program or would have caused undue financial and administrative burdens.

Among the failures of the emergency preparedness program identified by the court were inadequacies in the City’s 200-page Emergency Operations Plan, specifically its failure to address either notification of individuals with auditory or cognitive disabilities or evacuation, transportation, or temporary housing of individuals with disabilities during or immediately following a disaster. The City did not provide any documentation to support its belief that individual departments, such as the police and fire departments, were responsible for and capable of providing the needs of people with disabilities during emergencies. Furthermore, the City itself had not completed assessments to determine whether it had the capacity or the ability to respond to individuals with disabilities during a disaster. Regarding emergency shelters, the City had not conducted emergency compliance surveys for the majority of shelters and, of those that had been surveyed, only “a few-if any” met ADA accessibility standards. Again, there was no evidence to support the City’s belief that the American Red Cross was responsible for providing accessible and integrated mass shelters or temporary shelters, that the Red Cross was aware of this expectation or of the existence of any formal agreement between the City and the Red Cross with respect to providing services for people with disabilities during emergencies. In addition, the City’s emergency preparedness program did not include any provisions for inspecting or evaluating Red Cross policies and procedures at emergency shelters.

**New York: Brooklyn Center for Independence of the Disabled v City of New York**

More recently, in the 2011 New York case, the Brooklyn Center for Independence of the Disabled filed a class action lawsuit in federal district court alleging similar claims under Title II against Mayor Michael Bloomberg and the City of New York. Although this case is in the very preliminary stages of litigation, and thus there is no formal court opinion on the substance of the ADA claims, the fact that the allegations of discrimination are so similar to those in the California case is itself significant because it indicates the types of claims that emergency managers can expect, and which they can perhaps proactively preempt.

In this case, as in California, the plaintiffs allege that the City of New York excluded individuals with disabilities from participation in and denied them the benefits of the City’s emergency preparedness program in that the City failed “to plan to meet the unique needs of persons with disabilities during an emergency.” The plaintiffs allege that planning for the unique needs of individuals with disabilities during emergencies is not an integrated part of the City’s comprehensive emergency preparedness program and that the City failed to consistently engage, respond to, and
seek input from the disability community in developing emergency plans and that it even denied grant requests from the disability community to fund emergency preparedness initiatives for people with disabilities. In addition, the plaintiffs assert that the City failed to conduct surveys of emergency shelters to ensure that the shelters are architecturally and programmatically accessible to individuals with disabilities, including having the capacity to accommodate a variety of functional needs by providing, for example, access to refrigeration, durable medical equipment, medication, and accommodations for service animals. The plaintiffs also assert that the City failed to provide emergency communications that are accessible to individuals with vision disabilities.

The preceding cases are just two examples of how and why jurisdictions are being held accountable for stalling in the implementation of inclusive emergency preparedness programs that address the functional needs of individuals with disabilities. The cases demonstrate that although confusion regarding what is required to make emergency services accessible to people with disabilities is pervasive, it will not excuse the failure to adequately plan and will not shield emergency management agencies from liability.

CONCLUSIONS

Emergency managers may interpret the 2010 FEMA Guidance and other related guidance material as setting onerous standards for ADA compliance that are unnecessary, “purely ‘aspirational,’” or impossibly impractical to meet. The validity of those perceptions notwithstanding, emergency managers are nonetheless responsible for conducting emergency planning that complies with the ADA by becoming aware of and considering the functional needs of people with disabilities within their jurisdictions. The guidance materials should be viewed as “technical assistance” for implementing measures that are not readily apparent as necessary from the text of the ADA or the regulations alone, and as best practices for inclusive planning.

Emergency managers should use available guidance as tools against which comprehensive emergency plans can be checked to ensure that the myriad of functional needs presented by people with disabilities during emergencies are addressed in a meaningful way and to the best of the jurisdiction’s ability. However, that is not the only way that emergency managers can strive for ADA compliance. They might also initiate outreach to people with disabilities and stakeholders who represent people with specific types of disabilities to learn about their functional needs and to involve them in the planning process. The impetus for doing so is that ADA claims raised against emergency management to date, such as those in the California and New York cases, are based on the failure to conduct those types of inclusive planning and preparedness initiatives. Moreover, the ADA requires that emergency managers use available financial and administrative resources to carry out inclusive planning. The guidance should not dissuade emergency managers from implementing comprehensive preparedness programs to the best of their jurisdiction’s ability. The ADA, and specifically Title II, requires that people with disabilities have equal access to and enjoyment of the benefits of a government’s emergency preparedness program—just as people without disabilities do. Emergency managers need only level the playing field, and recognizing that there are a variety of flexible and meaningful ways to do this is imperative.

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REFERENCES


3. Americans with Disabilities Act of 1990, as amended by the ADA Amendments Act of 2008 (ADA), 42 USCA §§12101 et seq. (West 2011); Rehabilitation Act of 1973 (Section 504), 29 USCA §794 (West 2011).

4. ADA 42 USCA §12132; ADA Title II Regulations, 28 CFR §35.130(b)(1)(i)-(vii) (2010).

5. ADA Title II Regulations, 28 CFR §35.102, .130(b).

6. ADA Title II Regulations, 28 CFR §35.130(d).


8. ADA Title II Regulations, 28 CFR §35.130(b)(7), .150(a).

9. ADA Title II Regulations, 28 CFR §35.150(a)(3).

10. ADA 42 USCA §12131(2).

11. ADA 42 USCA §12133.

12. Zukle v Regents of the University of California, 116 F.3d 1041, 1048 (9th Cir 1999).


20. ADA 42 USCA §12201(a), 12133.


