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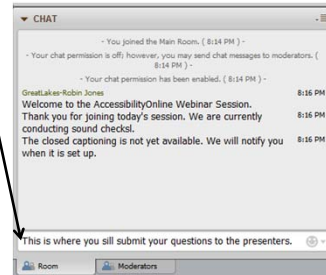
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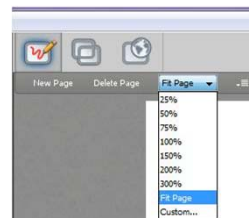
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WHAT'S YOUR PLAN?
Part One: Getting Started

**Self-evaluations,
transition plans,
barrier removal plans**

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January 21, 2014

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Us, officially

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Overview of sessions

- Part One: Getting Started

- Part Two: A Hands-on Approach to Self-Evaluations

- Part Three: Bringing It All Together: Transition Plans, Barrier Removal Plans, and Action Plans

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This session

- What's required and why?
- Should you do it?
- What you're evaluating
  - Equal opportunity
  - Program accessibility
- First, some decisions
- Stages
- Other approaches

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WHAT'S REQUIRED AND WHY?

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Self-evaluation (1)

ADA regulation: Evaluate <u>services, policies, and practices</u>, and the effects of them, that do not or may not meet title II requirements

> Describe areas examined, problems identified, modifications made

> Provide opportunity for interested persons to participate (submit comments)

> If entity larger than 50 employees, keep record of self-evaluation on file and available for public inspection for three years

> Make any necessary modifications [action plan]

1991 DOJ regulation: 28 CFR 35.105

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Self-evaluation (2)

- DOJ on do-overs

  "If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504… then the requirements [about self-evaluation] apply only to those policies and practices that were not included in the previous self-evaluation."

  1991 DOJ regulation
- Similar requirements under section 504 regulation

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Transition plan (1)

Regulation:

"If structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop … a transition plan setting forth the steps necessary to complete such changes."

- Opportunity to participate
- Copy available for public inspection (no time given).
- Make changes within three years [of January 26, 1992] but as expeditiously as possible.

28 CFR 35.150(d)

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Transition plan (2)

- Regulation:
  - Identify physical obstacles that limit accessibility of programs or activities
  - Describe in detail methods to be used to make accessible
  - Specify schedule
  - Identify responsible official
  - If authority over streets, roads, walkways, include schedule for curb ramps or other sloped areas where pedestrian walks cross curbs. 28 CFR 35.150(d)(3)

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Title III (1)

- Title III applies to "public accommodations" – private businesses in certain categories
  - Generally, those open to the public
  - Examples: private universities, theaters, hotels, restaurants
- Requirement: Remove barriers in existing facilities where "readily achievable"

Note: Some private entities are subject to section 504 (recipients of federal financial assistance), with requirements similar to title II's

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Title III (2)

- Remove barriers in existing facilities to extent readily achievable.
  - Building-by-building analysis
  - "Readily achievable" means "easily accomplishable and able to be carried out without much difficulty or expense"
  - On-going obligation

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Barrier removal plan

- Regulation doesn't require one
- DOJ in preamble/guidance urges "procedures for an ongoing assessment" and consultation with organizations representing people with disabilities
- DOJ encourages development of an implementation plan

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Should you do it?

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Benefits of a self evaluation

- Position the entity for compliance
  - Identify weaknesses
  - Make concrete improvements.
- The regulation tells you to
- You control the process, approach, timing
- Related training can make ADA part of the culture, raise awareness
- Shows good-faith effort
- Compliance!

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Downside to <u>not</u> acting

- Possibility of harsher mandates from litigation
- Possibility of "bad press"
- Project Civic Access "subject"
- Settlement agreements or lawsuits
  - More likelihood of advocates' success
  - Court or agreement can make you do <u>more</u> than otherwise
- Someone else controls the process, your resources, your schedule
- Implementation may be delayed pending overall evaluation
  - By end of evaluation, information may not be timely.

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Time for a do-over?

Why do another plan if we already did one?

- Hmmm... Has anything changed?
  - Programs
  - Facilities
  - Web site
  - People
  - Services contracted out
  - Requirements and expectations
  - Higher expectations

- Do you have plans that are current and that you're following?
- Are you implementing them?

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WHAT YOU'RE EVALUATING

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What will you be evaluating?

- Programs, activities, services: equal opportunity
- Policies
- "Program access"

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Discrimination prohibited

- The ADA and section 504 mandate an <u>equal opportunity to participate</u> in programs, activities, and services for people with disabilities
- Section 504 and Title II regulations specifically prohibit denial of equal opportunity to participate in programs, services, and activities <u>because of inaccessible facilities</u>

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Examples of programs and activities: town, city, county

- Hearings, meetings, events (fairs, concerts, graduations)
- Housing
- Museum programs
- Recreation
- Events
- Tours
- Social services and benefits
- Voting
- Web sites, IT

- Emergency preparedness, evacuation, sheltering
- Library services
- Police and fire
- Courts
- Corrections
- Procedures
- Mass transit
- Access to streets and sidewalks
- Zoning issues

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Examples of programs and activities: college, university

- Admissions
- Financial assistance
- Athletics
- Academic departments
- On-line learning
- Housing
- Recreation
- Student activities
- Alumni affairs

- Emergency preparedness, evacuation, sheltering
- Library services
- Meetings, hearings, conferences
- Access to streets and sidewalks
- Web sites

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Core topics

- Policies that may discriminate
- Separate programs/services
- Communication
- Infrastructure
- Outside entities (vendors, contractors, grantees)
- Furniture, equipment, purchasing
- Applications
- Tests
- Participation requirements (initial and continuing)

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What is "program access?"

- A term of art
- Relates to discrimination resulting from lack of access to <u>facilities</u>

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Program access: the concept

- Operate each <u>program/service/activity</u> so that, when viewed <u>in its entirety</u>, it is <u>accessible</u>.

  28 CFR 35.150(a)

- No exclusion/discrimination because of inaccessible facilities

  - Does not necessarily require physical changes

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Issues

Title II (and section 504): <u>programs</u> in <u>existing facilities</u> must be <u>accessible in their entirety</u> (cannot deny benefits, services, etc. due to <u>inaccessible facilities</u>).

- What's an "existing" facility?
- What's a program?
- When is a feature/element accessible?
- What are characteristics of an accessible program?

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"Existing facility"

DOJ definition, 2010: An "existing facility" is one that exists

> -- that is, on a given date

> One building can be both new and existing.

> Significance for program access: ALL buildings/facilities are evaluated

WELL, DUH!

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When is a feature/element "accessible?"

- Reference point: alterations standards
- Title II reference point: 2010 Standards
  - By March 15, 2012, programs should have met these standards as to program accessibility
  - Major implications for those elements not safe harbored; examples:
    - Pools
    - Exercise machines and equipment
    - Residential facilities dwelling units
    - Play areas
    - Team or player seating

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Now that the Standards have changed…

- Existence of barrier is measured by looking to the Standards
- Remedy to barrier is measured the same way
- SO what happens when the "measure" changes?

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New safe harbor for program accessibility

Existing elements that comply with pre-2010 requirements (UFAS or 1991 Standards) are "safe" from further changes just for the sake of program accessibility.
2010 Standards, section 35.150(b)(2)(i).

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Are you where you should be?

- Consider those elements/spaces that are "safe-harbored" and those that aren't
- If you didn't come into compliance with program access requirements by March 15, 2012 –
    - Have a plan
    - Implement it

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Characteristics of program access

- Provides equal opportunity
- Range of choices similar to others'
- Integration
- Privacy/confidentiality
- Dignity

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Program accessibility methods

- Flexibility allowed in achieving program accessibility: any method that results in making services, programs or activities accessible

- BUT public entity must give priority to those methods that provide for integration of persons with disabilities

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Examples of methods

- Relocate a service to an accessible location
- Deliver services in alternate way (e.g., with assistance)
- Provide benefits or services at an individual's home, or at an alternative accessible site.
- Redesign or purchase equipment
- Modify buildings and facilities
- Modify policies and procedures
- Alter existing facilities
- Construct new facilities

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Multi-site programs (1)

Examples: City parks, county courts

Entities have discretion in
   determining how many facilities
   of a multi-site program must be
   made accessible to achieve
   overall program accessibility.

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Multi-site programs (2)

DOJ 2010 regulation preamble describes factors for
   evaluation of multi-site program for "accessibility in
   its entirety"

- Size of entity
- Program features at each site
- Distance between sites
- Travel times
- Number of sites
- Public transportation
- Integrated setting

➢ Does not adopt concept of "reasonable number"

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Equipment (1)

Generally, only "fixed" items are covered by the standards and subject to new construction/alterations.

- ➢ I.e., fixed vending machines, ATMs

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Equipment (2)

BUT free-standing non-fixed vending machines, furniture, etc. are subject to provisions other than the Standards:

- ➢ Program access
- ➢ Barrier removal
- ➢ Full and equal enjoyment
- ➢ Opportunity to participate, benefit

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Equipment (3)

See
- DOJ advance notice of proposed rulemaking on equipment and furniture, July 26, 2010.

  http://www.ada.gov/anprm2010/

  equipment_anprm_2010.htm
- Access Board notice of proposed rulemaking and advisory committee report on medical diagnostic equipment. http://access-board.gov

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There <u>are</u> limits

- Fundamental alteration in the nature of a service, program, or activity
- Undue financial and administrative burdens
- BUT:
  - Decision must be made by head of the public entity after considering all resources available and must be in writing
  - And public entity must take other actions that will not result in fundamental alteration or undue burdens, but still provide access
- See also historic properties, 28 CFR 35.150(a)(2), 35.150(b)(3) and safe harbor

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An "additional" obligation: equal opportunity

- Equal opportunity requirements may require that you go "beyond" the standards
  - Automatic doors
  - More accessible parking
  - Bariatric fixtures/equipment

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Contractors and other partners

- A title II entity is responsible for actions of contractors and other partners when they carry out the title II entity's activities
- The title II entity cannot "contract away" its title II duties

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"Significant assistance"

- If an entity provides significant assistance to organization or person for their programs/services, ensure compliance

Image credit: http://www.knox.edu/Images/_News/news_media/img/2003/tke-ramp-18s.jpg

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FIRST, SOME DECISIONS

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Self-evaluation

Review: Public entities are to
- evaluate current services, policies, and practices, and the effects of them, that do not or may not meet title II requirements and
- make any necessary modifications

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Transition plans

Review: Required if physical changes to facilities will be undertaken to achieve program accessibility
- Description of physical obstacles affecting accessibility that must be removed
- Methods for making facilities accessible (in detail)
- Time frames (if more than one year, annual markers)
- Name of person responsible for implementation

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Where are you now?

- When did you do your last self-evaluation or transition plan?
- What has changed (other than some of the requirements!)?
- Should you develop policies, train, and <u>then</u> assess?
- What needs attention most or first?
- Do you have support from the top? Legal? Facilities? Others?

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You are unique:
What will work for you?

- Consider your "culture"
  - How does your entity work?
  - How does change happen?
  - How does disability compliance fit within the compliance structure?
- Consider your constituency
  - Input from people with disabilities: when, who, how
  - Input from program managers
  - Input from the public

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Decisions (1)

- **Level of detail**
  - What's a program
  - How deep do you go in analysis
  - How much data can you handle
  - How quickly do you want this done
- **Tools**
  - Overview of programs, policies, etc.
  - What does each department do?
  - Program survey
  - Facilities survey
  - Way to track changes

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Decisions (2)

- **Analysis**

- **Reporting**

- **Planning for remediation**

- **Making the changes**

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Challenges

- **Tying together service and facility issues**

- **Outside parties**
  - Procurement
  - Vendors
  - Facilities owned by others
  - Others' use of your facilities

- **Programs carried out mostly by contractors, delegate agencies – Title II obligation stays with entity**
  - Shelters for those who are homeless, experience domestic violence
  - Child care
  - Family services

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Do it yourself or outside consultant?

- Process can be
  - Entity-driven
  - Consultant-driven
  - A mixture

- ADA Coordinator plays a key role in any of these.

- Consider how much time and money entity can devote

- "Informed insiders" are the best evaluators

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FOUR STAGES

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Step by step

➢Plan
➢Gather information
➢Analyze and report
➢Implement

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Reporting and planning

Report by –

- Town/city if small or
- Department or
- Each program, service, or activity

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ALTERNATIVES

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Instead of or in addition to a self-evaluation…

- Focus on what's new
- Focus on where improvement is needed
- Develop policies, check for compliance after a while
- Train on difficult areas
- Open-ended interviews
- Reviews of policies

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Address vulnerabilities and DOJ priorities

- Known problems or complaint areas
- Emergency preparedness
- Web accessibility
- Information technology
- Recreation
- Health care

- Housing
- Voting
- Shelters
- 911
- Facilities not safe-harbored
- Mobility devices
- City-wide program access obligation for programs carried out by third parties

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The next scheduled session is:

"What's Your Plan? A three-part series on self-evaluations, barrier removal plans, and transition plans"

Part II: A Hands-on Approach to Self-Evaluations
February 18, 2014

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