Soft Lights Foundation
9450 SW Gemini Dr., PMB 717836
Beaverton, OR 97008
www.softlights.org

Light should guide us, not blind us.

POSITION PAPER

Self-Evaluation, Individualized Inquiry, and the Architecture of ADA Title II Compliance

by Mark Baker, President, Soft Lights Foundation — September 3, 2026

I. Summary

Title II of the Americans with Disabilities Act (ADA) imposes two distinct obligations on public entities, operating at two different points in time. The first is systemic and prospective: 28 C.F.R. § 35.105 requires every public entity to evaluate its own current services, policies, and practices for consistency with Title II, before any individual ever raises a complaint.[1] The second is individualized and reactive: once a specific person requests an accommodation, or the need for one is obvious, the public entity must undertake a fact-specific investigation into what that person actually requires, rather than speculating or refusing outright. The Ninth Circuit crystallized this second duty in *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001),[2] but its lineage runs back through *Wong v. Regents of the University of California*, 192 F.3d 807 (9th Cir. 1999),[3] to the Supreme Court's 1985 observation in *Alexander v. Choate* that Congress had perceived disability discrimination to be "most often the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect." *Alexander v. Choate*, 469 U.S. 287, 295 (1985).[4]

These two duties, the systemic ADA Self-Evaluation under 28 C.F.R. § 35.105 and the individualized fact-specific investigation under *Duvall*, are not redundant; they are sequential and complementary. The systemic duty exists so that a public entity already understands its own barriers before anyone is harmed by them. The individualized duty exists as a backstop, for the barriers the systemic process missed or for needs particular to one person that no general policy review could anticipate. A public entity that competently performs the first systemic duty under 28 C.F.R. § 35.105 should rarely need to rely on the second individualized investigation required by *Duvall*. This paper examines both duties, their shared doctrinal ancestry, and the all-too-common pattern of entities that have performed neither the systemic evaluation nor the individualized investigation.

[1] 28 C.F.R. § 35.105. https://www.ecfr.gov/current/title-28/chapter-I/part-35/subpart-A/section-35.105
[2] Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001). https://caselaw.findlaw.com/court/us-9th-circuit/1301078.html
[3] Wong v. Regents of the University of California, 192 F.3d 807, 818 (9th Cir. 1999). https://law.resource.org/pub/us/case/reporter/F3/192/192.F3d.807.98-15757.html
[4] Alexander v. Choate, 469 U.S. 287 (1985). https://supreme.justia.com/cases/federal/us/469/287/

II. The Two Duties Title II Imposes

Title II's operative command is that

> *"no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."* 42 U.S.C. § 12132.[5]

The Department of Justice's implementing regulations translate that command into two obligations that operate on different timelines and by different mechanisms.

The first is § 35.105's self-evaluation requirement: a public entity must

> *"evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications."* 28 C.F.R. § 35.105(a).[6]

This obligation runs continuously and applies to any current practice not previously evaluated — including practices adopted or continued after an entity's original self-evaluation. See 28 C.F.R. § 35.105(d); *Tyler v. City of Manhattan*, 849 F. Supp. 1429 (D. Kan. 1994).[7] It does not wait for a complaint. It is the entity's own obligation to look.

The second is the individualized duty most fully articulated in *Duvall v. County of Kitsap*: once notice arises — because the individual has requested an accommodation or because the need is obvious — the public entity "is required to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation," and "mere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement." *Duvall*, 260 F.3d at 1139 (quoting *Wong*, 192 F.3d at 818). This obligation is triggered by an individual, applies to that individual's circumstances, and requires the entity to gather sufficient information — from the individual and, where appropriate, from qualified experts — before it may deny or unilaterally impose an accommodation.

Properly understood, § 35.105 is meant to make heavy reliance on the *Duvall* duty the exception rather than the norm. A self-evaluation that actually examined a practice like LED streetlights, flashing auxiliary warning lamps, or Rectangular Rapid Flashing Beacons (RRFBs) would surface the conflict between that practice and the needs of photosensitive individuals before any individual encounter with it — at which point the entity could adjust the practice, adopt a compliant variant, or build an accommodation pathway into the practice from the outset. A functioning systemic process does not eliminate the individualized duty entirely; some needs are genuinely idiosyncratic and could not be

---

[5] 42 U.S.C. § 12132. https://www.law.cornell.edu/uscode/text/42/12132

[6] 28 C.F.R. § 35.105. https://www.ecfr.gov/current/title-28/chapter-I/part-35/subpart-A/section-35.105

[7] Tyler v. City of Manhattan, 849 F. Supp. 1429 (D. Kan. 1994). https://law.justia.com/cases/federal/district-courts/FSupp/849/1429/2139555/

anticipated by any general review. But for a foreseeable, generically documented class of harm — and the interaction between flashing light devices and photosensitivity is exactly that — a working self-evaluation process should mean that individual accommodation requests become rare, not routine.

III. Historical Foundation

The individualized-inquiry principle that *Duvall* would eventually name did not originate with *Duvall*, and did not originate with the ADA. Its roots lie in Section 504 of the Rehabilitation Act of 1973, seventeen years before Title II existed.

In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979),[8] the Supreme Court first addressed what Section 504 required of a federally funded program facing a disabled applicant, holding that the statute imposed no requirement upon an educational institution to lower or substantially modify its standards to accommodate a disabled person, while leaving open that a refusal to modify an existing program could, in some circumstances, amount to discrimination. *Id.* at 405–414. Six years later, in *Alexander v. Choate*, 469 U.S. 287 (1985), the Supreme Court supplied the diagnosis that would anchor everything that followed: Congress, in passing the Rehabilitation Act, had "perceived" disability discrimination as "most often the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect." *Id.* at 295.[9] That single sentence reframes the entire inquiry. If the harm is neglect rather than animus, the remedy cannot simply be a rule against intentional exclusion — it must be a rule that requires the entity to actually look, because an entity that never looks cannot be expected to stumble into the correct accommodation by chance.

When Congress enacted the ADA in 1990, it expressly modeled Title II on Section 504, and courts have consistently treated the two statutes' standards as functionally identical outside a handful of specific textual differences. See, e.g., *Duvall*, 260 F.3d at 1135 ("Title II of the ADA was expressly modeled after § 504 of the Rehabilitation Act."). The *Choate* diagnosis carried over with it. The Ninth Circuit gave that diagnosis its first explicit evidentiary teeth in *Wong v. Regents of the University of California*, holding that "mere[ ] speculat[ion] that a suggested accommodation is not feasible" falls short of the reasonable accommodation requirement, and that the Acts create "a duty to gather sufficient information from the [disabled individual] and qualified experts as needed to determine what accommodations are necessary." *Wong*, 192 F.3d at 818.[10] Notably, this rule was not new even in 1999: *Wong* was itself quoting a Ninth Circuit employment case decided the same year as *Choate*.[11] The information-gathering duty this paper traces to *Wong* and *Duvall*, in other words, has roots

---

[8]Southeastern Community College v. Davis, 442 U.S. 397, 405–414 (1979). https://www.law.cornell.edu/supremecourt/text/442/397

[9]Alexander v. Choate, 469 U.S. 287 (1985). https://supreme.justia.com/cases/federal/us/469/287/

[10]Wong v. Regents of the University of California, 192 F.3d 807, 818 (9th Cir. 1999). https://law.resource.org/pub/us/case/reporter/F3/192/192.F3d.807.98-15757.html

[11]Buckingham v. United States, 998 F.2d 735, 740 (9th Cir. 1993) (quoting Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985)), quoted in Wong, 192 F.3d at 818. https://law.justia.com/cases/federal/appellate-courts/F2/998/735/48141/

running in parallel with *Choate* itself, not merely descending from it. Two years after *Wong*, *Duvall* took this evidentiary rule and converted it into an affirmative obligation, applied squarely to a Title II public entity — a county court system — for the first time: a public entity "is required to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation." *Duvall*, 260 F.3d at 1139.

Most recently, in *A.J.T. v. Osseo Area Schools*, 605 U.S. 335 (2025), a unanimous Supreme Court reached back to *Choate*'s language directly, applying its "benign neglect" framing to Title II by name and confirming that disability-discrimination claims under the ADA and the Rehabilitation Act are governed by "the same standards that apply in other disability discrimination contexts," rejecting a heightened bad-faith standard that had been applied in the education context alone. *Id.* at 340–41.[12] Forty years separate *Choate* from *Osseo*, and two different statutes span that period, but the underlying premise has not moved: an entity that does not investigate cannot be presumed to have accommodated correctly, because — as *Choate* recognized at the outset — the harm the statute exists to prevent is precisely the harm of never having looked.

IV. The Systemic Duty: 28 C.F.R. § 35.105

The Department of Justice's Title II regulations require every public entity to

> *"evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications."* 28 C.F.R. § 35.105(a).[13]

The regulation further requires the entity to provide interested persons — including individuals with disabilities and organizations representing them — an opportunity to participate in that process by submitting comments, § 35.105(b), and requires entities with fifty or more employees to maintain the self-evaluation on file for public inspection for at least three years, § 35.105(c).

The Department's own preamble to the regulation explains its purpose in institutional terms: the self-evaluation requirement is "based on the section 504 regulations for federally assisted and federally conducted programs," under which "the self-evaluation process" had proven "a valuable means of establishing a working relationship with individuals with disabilities, which has promoted both effective and efficient implementation" of the underlying nondiscrimination mandate. 28 C.F.R. Part 35, App. B (1991 preamble).[14] The Department expected the same benefit to follow for entities newly covered by the ADA. *Id.* The systemic duty, in other words, was designed as an efficiency measure as much as a

[12] A.J.T. v. Osseo Area Schools, 605 U.S. 335 (2025). https://www.supremecourt.gov/opinions/24pdf/24-249_a86c.pdf
[13] 28 C.F.R. § 35.105. https://www.ecfr.gov/current/title-28/chapter-I/part-35/subpart-A/section-35.105
[14] 28 C.F.R. Part 35, App. B (1991 preamble, Section 35.105 analysis). https://www.law.cornell.edu/cfr/text/28/appendix-B_to_part_35

compliance one: an entity that knows its own barriers in advance does not need to reconstruct that knowledge, ad hoc, every time an individual is affected by them.

The obligation is also a continuing one, and LED streetlight conversion illustrates why that matters concretely. Where an entity has already completed a self-evaluation under Section 504, § 35.105's requirements under Title II apply "only to those policies and practices that were not included in the previous self-evaluation." 28 C.F.R. § 35.105(d). A federal district court gave that continuing character concrete effect in *Tyler v. City of Manhattan*, 849 F. Supp. 1429 (D. Kan. 1994),[15] rejecting a city's argument that a prior Section 504 self-evaluation satisfied its Title II obligations wholesale, and holding that the city's obligation to evaluate — and, in the interim, to make its services accessible by alternative means — continued to run for practices its earlier evaluation had not addressed. High-intensity LED streetlighting is, for most municipalities, exactly such an unaddressed practice: any self-evaluation an entity performed in the years immediately following the ADA's 1990 enactment could not have considered a lighting technology that did not yet exist in its current municipal form. A city that has since converted some or all of its streetlight network to high-intensity LED fixtures — a purely infrastructural, non-communicative service, unlike the signaling devices discussed in Part VI — has adopted a current practice that its last self-evaluation, if one was ever performed, did not and could not have addressed. The duty to evaluate that specific practice has not lapsed merely because the entity once evaluated something else.

Courts are not uniform on whether § 35.105 supports an independently enforceable private cause of action apart from proof of an underlying substantive Title II violation; that question has divided courts and is not resolved here. But that unresolved question does not drain the self-evaluation requirement of evidentiary significance. In *Pierce v. County of Orange*, the Ninth Circuit rejected as clearly erroneous a district court's assumption that a county would eventually "move toward full compliance" with Title II, relying in part on the county's own ADA coordinator's admission that she did not know whether the self-evaluation § 35.105 requires had ever been completed for the county's jails.[16] The same logic applies with equal force to the absence of a § 35.105 self-evaluation addressing LED streetlight conversion: a public entity's failure to have ever examined that practice is relevant evidence bearing on the entity's broader posture toward its Title II obligations.

V. The Individual Duty: *Duvall* and Its Reception

Duvall is a Ninth Circuit holding, and it is binding law only within that circuit. Elsewhere it is persuasive rather than controlling authority. That distinction matters for how the individualized-inquiry principle should be presented, but it does not diminish the principle itself — because the doctrinal foundation *Duvall* rests on, the *Choate*-derived recognition that unexamined neglect is itself a form of discrimination, is not confined to any one circuit.

---

[15] Tyler v. City of Manhattan, 849 F. Supp. 1429 (D. Kan. 1994). https://law.justia.com/cases/federal/district-courts/FSupp/849/1429/2139555/

[16] Pierce v. County of Orange, 526 F.3d 1190, 1223 (9th Cir. 2008). https://caselaw.findlaw.com/court/us-9th-circuit/1376473.html

Other courts, working from that same foundation, have reached compatible conclusions without necessarily adopting *Duvall*'s precise formulation.

The clearest example is the Second Circuit's decision in *Mary Jo C. v. New York State & Local Retirement System*, 707 F.3d 144 (2d Cir. 2013).[17] In holding that the reasonableness of a proposed modification "cannot be determined as a matter of law" without a fact-specific inquiry, the court did not merely gesture at a generic standard — it quoted, directly and by name, the same Ninth Circuit lineage this paper traces: "the question of what constitutes a reasonable accommodation under the ADA '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,'" quoting *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004), which in turn quotes *Wong*, 192 F.3d at 818 — the same *Wong* holding *Duvall* itself is built on. *Mary Jo C.*, 707 F.3d at 153. A sister circuit, addressing an entirely different fact pattern — a disability-retirement filing deadline, not a communication aid or an infrastructure barrier — reached for the identical doctrinal source *Duvall* draws from, by name, without any need to be bound by *Duvall* itself.

Other circuits illustrate the same underlying principle operating through a different doctrinal packaging. In *Kiman v. New Hampshire Department of Corrections*, 451 F.3d 274 (1st Cir. 2006),[18] the First Circuit addressed when a public entity's obligation to accommodate is triggered, holding that the requirement "usually does not apply unless triggered by a request," except that "sometimes the [person]'s need for an accommodation will be obvious; and in such cases, different rules may apply." *Id.* at 283 (citing *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 261 (1st Cir. 2001)). That is a narrower question than *Duvall* answers — it addresses when the duty begins rather than what the duty requires once it does — but it proceeds from the identical premise: a public entity cannot simply do nothing and call its ignorance a defense.

This paper does not attempt to catalog how every circuit has approached this question. The relevant point is narrower and, for present purposes, sufficient: the principle *Duvall* states in its most explicit form — that an entity confronted with a request, or an obvious need, must actually investigate rather than speculate or refuse — is not a Ninth Circuit idiosyncrasy. It is the natural doctrinal consequence of *Choate*'s forty-year-old diagnosis, and courts outside the Ninth Circuit, addressing their own facts under their own precedent, have continued to reach for that same diagnosis when the moment requires it.

VI. The Communication-Specific Investigation Duty: §§ 35.160–35.164 and Flashing Warning Devices

Not every municipal device raises the same kind of Title II question. A streetlight illuminates a space; it does not, in itself, convey a specific message. A Rectangular Rapid-

[17] Mary Jo C. v. New York State & Local Retirement System, 707 F.3d 144 (2d Cir. 2013). https://www.justice.gov/sites/default/files/crt/legacy/2013/02/05/maryjocopinion.pdf
[18] Kiman v. New Hampshire Department of Corrections, 451 F.3d 274 (1st Cir. 2006). https://openjurist.org/451/f3d/274/kiman-v-new-hampshire-department-of-corrections

Flashing Beacon (RRFB), by contrast, exists for no purpose other than to communicate one: that a pedestrian is present and a vehicle should yield. A police light bar or fire apparatus warning system communicates a comparably specific message: that an emergency vehicle is operating in the area and other road users should respond accordingly. These devices are not incidental lighting — they are signaling systems, and Title II's regulations governing communication apply to them with the same force they apply to any other method a public entity uses to convey time-sensitive information to the public.

Public entities have already recognized as much for an analogous device. The City of Seattle's Department of Transportation ADA Committee, addressing Accessible Pedestrian Signals — audible and vibrotactile crossing signals installed at signalized intersections — stated plainly that "Title II of the ADA mandates that state and local government provide 'effective communications' to those living with disabilities," and that such signals "can provide information in an 'effective' or accessible format to assist in making signalized street crossings easier to use for all pedestrians."[19] A city's own ADA committee, in other words, has already concluded that a traffic-control signaling device used to convey crossing information is subject to § 35.160's effective-communication mandate. RRFBs and vehicle warning lamps convey information of the same character — a specific, momentary condition requiring a specific response — through a different sensory channel. There is no principled basis to treat one signaling device as communication for Title II purposes and the other as mere infrastructure.

Once a flashing warning device is understood as a method of communication, the specific procedural requirements discussed generally in this paper's treatment of *Duvall* take on their fullest, most demanding form. Section 35.160(b)(2) requires a public entity to give "primary consideration" to the requests of individuals with disabilities in determining what auxiliary aid or service is necessary[20] — meaning the entity must honor an individual's preferred accommodation (for example, a request that flashing warning lamps operate in steady-burning mode, or that an alternative crossing signal be provided) unless it can demonstrate an equally effective alternative exists, or that the request would impose an undue burden or fundamental alteration. Where the entity's own staff lack the expertise to evaluate that request — for instance, the intensity, flash frequency, or duration thresholds at which a given device becomes hazardous to a photosensitive individual — *Duvall*'s duty to consult "qualified experts" is not a discretionary courtesy but part of the investigation itself. *Duvall*, 260 F.3d at 1137–39. And where the entity does assert an undue burden, § 35.164 requires that the determination be made by the entity's head or an appropriate designee, evaluated against the resources available to fund and operate the relevant service, and documented in a written statement of reasons[21] — not asserted by the department operating the device in question, and not left unexplained.

[19]City of Seattle, SDOT ADA Committee, Policy Memorandum: SDOT Policy for Accessible Pedestrian Signal (APS) Installation Requirements (Oct. 27, 2017).
https://www.seattle.gov/Documents/Departments/SDOT/Services/PolicyMemo_APS_Final.pdf
[20]28 C.F.R. § 35.160(b)(2). https://www.ecfr.gov/current/title-28/chapter-I/part-35/subpart-E/section-35.160
[21]28 C.F.R. § 35.164. https://www.law.cornell.edu/cfr/text/28/35.164

A conclusory letter stating that flashing warning lamps or RRFBs cannot be modified, without evidence that any individual making that request received primary consideration, without consultation of the relevant technical expertise, and without a documented undue-burden analysis performed at the appropriate level of institutional authority, does not satisfy §§ 35.160 through 35.164. It satisfies neither the communication-specific procedural requirements those sections impose, nor the general investigation duty *Duvall* requires of every accommodation request regardless of subject matter.

VII. Where the Two Duties Meet

The two duties this paper has traced operate on different timelines but serve a single underlying purpose: they are the mechanisms by which Title II attempts to convert *Choate*'s "thoughtlessness and indifference" into affirmative, examined choice. Part IV described the systemic duty — the entity's standing obligation to know its own barriers before anyone is harmed by them. Parts V and VI described the individual duty — the entity's triggered obligation to investigate a specific person's needs once notice arises, and the fuller procedural requirements that duty carries when the subject matter is a communicative device. Read together, the two are not redundant safeguards; they are sequential ones. A public entity that performs the systemic duty competently should rarely need the individual duty at all, because the barriers most likely to recur — the foreseeable, generically documented ones — will already have been identified and addressed before any individual encounters them.

The real-world record over the past decade relevant to LED streetlights, flashing auxiliary vehicle warning lamps, and RRFBs shows a different pattern: not a sequence in which the systemic duty renders the individual duty largely unnecessary, but one in which neither duty has been performed at all. Public entities operating these devices have, in the instances examined here, neither conducted a § 35.105 self-evaluation addressing LED streetlighting or flashing-light devices and their effects on photosensitive individuals, nor performed the fact-specific investigation *Duvall* and §§ 35.160–35.164 require once an individual accommodation request is made. This is not an argument that the absence of the first duty renders the second legally deficient as a matter of doctrine — Parts IV, V, and VI do not establish that causal relationship, and this paper does not assert it. It is instead an observation about what the historical record shows: the same entities, confronted with the same subject matter, on two independent and non-overlapping occasions — one continuous and self-initiated, one discrete and individual — have taken no examined position either time.

That pattern is what *Choate* described four decades ago, in a different statutory context but in the same conceptual terms: harm that follows not from any decision to exclude, but from the absence of any decision at all. A public entity that has never evaluated whether its LED streetlights, flashing warning lamps or RRFBs are consistent with Title II, and that also declines — upon direct request — to investigate what a specific photosensitive individual requires, has not made a judgment that its practices are lawful. It has simply not looked, twice over, at the same question.

VIII. What Functioning Compliance Would Look Like

The preceding Parts describe two obligations operating through different mechanisms, on different subject matter. It is worth stating, affirmatively, what an entity meeting both obligations would actually do — because the pattern described in Part VII is best understood against that standard, not merely against the abstract text of the regulations.

For a generic municipal service like LED streetlighting, functioning compliance begins with the systemic duty described in Part IV. A public entity converting its streetlight network to high-intensity LED fixtures would have evaluated, at the time of conversion, whether the new technology's intensity, spectral, and temporal characteristics were consistent with Title II — drawing on qualified outside expertise in vision and neurological science or lighting design where its own staff lacked that knowledge, consistent with the same expert-consultation principle *Duvall* later applied at the individual level. Where that evaluation identified a concern, the entity would have documented it and adjusted its specification, fixture selection, or shielding accordingly, before widescale deployment rather than after individual harm.

For a communicative device like an RRFB or a vehicle warning lamp, functioning compliance requires the fuller procedural apparatus described in Part VI. An entity confronted with an individual's request — that a device operate in steady-burning mode, or that an alternative signaling method be provided — would treat that request as the beginning of an investigation, not the occasion for a form response. It would gather information from the individual directly and consult qualified experts where the technical question exceeded its own staff's knowledge, consistent with *Duvall*, 260 F.3d at 1137–39. It would treat the individual's preferred accommodation as the presumptive answer, consistent with § 35.160(b)(2)'s primary-consideration requirement, departing from it only where it could demonstrate an equally effective alternative or a genuine undue burden. If it asserted an undue burden, it would route that determination to the entity's head or an appropriate designee, evaluate it against the resources available to fund and operate the relevant service, and document its reasoning in writing, consistent with § 35.164. And it would consider what alternative action would still ensure meaningful access, whether or not it granted the specific accommodation requested.

Neither description is exotic, and neither requires reading any regulation more expansively than its own text supports. What distinguishes both from the pattern this paper has otherwise addressed is simply that they describe an entity that did the work — at the systemic level for its general services, and at the individual, communication-specific level for its signaling devices — rather than an entity that, confronted with the same recurring subject matter through two independent legal channels, examined it through neither.

IX. Deliberate Indifference and the Limits of Compensatory Relief

Everything this paper has described so far states what Title II requires a public entity to do. It does not, by itself, state what a court can award when a public entity fails to do it. That is a separate and narrower body of doctrine, and it matters to any reader weighing what is actually at stake in litigation, because the remedy available depends on a showing well beyond a bare violation of the duties described in Parts II through VIII.

Title II's ordinary remedy is injunctive relief, and injunctive relief does not require proof of intent. As the Supreme Court put it in *A.J.T. v. Osseo Area Schools*: "[t]o establish a violation or to obtain injunctive relief, the plaintiff need not prove intentional discrimination."[22] Compensatory damages are different. The Supreme Court held in *Barnes v. Gorman* that the remedies available in a private Title II or § 504 suit are those "traditionally available in suits for breach of contract," a framework that permits compensatory damages but forecloses punitive damages entirely.[23] Building on that foundation, the courts of appeals have required something more than a bare Title II violation before compensatory damages are available at all: as the Court restated in *Osseo*, "to obtain compensatory damages... courts generally agree that a plaintiff must prove that the defendant was at least 'deliberately indifferent' to federally protected rights."[24]

The Ninth Circuit supplied one of the earliest and most-cited definitions of that standard in *Duvall* itself. Recovering monetary damages under Title II or the Rehabilitation Act, the court held, requires that "a plaintiff must prove intentional discrimination" — and that showing is satisfied by proof of deliberate indifference, which "requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood."[25] Other circuits have adopted the same two-part test in materially identical terms: the Eleventh Circuit in *Liese v. Indian River County Hospital District*,[26] the Eighth Circuit in *Meagley v. City of Little Rock*,[27] the Second Circuit in *Loeffler v. Staten Island University Hospital*,[28] and the Tenth Circuit in *Barber v. Colorado Department of Revenue*.[29] The Supreme Court's 2025 decision in *Osseo* confirmed that this is now the majority position nationally, observing that "'a majority' of the Courts of Appeals to have weighed in on the question—including the Eighth Circuit—find the requirement to show 'intentional discrimination' satisfied by proof that the defendant acted with 'deliberate indifference,'" a standard that "does not require a showing of personal ill will or animosity toward the disabled person" and requires only proof that the defendant "disregarded a strong likelihood that the challenged action would violate federally protected rights."[30]

Even where deliberate indifference is shown, the resulting damages award is narrower than it might first appear. In *Cummings v. Premier Rehab Keller, P.L.L.C.*, the Supreme Court

[22] A.J.T. v. Osseo Area Schools, 605 U.S. 335 (2025). https://www.supremecourt.gov/opinions/24pdf/24-249_a86c.pdf
[23] Barnes v. Gorman, 536 U.S. 181, 187–189 (2002). https://supreme.justia.com/cases/federal/us/536/181/
[24] A.J.T. v. Osseo Area Schools, 605 U.S. 335 (2025). https://www.supremecourt.gov/opinions/24pdf/24-249_a86c.pdf
[25] Duvall v. County of Kitsap, 260 F.3d 1124, 1138–1139 (9th Cir. 2001). https://caselaw.findlaw.com/court/us-9th-circuit/1301078.html
[26] Liese v. Indian River County Hospital District, 701 F.3d 334, 344 (11th Cir. 2012). https://caselaw.findlaw.com/court/us-11th-circuit/1615643.html
[27] Meagley v. City of Little Rock, 639 F.3d 384, 389 (8th Cir. 2011). https://law.justia.com/cases/federal/appellate-courts/ca8/10-2932/102932p-2011-05-02.html
[28] Loeffler v. Staten Island University Hospital, 582 F.3d 268, 274–277 (2d Cir. 2009). https://law.justia.com/cases/federal/appellate-courts/ca2/07-1404/07-1404-cv_opn-2011-03-27.html
[29] Barber v. Colorado Department of Revenue, 562 F.3d 1222, 1228–1230 (10th Cir. 2009). https://caselaw.findlaw.com/court/us-10th-circuit/1349075.html
[30] A.J.T. v. Osseo Area Schools, 605 U.S. 335 (2025). https://www.supremecourt.gov/opinions/24pdf/24-249_a86c.pdf

held that emotional distress damages are not recoverable under Title II or § 504, extending *Barnes*'s contract-remedy analogy to conclude that a public entity accepting federal funds has not received the "clear notice" that ordinary contract law would require before facing liability for a plaintiff's emotional suffering.[31] What remains recoverable, in other words, excludes a plaintiff's emotional suffering, but it is not limited to bare receipts for out-of-pocket costs — as the case discussed below shows, it can include the value of opportunities a plaintiff lost because of the discrimination, provided that value is proven with evidence rather than left to speculation.

Deliberate indifference can expose a public entity to substantial damages even after *Cummings*, and a recent case shows what that looks like in practice. In *Payan v. Los Angeles Community College District*, a jury found that a community college district had intentionally violated Title II on nine separate factual grounds — applying the same deliberate-indifference standard *Duvall* supplies, which the jury instructions in that case cited directly — in denying two blind students accessible course materials, library resources, and classroom software, and awarded them $218,500 and $24,000 respectively.[32] The district court reduced that award to $1,650 and zero, reasoning that the jury must have compensated the students for emotional distress, which *Cummings* forecloses. The Ninth Circuit reversed in March 2026, holding that "lost educational opportunities" is a distinct, non-emotional category of compensatory damages available under Title II, and ordered the original jury award reinstated — agreeing with the Eleventh Circuit, which had reached the same conclusion two years earlier in a case the panel discussed directly.[33] The litigation took nearly nine years and two full trials to reach that result, and one judge dissented on the ground that the plaintiffs had not proven the size of the award with reasonable certainty, even while agreeing that the category of damages itself was proper.[34] The case is a reminder that *Cummings* narrows what deliberate indifference can recover, but does not reduce it to nothing — and that what a plaintiff actually recovers still depends on the evidence put before a jury.

This distinction connects directly to the pattern described in Part VII. Deliberate indifference's first element is knowledge — that the entity knew a harm to a federally protected right was substantially likely. A public entity's own documented failure to perform the systemic self-evaluation § 35.105 requires, combined with a documented refusal to perform the individualized investigation *Duvall* requires once a specific request is made, is not merely evidence of two separate violations. It is evidence bearing directly on the knowledge element of deliberate indifference itself: an entity repeatedly notified of a legal requirement, and unable or unwilling to say whether it will comply with it, is in a materially different position — for purposes of a damages claim, not merely an injunctive

---

[31] Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022). https://supreme.justia.com/cases/federal/us/596/20-219/

[32] Payan v. Los Angeles Community College District, No. 24-1809, slip op. at 8–9 (9th Cir. Mar. 11, 2026). https://cdn.ca9.uscourts.gov/datastore/opinions/2026/03/11/24-1809.pdf

[33] Payan v. Los Angeles Community College District, No. 24-1809, slip op. at 15–16, 18 (9th Cir. Mar. 11, 2026). https://cdn.ca9.uscourts.gov/datastore/opinions/2026/03/11/24-1809.pdf

[34] Payan v. Los Angeles Community College District, No. 24-1809, slip op. at 19–20 (9th Cir. Mar. 11, 2026) (Lee, J., dissenting in part). https://cdn.ca9.uscourts.gov/datastore/opinions/2026/03/11/24-1809.pdf

one — than an entity that investigated in good faith and made a reasonable, if ultimately incorrect, judgment.

X. The Asymmetry of Attorney's Fees

The litigation incentives this paper has described do not run only through the merits. Both Title II and § 504 authorize a court to shift attorney's fees to the prevailing party, and that authority operates asymmetrically — a fact that bears directly on the cost-benefit calculus a public entity faces in deciding whether to comply with the duties described in Parts II through IX before litigation, or to defend a claim after the fact.

On its face, the statutory language is neutral. Title II provides that "the court or agency, in its discretion, may allow the prevailing party… a reasonable attorney's fee, including litigation expenses, and costs."[35] Section 504 similarly authorizes a court to award "a reasonable attorney's fee as part of the costs" to the "prevailing party."[36] Neither provision distinguishes, in its text, between a prevailing plaintiff and a prevailing defendant.

Courts have not applied that language neutrally. Both provisions are drawn from, and have been interpreted consistently with, Title VII's nearly identical fee-shifting language, which the Supreme Court construed in *Christiansburg Garment Co. v. EEOC*.[37] The Court held that a prevailing plaintiff "ordinarily is to be awarded attorney's fees in all but special circumstances," while a prevailing defendant is to be awarded fees "only when the court in the exercise of its discretion has found that the plaintiff's action was frivolous, unreasonable, or without foundation" — a showing the plaintiff's ultimate loss on the merits does not by itself satisfy.[38] The Court explained why the same language yields different results for the two sides: "there are at least two strong equitable considerations counselling an attorney's fee award to a prevailing… plaintiff that are wholly absent in the case of a prevailing… defendant." The plaintiff is "the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority," and a fee award to a prevailing plaintiff is "awarded against a violator of federal law." Neither consideration has any counterpart when the defendant prevails.[39]

The Ninth Circuit has applied this same asymmetric framework to the ADA directly, holding that a prevailing ADA defendant may recover its fees "only if the claim was frivolous, unreasonable or lacking foundation" — the *Christiansburg* standard, imported without

[35] 42 U.S.C. § 12205. https://www.law.cornell.edu/uscode/text/42/12205
[36] 29 U.S.C. § 794a(b). https://www.law.cornell.edu/uscode/text/29/794a
[37] Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). https://caselaw.findlaw.com/court/us-supreme-court/434/412.html
[38] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417, 421 (1978). https://caselaw.findlaw.com/court/us-supreme-court/434/412.html
[39] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418–419 (1978). https://caselaw.findlaw.com/court/us-supreme-court/434/412.html

modification.[40] Every circuit to have addressed the question has reached the same conclusion.[41]

The scale this asymmetry can reach is not hypothetical. In the same *Payan v. Los Angeles Community College District* litigation discussed in Part IX, plaintiffs' counsel moved on August 3, 2026 for an award of $7,150,516.15 in combined attorney's fees and expenses — $5,523,547 in fees and $324,162.46 in expenses for Brown, Goldstein & Levy, and $1,297,125.30 in fees and $5,681.39 in expenses for the Barbosa Group — following the Ninth Circuit's reinstatement of a $242,500 compensatory damages award.[42] The same motion recounts that plaintiffs' counsel had already represented their fees at a combined $2,266,002.50 as early as August 2019, when the compensatory recovery after the first trial stood at only $40,000.[43] No order had issued on the current motion as of this writing; the figures above are the amount requested, not a judicial determination of what is reasonable, and courts routinely reduce lodestar requests of this kind. But even substantially reduced, the request illustrates concretely what the asymmetry described above can mean in practice: a compensatory recovery in the hundreds of thousands of dollars, and an attorney's fee request in the millions.

That $7,150,516.15 figure is only what plaintiffs' counsel billed. It says nothing about what LACCD itself paid its own outside counsel, Liebert Cassidy Whitmore, to defend the case through two jury trials, two rounds of Ninth Circuit appeal, and the motion practice in between.[44] Public entities are not subject to the same disclosure that a fee motion forces on a prevailing plaintiff's counsel, and no comparable figure for LACCD's own defense costs appears in the public record reviewed here. But there is little reason to expect those costs were small: litigation of this duration and complexity typically requires comparable staffing and comparable hourly rates on both sides of the case, regardless of which side the lawyers represent. A public entity's realistic exposure in a case like this is therefore not two components but three — the compensatory damages award, the prevailing plaintiff's attorney's fees under the asymmetric standard described above, and the entity's own

---

[40]Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1190 (9th Cir. 2001). https://openjurist.org/246/f3d/1182/karen-brown-v-lucky-stores-inc

[41]See, e.g., Tarter v. Raybuck, 742 F.2d 977, 984–988 (6th Cir. 1984). https://law.justia.com/cases/federal/appellate-courts/F2/742/977/212987/ Bercovitch v. Baldwin School, Inc., 191 F.3d 8, 10–11 (1st Cir. 1999). https://law.justia.com/cases/federal/appellate-courts/F3/191/8/641563/ Bruce v. City of Gainesville, Georgia, 177 F.3d 949, 951 (11th Cir. 1999). https://law.justia.com/cases/federal/appellate-courts/F3/177/949/475364/ No Barriers, Inc. v. Brinker Chili's Texas, Inc., 262 F.3d 496, 498 (5th Cir. 2001). https://www.ca5.uscourts.gov/Opinions/pub/00/00-10791.cv0.wpd.pdf Parker v. Sony Pictures Entertainment, Inc., 260 F.3d 100, 111 (2d Cir. 2001). https://www.courtlistener.com/opinion/774384/douglas-parker-v-sony-pictures-entertainment-inc-and-columbia-pictures/

[42]Plaintiffs' Notice of Motion and Motion for an Award of Attorneys' Fees, Costs, and Expenses at 2, Payan v. Los Angeles Community College District, No. 2:17-cv-01697-SVW(SKx) (C.D. Cal. filed Aug. 3, 2026). Obtained from the PACER docket for this case; not otherwise publicly available online.

[43]Memorandum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Costs, and Expenses at 7, Payan v. Los Angeles Community College District, No. 2:17-cv-01697-SVW(SKx), ECF No. 334-1 (C.D. Cal. filed Aug. 2019). Obtained from the PACER docket for this case; not otherwise publicly available online.

[44]Payan v. Los Angeles Community College District, No. 24-1809, slip op. at 4 (9th Cir. Mar. 11, 2026). https://cdn.ca9.uscourts.gov/datastore/opinions/2026/03/11/24-1809.pdf Payan v. Los Angeles Community College District, 11 F.4th 729 (9th Cir. 2021). https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/24/19-56111.pdf

defense costs, which it bears whether it wins or loses, and which in litigation of this scale are unlikely to be trivial by comparison.

The practical consequence is straightforward. A public entity that successfully defends an ADA claim ordinarily bears its own litigation costs regardless of the outcome; recovering those costs from the individual who brought the claim requires the additional and rarely-satisfied showing that the claim was groundless from the outset — a showing courts are especially reluctant to make where, as here, the claim rests on established, judicially-recognized duties rather than a novel or speculative theory. A prevailing plaintiff, by contrast, ordinarily recovers attorney's fees as a matter of course. The asymmetry means a public entity cannot treat the prospect of prevailing on the merits as an adequate offset to its litigation exposure: it stands to recover its own fees only in the unusual case, while an individual who prevails — even in part — is likely to recover the cost of having brought the claim at all.

This asymmetry compounds, rather than stands apart from, the architecture described earlier in this paper. A public entity deciding whether to perform the self-evaluation § 35.105 requires, or the individualized investigation *Duvall* requires once a request is made, is not simply weighing the cost of compliance against the cost of doing nothing. It is weighing a comparatively modest, one-time administrative cost against the cost of litigating a claim that — if it rests on the well-established law this paper has described — the entity is likely to lose, and for which it will very likely owe the plaintiff's attorney's fees on top of its own, with little realistic prospect of recovering its own fees even in the cases it wins.

XI. Class Actions, System-Wide Injunctions, and the Limits of Risk Pooling

Everything this paper has discussed so far concerns what a single individual can obtain — an investigation, an accommodation, or damages measured by that one person's experience. LED streetlights, RRFBs, and vehicle warning lamps are not, however, installed one at a time for one resident at a time. A city that has converted its streetlight network to a common LED technology, adopted a common specification for its RRFBs, or equipped its police and fire fleet with a common warning-lamp system has adopted a policy or practice that affects every similarly situated resident of that jurisdiction identically. That structural feature — one practice, one defect, one affected class — is exactly what Federal Rule of Civil Procedure 23(b)(2) is built for: certification is appropriate where the party opposing the class "has acted or refused to act on grounds that apply generally to the class," such that final injunctive relief is appropriate for the class as a whole.

Willits v. City of Los Angeles shows what that can mean in practice. A class of approximately 280,000 people with mobility disabilities was certified against the City of Los Angeles over inaccessible sidewalks, curb ramps, and pedestrian rights-of-way — infrastructure the City had built and maintained the same way, citywide, for decades.[45] The resulting settlement required the City to spend more than $1.367 billion over thirty years

[45] Willits v. City of Los Angeles, 925 F. Supp. 2d 1089 (C.D. Cal. 2013). https://dhkl.law/cases/willits-et-al-v-city-of-los-angeles/

to remediate its sidewalk system.[46] The settlement agreement is explicit that the court made no finding that the City acted intentionally, with reckless disregard, or in any manner that would support liability for damages under Title II or § 504.[47] That is not an incidental detail. It confirms, at the largest scale reported here, the point Part IX made about individual claims: injunctive relief does not require proof of intent. A public entity does not need to have acted with deliberate indifference to face a class-wide injunction requiring it to remediate an entire system — it only needs to have maintained, jurisdiction-wide, a practice inconsistent with Title II.

LED streetlights, RRFBs, and vehicle warning lamps present the same structure as the sidewalks in *Willits*. Each is typically specified, procured, and installed according to a common citywide or countywide standard, not decided device-by-device. A claim that such a standard is inconsistent with Title II is, by its nature, a claim about a policy or practice applicable to an entire class of similarly situated residents — not a claim about what happened to one person at one intersection. The cost of remediating that kind of claim scales with the size of the system, not with the severity of any individual plaintiff's injury: reworking an entire LED streetlight specification or replacing or reprogramming every RRFB in a jurisdiction, is a different order of expense than compensating one person's experience of any single device.

The cost of remediation, however, is not uniform across these three categories of devices, and that difference matters for how a public entity should prioritize its response. LED streetlights are physical infrastructure in the same sense the sidewalks in *Willits* were: bringing an entire network into compliance may require replacing or retrofitting fixtures citywide or countywide, the same category of capital expense that produced a $1.367 billion remediation program there. RRFBs occupy a middle position — depending on the specific device and how it was procured, remediation may mean reprogramming existing units or replacing them outright. Flashing warning lamps on police, fire, and other public vehicles are different in kind from either. As the Soft Lights Foundation's companion paper on the federal steady-burning requirement explains, the equipment already installed on these vehicles is generally capable of steady-burning operation; flashing is a selectable mode, not a hardware limitation.[48] Remediating this category is therefore often not a capital project at all — it can be a configuration change, setting the lamp to steady-burning rather than strobing, at little or no marginal cost. A public entity facing exposure across all three categories should not treat them as a single undifferentiated problem. The streetlight and RRFB components may require the kind of budgeting and planning this Part has described.

[46] Notice of Proposed Settlement of Class Action Lawsuit, Willits v. City of Los Angeles, Case No. CV 10-05782 CBM (C.D. Cal.). https://www.corada.com/documents/willits-et-al-v-city-of-la-settlement-notice/summary-of-the-proposed-settlement-agreement

[47] Settlement Agreement and Release of Claims, Willits v. City of Los Angeles. https://www.corada.com/documents/willits-et-al-v-city-of-la-settlement-agreement/whole-document

[48] Federal Preemption of State Authorization for Flashing Auxiliary Vehicle Warning Lamps: The Steady-Burning Requirement of FMVSS No. 108 https://www.softlights.org/wp-content/uploads/2026/09/Steady_Burning_Preemption_White_Paper-1.pdf

The vehicle-lamp component may not: it can be among the least expensive corrections a public entity is ever asked to make, and there is little reason not to make it first.

Public entities, and the joint powers authorities and risk-sharing pools many of them rely on for liability coverage, should weigh this exposure carefully, because pooled coverage does not protect against it the way it protects against ordinary tort claims. Risk pooling reduces cost by spreading unpredictable, statistically independent losses across many members — the classic case is a pool of vehicle-accident or slip-and-fall claims, where one member's loss has no bearing on another's. That is the situation in which pooling works best. Where losses are correlated — where the same event or the same underlying condition can trigger claims against multiple members at once — pooling provides little of that benefit; industry commentary on risk pooling puts the point directly: risk pooling works best when individual losses are largely independent, and where a common condition affects many members of the pool simultaneously, the collective losses can overwhelm the pool's capacity rather than being diversified away by it.[49]

A systemic ADA Title II failure of the kind this paper describes is a correlated risk, not an independent one. If multiple member agencies of the same risk pool have adopted the same LED streetlight technology, the same or a similar RRFB specification, or — as this paper has emphasized throughout — the common practice of never having performed the § 35.105 self-evaluation or the *Duvall* investigation these devices require, then the defect that exposes one member exposes the others for the identical reason. A pool does not diversify that kind of exposure; it aggregates it. Member after member may present the same claim, arising from the same unaddressed practice, and the pool may find itself paying out repeatedly for what is, in substance, a single uncorrected failure repeated across its membership rather than a series of unrelated local incidents. A public entity that assumes its risk pool has this exposure covered in the way it covers an ordinary accident claim is making an assumption the structure of that exposure does not support.

None of this is a substitute for the legal analysis in the preceding Parts; it is a practical supplement to it. A public entity weighing whether to perform the self-evaluation § 35.105 requires, or to conduct the investigation *Duvall* requires once a request is made, is not merely weighing one individual's claim against the cost of compliance. It is weighing the cost of compliance against the possibility of class-wide injunctive relief covering its entire system, against an attorney's-fee exposure that this paper has shown can dwarf any damages award, and against a risk-pool structure that offers little protection when the underlying failure is common to the pool's own membership. Correcting the practice is the only response that addresses all three exposures at once.

XII. Conclusion

Title II of the Americans with Disabilities Act does not ask public entities to guess correctly. It asks them to look — first at their own current practices, before anyone is harmed by them,

---

[49] Risk pooling: Meaning, Criticisms & Real-World Uses, Diversification.com. https://diversification.com/term/risk-pooling

and again at each individual's particular circumstances, when a request or an obvious need brings a specific person before them. Both obligations trace to the same forty-year-old diagnosis: that disability discrimination is, in the ordinary case, not a decision to exclude but a failure to examine. *Alexander v. Choate*, 469 U.S. 287, 295 (1985). Neither obligation is satisfied by silence, by delay, or by a conclusory denial issued without the investigation the regulations and *Duvall v. County of Kitsap* require.

For public officials responsible for services and infrastructure of the kind discussed in this paper — LED streetlighting, RRFBs, and vehicle warning lamps among them — the path forward is neither novel nor burdensome in the way it is sometimes assumed to be. A self-evaluation that has never been performed for a given practice can be performed now, at the systemic level, before the next individual request arrives. An accommodation request that would otherwise receive a form denial can instead receive the investigation §§ 35.160 through 35.164 already require: consultation with the requesting individual, expert input where needed, a documented undue-burden analysis at the appropriate level of institutional authority, and consideration of alternatives. Neither step requires new legislation, new litigation, or a novel legal theory. Both are already the law: the self-evaluation duty has applied since § 35.105 took effect in 1991, and the individualized investigation duty since *Duvall* was decided in 2001. What remains is simply for public entities to do what Title II has asked of them from the outset: to look before they decide, rather than deciding without having looked.

About the Soft Lights Foundation

The Soft Lights Foundation is a nonprofit organization focused on the health, safety, and accessibility impacts of high-intensity lighting. The Foundation researches and advocates on the effects of LED lighting, strobe and flashing signal devices, and related technologies on individuals with photosensitivity, seizure disorders, autism spectrum disorder, and related conditions, and engages with government agencies and public entities on regulatory and accommodation matters arising from these effects.