Title II regulations contain procedural requirements for public entities that wish to assert a fundamental alteration or undue burden defense:

1. A decision that a particular action, modification or provision of auxiliary aids and devices would be a fundamental alteration or undue financial or administrative burden must be made by the head of the public entity or his or her designee.607

2. Before such a determination is made, all of the resources available for use in the operation of the program or service must be considered.608

3. The public entity’s determination must be accompanied by a written statement of the reasons for the decision.609

4. If an agency determines that a particular action would be an undue financial or administrative burden, this is not a justification for the public entity to do nothing. Instead, the public entity must take any other action that would not be a fundamental alteration or undue burden but that would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits and services of the entity.610

Though many defendants assert fundamental alteration and undue burden defenses, few cases mention these procedural requirements or discuss whether defendants have complied with them.611 Advocates may want to request written justifications when public entities refuse to make program modifications and if litigation ensues, argue that defendants have violated this requirement and that after-the-fact justifications should be viewed skeptically by courts.

606. See Olmstead, 527 U.S. at 602-03.


608. See id.

609. See id.


