STATE OF MICHIGAN

DANA NESSEL, ATTORNEY GENERAL

OPEN MEETINGS ACT:

AMERICANS WITH DISABILITIES ACT:

REHABILITATION ACT:

Providing reasonable accommodations to qualified individuals with a disability who request them in order to fully participate in meetings that are required by the Open Meetings Act to be held in a place available to the general public.

The Americans with Disabilities Act, 42 USC 12131 *et. seq.*, and Rehabilitation Act, MCL 395.81 *et. seq.*, require state and local boards and commissions to provide reasonable accommodations, which could include an option to participate virtually, to qualified individuals with a disability who request an accommodation in order to fully participate as a board or commission member or as a member of the general public in meetings that are required by the Open Meetings Act, MCL 15.261 *et. seq.*, to be held in a place available to the general public.

Opinion No. 7318

Date: February 4, 2022

The Honorable Jeff Irwin
State Senator
The Capitol
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The Honorable Wayne Schmidt
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You have requested an opinion on how Michigan's Open Meetings Act (OMA) intersects with federal law when a person with a disability either serves on a body subject to the OMA or desires to fully participate in the meetings of such a body and requests an accommodation for their disability. Specifically, you have asked whether the Americans with Disabilities Act or Rehabilitation Act allows or requires state and local boards and commissions to provide reasonable accommodations, such as the option to participate virtually, to individuals with disabilities who have been elected or appointed to serve or wish to fully participate as members of the public and have requested an accommodation. You note that this issue is "especially important as the COVID-19 pandemic poses a real threat to the health and safety of people serving their state and local governments," and that the absence of such options "threatens the health and safety of people with disabilities and/or those who are immuno-compromised serving in local government offices and of those wanting to participate in public meetings."

Your question requires an understanding of both the OMA and federal laws that govern access to public meetings.

The OMA, 1976 PA 267, as amended, MCL 15.261 to 15.272, was intended to "promote a new era in governmental accountability," *Booth Newspapers v Univ of Mich Bd of Regents*, 444 Mich 211, 222–223 (1993), "by facilitating public access to official decision making and to provide a means through which the general public may better understand issues and decisions of public concern," *Vermilya v Delta College Bd of Trustees*, 325 Mich App 416, 419 (2018) (quotation omitted). To that

end, section 3 of the OMA requires that, "[a]ll *meetings* of a *public body* must be open to the public and must be held *in a place* available to the general public." MCL 15.263(1) (emphasis added).

The word "[m]eeting" and the term "[p]ublic body" are specifically defined in the OMA. In particular, a "[m]eeting" is the "convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy, or any meeting of the board of a nonprofit corporation formed by a city under section 4*o* of the home rule city act . . . ." MCL 15.262(b). And a "[p]ublic body" means "any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit corporation formed by a city under section 4*o* of the home rule city act . . . ." MCL 15.262(a).

What is not defined in the OMA, however, is the phrase "in a place available to the general public," and it is this language that is most relevant to your question as it pertains to the OMA. Undefined statutory terms should be given their plain and ordinary meanings, for which dictionaries may be consulted. *Koontz v Ameritech Servs Inc*, 466 Mich 304, 312 (2002). Doing that here, and breaking the phrase down, the word "in" is "used as a function word to indicate inclusion, location, or position within limits," In Definition & Meaning - Merriam-Webster,

https://www.merriam-webster.com/dictionary/in?src=search-dict-box (accessed February 1, 2022), and the word "place" may be commonly understood to mean, a "physical environment," Place Definition & Meaning - Merriam-Webster, https://www.merriam-webster.com/dictionary/place (accessed February 1, 2022). Therefore, the plain and ordinary meaning of "in a place" is a location or position within a physical space. And because the meetings of a public body *must* be held in such a physical space, the OMA does not contemplate wholly virtual meetings.[1]

The conclusion that the OMA, when enacted, envisioned meetings being held within a physical space, and not a virtual one, is further supported by recent amendments to the act. On December 22, 2020, the OMA was amended because of the COVID-19 pandemic, and strict compliance with section 3 of the OMA was suspended to alleviate physical-place or physical-presence requirements.[2] These amendments not only instituted social-distancing and cleaning protocols, but also permitted both remote participation by board members and completely virtual meetings for the safety of board members and the general public. MCL 15.263(2) and MCL 15.263a(1)(b).[3] Obviously, such amendments would not have been

[1]The words of a statute are to be interpreted in the sense in which they were understood at the time the statute was enacted. See *Cain v Waste Mgt Inc*, 472 Mich 236, 258 (2005). At the time the OMA was enacted, the Legislature could not have envisioned today's technological options and the ease with which they allow for remote participation by members and the public. Although it could be argued that a virtual platform is a "place" available to the general public, that is not the most natural reading of the Act or consistent with what would have been understood at the time the OMA was enacted.

[2] The Governor had previously issued Executive Order 2020-154, which similarly suspended strict compliance with section 3 of the OMA in light of the pandemic.

[3] Public bodies had to establish procedures by which an absent member could participate in, and vote on, business before the public body, including, but not limited to, procedures that provided both

necessary if the language of the OMA previously and otherwise allowed for such virtual proceedings and remote participation.

As of January 1, 2022, however, a significant portion of those procedures and protocols have now expired, and the OMA no longer contains an exception to in-person meetings or for a non-military member's in-person attendance at a meeting.[4] So once again, the OMA does not generally provide any affirmative accommodation, upon request, for a disabled individual's access to a public body on which he or she serves, and more importantly, may not allow for a disabled public body member, including one who is immuno-compromised or has other health issues, to be accommodated to fully participate in public meetings. Likewise, its provisions do not affirmatively require accommodations for members of the general public who are disabled, including those who are immuno-compromised, to access and fully participate in meetings of public bodies because the OMA does not require public bodies to provide virtual or other remote access to disabled members of the public upon request.

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for two-way communication, and, for members of the public body attending the meeting remotely, a public announcement at the outset of the meeting by that member, to be included in the meeting minutes, that the member was attending the meeting remotely. MCL 15.263(2)(a)(i) & (ii). If the member was attending the meeting remotely for a purpose other than for military duty, the member's announcement had to further identify specifically the member's physical location by stating the county, city, township, or village and state from which he or she was attending the meeting remotely. MCL 15.263(2)(a)(ii). Finally, the public body had to establish procedures by which it provided the public notice of the absence of the public body member and information about how to contact that member sufficiently in advance of a meeting of the public body to provide input on any business that would come before the public body. MCL 15.263(2)(b).

[4] Amendments to the OMA from 2018 that allowed for remote participation to "accommodate the absence of any member of the public body due to military duty" remain in effect. See 2018 PA 485, MCL 15.263(2).

In short, there is nothing in the OMA that *requires* a public body to accommodate a disabled member of that body, or a disabled member of the general public, who is unable to attend an in-person meeting of that body due to a medical condition, including an immuno-compromised condition, and requests an accommodation. In fact, the OMA does not even address the issue of accommodation.

Given the lack of provisions to accommodate the disabled under the OMA, it is important to look at what accommodations are afforded the disabled under federal law.

The Americans with Disabilities Act (ADA) is a broad remedial civil rights law enacted to provide uniform federal protections for the disabled and to address the historic and pervasive discrimination against people with disabilities in all areas of public life.[5] In enacting the ADA, Congress declared that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting," and, relevant to your question, "access to public services." 42 USC 12101(a)(3). This discrimination, Congress noted, "continue[s] to be a serious and pervasive social problem," 42 USC

[5] In 2018, the CDC said that one in four adults – 61 million Americans – had a disability that impacted their major life activities. CDC's Morbidity and Mortality Weekly Report, https://www.cdc.gov/mmwr/index.html (accessed February 1, 2022).

12101(a)(2), that denies people with disabilities the opportunity to compete and pursue opportunities on an equal basis, 42 USC 12101(a)(8).

Section 504 of the Rehabilitation Act, "parallels th[is] command of the ADA concerning accessibility to public facilities for persons with disabilities," *Mote v City of Chelsea*, 391 F Supp 3d 720, 740 (ED Mich, 2019), with the biggest difference being that the Rehabilitation Act applies only to a "program or activity receiving Federal financial assistance." See generally, *Babcock v Michigan*, 812 F3d 531, 540 (CA 6, 2016). Claims under the Rehabilitation Act are reviewed under essentially the same standard as claims under the ADA, so the analysis is generally the same for both. *Id*. Therefore, for ease of reading and analytical purposes, this opinion will focus on the ADA and not separately discuss the Rehabilitation Act.[6]

As an initial matter, the ADA does not "invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them." 28 CFR 35.103(b). But the ADA does contemplate modification to, and thereby preemption of, state laws when necessary to effectuate the protections afforded under the ADA. *Mary Jo C v New York State & Local Ret Sys*, 707 F3d 144, 163 (CA 2, 2013). As

[6] It should also be noted that Michigan's Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et. seq.*, and the ADA "share the same purpose and use similar definitions and analyses." *Chiles v Machine Shop Inc*, 238 Mich App 462, 472-473 (1999). Because your request specifically asks about federal law as it relates to the OMA, this opinion will not separately discuss the PWDCRA either. But Michigan courts frequently "look to the ADA and federal cases interpreting the ADA for guidance" in analyzing PWDCRA cases. *Id*.

discussed, Michigan's OMA fails to provide *any* affirmative accommodations for disabled individuals to fully participate in public meetings. Therefore, to the extent the OMA is inconsistent with what is required under the ADA, the OMA is preempted.

The ADA consists of three Titles, only one of which—Title II—is relevant here. Title II is brief, but there is a lot packed into a few words: "[N]o 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 USC 12132. For purposes of Title II, a "public entity" is "(A) any State or local government; (B) any department, agency, special purpose district *or other instrumentality of a State or States or local government* . . . ." 42 USC 12131(1)(A)(B) (emphasis added). Therefore, "instrumentalities" such as local and state boards and commissions are public entities under Title II. Moreover, Title II's language is broad enough to include both board members and members of the general public seeking to fully participate in a public entity's public meetings.

Under Title II, two types of claims are cognizable: claims for intentional discrimination and claims for a reasonable accommodation. *Ability Ctr of Greater Toledo v City of Sandusky*, 385 F3d 901, 907 (CA 6, 2004). It is the latter type – a claim for a reasonable accommodation – that most relates to your question.

When seeking an accommodation to fully participate in board meetings, a board member or a member of the general public must show that they have a "disability" and that they are a "qualified individual with a disability" as those terms are understood under the ADA. The definition of "disability" that is most relevant here is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 USC 12102(1)(A). And a "qualified individual with a disability" is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 USC 12131(2).

Your request indirectly raises the question of whether those who are immuno-compromised have a disability under the ADA. It should be noted that, "[f]or purposes of [defining disability under § 12102(1)], major life activity . . . includes the operation of a major bodily function, including but not limited to, functions of the immune system [and] normal cell growth . . . ." 42 USC 12102(2)(B). That definition incorporates amendments to the ADA enacted in 2009 as part of the ADA Amendments Act ("ADAAA"), which broadened the scope of ADA coverage by expanding the definition of disability.

To that end, 29 CFR 1630.2(j)(3)(iii) lists examples of impairments that, at a minimum, substantially limit major life activities—including cancer, which

substantially limits normal cell growth, and Human Immunodeficiency Virus ("HIV") infection, which substantially limits immune function. See *Katz v Adecco USA, Inc,* 845 F Supp 2d 539, 548 (SD NY, 2012) ("Cancer will virtually always be a qualifying disability [because it limits normal cell growth].") (quotation marks omitted). Nevertheless, even for those impairments, courts often require an individual assessment. *See, e.g., Alston v Park Pleasant, Inc*, 679 F App'x 169, 171—172 (CA 3, 2017) (agreeing that cancer can—and generally will—be a qualifying disability under the ADA, but nevertheless noting that an individual assessment of whether an impairment substantially limits a major life activity must still take place). Impairments not on the list will assuredly require an assessment of their effect on the individual. *Scavetta v Dillon Cos, Inc*, 569 F App'x 622, 625—626 (CA 10, 2014) (declining to reference major bodily functions in its jury instruction because there was no specific evidence that the plaintiff's rheumatoid arthritis substantially limited the operation of her major bodily functions); *Hustvet v Allina Health Sys*, 910 F3d 399, 411 (CA 8, 2018) (holding that there was insufficient evidence in the record to support the conclusion that the plaintiff's chemical sensitivities or allergies substantially or materially limited her ability to perform major life activities, as she had never been hospitalized due to an allergic or chemical reaction, never seen an allergy specialist, never been prescribed an EpiPen, never sought significant medical attention when experiencing a chemical sensitivity, taken prescription medication because of a serious reaction, or had to

leave work early because of a reaction; and concluding that this was garden-variety allergies that only moderately impacted her daily living.)

In light of the above, and because all showings of a "disability" under the ADA are heavily fact-dependent and resolved on a case-by-case basis, it cannot be stated that, in all situations, an immuno-compromised individual is a "qualified individual with a disability." But the existence of such a condition, or any other underlying condition, that makes an individual particularly susceptible to contracting an illness or disease such as COVID-19 if they were to attend a meeting in a public, physical space, could very well form the basis for a sufficient showing. See e.g., *Silver v City of Alexandria,* 470 F Supp 3d 616 (WD La, 2020) (holding that a 98-year-old man with a pacemaker due to inoperable and dangerous heart conditions who sought an accommodation so that he could attend city council meetings by telephone during COVID-19 "easily" had a qualifying disability and "[n]either the ADA nor the Rehabilitation Act contain any language to limit application to certain environmental or health-related situations.")[7]

Assuming a request for an accommodation is received from a "qualified individual with a disability," the next step is to determine whether the requested accommodation is appropriate under the "reasonable-modifications regulation," *Olmstead v L C ex rel Zimring*, 527 US 581, 581 (1999); 28 CFR 35.130(b)(7). A

[7] Even if an immuno-compromised individual does not meet the definition of "disabled" under the ADA, state and local boards and commissions are encouraged, where possible, to err on the side of inclusiveness, public participation, and transparency.

modification or accommodation "is reasonable unless it requires 'a fundamental alteration in the nature of a program' or imposes 'undue financial and administrative burdens.'" *Smith & Lee Assoc, Inc v City of Taylor*, 102 F3d 781, 795 (CA 6, 1996), quoting *Southeastern Community College v Davis*, 442 US 397, 410, 412 (1979); 28 CFR 35.150(a)(3).

Therefore, when a request for an accommodation is received from a qualified individual with a disability, a state or local board or commission must consider whether it can modify its meetings without incurring an undue burden or fundamentally altering the nature of the meetings. Historically, the kinds of modifications that have been requested have addressed physical or communication barriers, which have been remedied by disabled ramps, closed captioning, and the like. It is crucial that efforts aimed at removing those types of barriers continue. But medical conditions that make physical presence dangerous or impossible highlight a different but equally important need, and physical-presence requirements such as those of the OMA present an equally troubling barrier—one that potentially excludes the disabled as effectively as the lack of handicapped accessible parking or a wheelchair ramp. *Tennessee v Lane*, 541 US 509, 531 (2004), citing 42 USC 12131(2)) (noting that Congress recognized that failing to accommodate persons with disabilities will often have the same practical effect as outright exclusion).

Determining what reasonable modifications might remedy such a barrier is, also, a heavily fact-dependent inquiry that must be determined on a case-by-case

basis, considering the nature, location, and resources of a particular board or commission. (Some municipalities might have IT challenges, for example.) But because our boards and commissions already must, under the OMA, provide remote access and allow full participation for a member of the military, and because many of these boards and commissions have successfully gone wholly or partially virtual during the COVID-19 pandemic, it seems unlikely that a request for a hybrid approach of an in-person meeting and telephonic access or a virtual platform would result in an undue administrative or financial burden or constitute a fundamental alteration of a board's or commission's meetings. See *Hindel v Husted*, 875 F3d 344, 348 (CA 6, 2017). This is especially true given the prevalence, ease, and affordability of setting up remote platforms.

That said, a request for a *fully* virtual option is more likely to be viewed as a fundamental alteration of a board's or commission's services, and therefore not required. More importantly, where that option is not necessary to accommodate a qualified individual with a disability, the ADA does not require it and the OMA would not permit it. The Legislature's clear intent behind the OMA was to have in-person meetings. The Legislature, of course, could amend the OMA to permit fully virtual meetings. The potential benefits are many, including greater transparency, increased public involvement and participation, and the avoidance of singling out disabled board members who are participating remotely. The latter benefit would

have particular impact in the context of boards that require one or more members with disabilities, such as Michigan's barrier-free design board.[8]

Finally, while a board's or commission's careful consideration of modifications is important, its duties with respect to the ADA are broader than simply being responsive to requests. Title II regulations actually require public entities to evaluate their current services, policies and practices, and their effects, that "do not or may not meet the requirements [of Title II of the ADA]," and if modification of services, policies, and practices is needed to achieve compliance, make the necessary modifications. 28 CFR 35.105(a). These are referred to as self-evaluation plans.

In its Title II Technical Assistance Manual, the Department of Justice suggests certain areas that need "careful examination" in an agency's self-evaluation plan, including the modifications needed to achieve program access, and the steps that will be taken to achieve access; whether policies and practices exclude or limit participation of people with disabilities; and whether equipment has been assessed for usability and there are policies to ensure that it is kept in working order. See ADA TITLE II TECHNICAL ASSISTANCE MANUAL, *See* 28 CFR 35.150(c) at § II-8.2000. The ADA Title II Action Guide for State and Local Governments suggests that a self-evaluation plan should address these additional

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[8] The Barrier Free Design Board, created by 1974 PA 190, amending 1966 PA 1, MCL 125.1355, has jurisdiction to review and grant or deny requests for exceptions to the barrier free design specifications; require alternatives when exceptions are granted; receive, process, review, and act on complaints of noncompliance, and make recommendations for barrier free design rules.

More information is available at https://www.michigan.gov/lara/0,4601,7-154-89334_10575_45904-347265--,00.html (accessed February 1, 2022).

Title II requirements: 1) the agency's process for responding to requests for modifications; 2) the process for determining whether a modification would be a fundamental alteration; 3) whether the agency has any separate programs for people with disabilities, and if so, 4) whether people with disabilities are excluded from participation in regular programs; and 5) whether programs are provided in the most integrated setting appropriate to the needs of people with disabilities. *Title II Action Guide for State and Local Governments*.[9]

Accordingly, even without being asked to respond to specific requests for accommodations (and before being required to engage in the necessarily fact-intensive analysis set out above to determine whether a requestor is a "qualified individual with a disability"), state and local boards and commissions are strongly encouraged to proactively evaluate the services they provide and, to the extent reasonably possible, offer alternatives to completely in-person, physical meetings to allow this new era of technology to truly promote a new era in governmental accountability, transparency, inclusivity, and participation.

It is my opinion, therefore, that the Americans with Disabilities Act and Rehabilitation Act require state and local boards and commissions to provide reasonable accommodations, which could include an option to participate virtually, to qualified individuals with a disability who request an accommodation in order to

[9] Available at https://www.adaactionguide.org/action-steps (accessed February 1, 2022).

fully participate as a board or commission member or as a member of the general public in meetings that are required by the Open Meetings Act to be held in a place available to the general public.

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