

DELAWARE DOT CIVIL RIGHTS SUMMIT

Planning for Right-of-Way Accessibility

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Irene Bowen, ADA One, LLC

Agenda

- The big picture: Why it matters
- Federal laws, regulations, and roles
- Lots of lawsuits
- Federal expectations
- Going forward

THE BIG PICTURE

Why it matters

Video: Seattle



Take-aways (1)

1. Two federal disability nondiscrimination laws: The ADA and Section 504
2. Federal money carries strings under Section 504
 - State can lose money if not compliant
 - Sub-recipients (cities, counties that receive federal funds through State) have separate and independent obligation
 - State can't fund noncomplying sub-recipients

Take-aways (2)

3. FHWA (U.S. DOT) and DOJ regulations address both substance and process
4. FHWA November 2015:
 - Failure to have a self-evaluation and transition plan would violate the DOT regulations
 - DOT can withhold federal financial assistance for failure to comply with regulations

Take-aways (3)

5. Lots of lawsuits, increasing in number
 - Not just about new construction and alterations
 - Also addressing “program access”
 - High dollar settlements often result



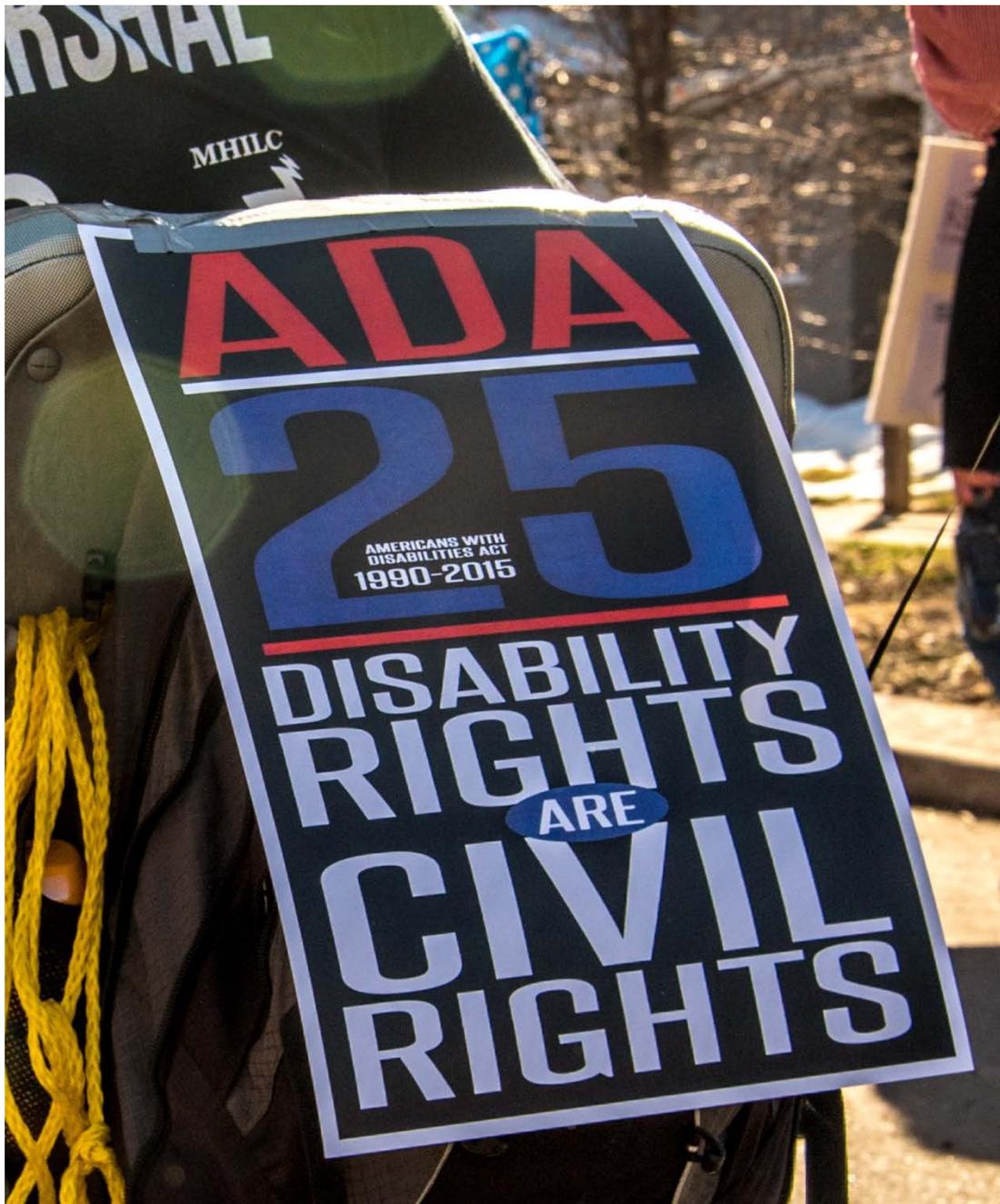
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FEDERAL LAWS, REGULATIONS, AND ROLES



The ADA and section 504

- The ADA
 - Title II: State and local governments
 - Regulations by DOJ
- Section 504 of the Rehabilitation Act
 - Applies to recipients of federal financial assistance
 - Regulations by various agencies; here, U.S. Department of Transportation



Title II and Section 504: Civil rights laws

- **Title II: Basic statutory provision**

“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.”

- **Same provision in section 504**

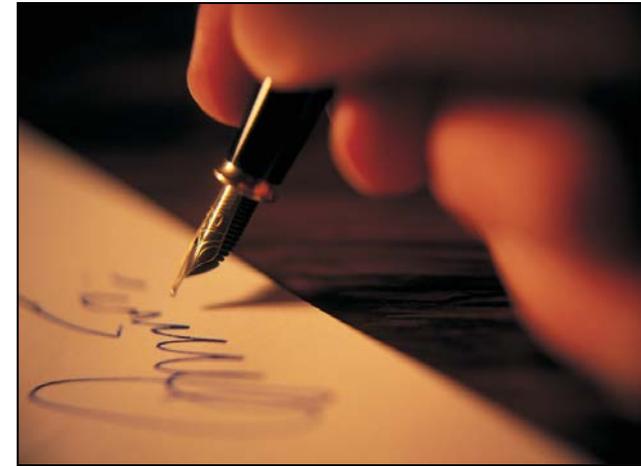
Tied to federal funding

Federal regulations

- Department of Justice issues title II regulations for all state/local entities
28 CFR part 35 (amended September 15, 2010, effective March 15, 2011, including new 2010 ADA Standards)
- DOT issues section 504 regulations (49 CFR Part 27) and transportation-related ADA title II regulations (49 CFR Part 37)
 - Facilities built or altered on or after November 29, 2006: follow 2006 standards, based on 2004 ADAAG with additions:
 - Detectable warnings at curb ramps
 - Specific requirements about bus boarding and alighting areas

Compliance and enforcement

- Under the ADA, “designated agencies” and DOJ --
 - Investigate as authorized
 - Issue letters of finding/letters of resolution
 - Conduct compliance reviews
 - Settle
- DOT is designated for transportation; DOJ also has this authority under 2010 regulations
- Section 504: DOT can withhold funds or refer to DOJ
- 504 or ADA: DOJ can bring litigation



The state and sub-recipients

- State itself must comply with ADA and section 504
 - State cannot give “significant assistance” to those who discriminate
- Counties and cities are “sub-recipients” under section 504 and covered entities under title II
- Under both, must ensure all operations comply with the law



Contractors and other partners

- A covered entity (state, sub-recipient) is responsible for actions of contractors and other partners when it carries out its activities
- The entity cannot “contract away” its duties under title II or section 504
- Include link to standards/guidelines in contracts
- Monitor compliance by contractors and others

FHWA and states are increasing compliance efforts (1)

- FHWA is required to monitor compliance of recipients with self-evaluation and transition plan requirements (49 CFR 27.11)
- States have directed sub-recipients to submit transition plans, sometimes on short notice
- New guidance about FHWA acceptance of state self-evaluations and transition plans was issued in late 2015

Accessibility standards

- Per statutes and regulations, new construction and alterations must meet accessibility standards issued by agencies
 - For alterations, to “maximum extent feasible “
 - Exception for technical infeasibility: when physical or site constraints prohibit modification or addition of features in strict compliance with standards
- For program accessibility purposes, use alterations standards for assessing whether facilities used in programs are accessible

Curb ramps at intersections

- DOJ's ADA regulations: 28 CFR 35.151(i)
 - Newly constructed or altered streets/roads must have curb ramps or other sloped areas where pedestrian walks cross curbs
 - Newly constructed/altere street level pedestrian walkways must contain curb ramps or other sloped areas where pedestrian walks cross curbs

This language has not changed since 1991.

No standard is referenced.





DOT's ADA regulations

- Facilities built or altered before November 29, 2006: follow 1991 ADA regulations (including 1991 ADAAG).
- Facilities built or altered after that date: follow 2006 standards, based on 2004 ADAAG with additions:
 - Detectable warnings at curb ramps
 - Specific requirements about bus boarding and alighting areas

49 CFR part 37

Public Rights of Way (PROW)

Only routes on a “site” are currently addressed by ADA and ABA Standards



ADA Standards for facilities on a site



Proposed guidelines for public ROW

What if there are no standards for a particular element or space?

- Follow the “closest thing” in the standards
 - E.g., fixed table standards for moveable tables
- Follow “best practices”
 - Guidelines/standards for federal outdoor developed areas (trails, picnic areas, overlooks)
- Look to proposed guidelines/standards
 - Equipment
 - Rights of way
- Document what guidelines/standards you’re using, why, and how

Public Rights of Way Accessibility Guidelines (PROWAG)

U. S. Access Board is developing guidelines for pedestrian facilities in public right of way (PROWAG)

- Draft guidelines 2005
- Proposed guidelines 2011 – final expected ????
- They address
 - Pedestrian routes
 - Curb cuts
 - Street crossings
 - Accessible pedestrian signals
 - On-street parking
 - Bus stops and shelters
 - Street furniture
 - Other elements not on a “site”



With no “standard” for ROW --

- In absence of official standard for new construction/alteration of rights of way, courts and agencies look to 2011 proposed rights of way guidelines (PROWAG)
 - FHWA, DOJ agreements
- Recently both agencies are looking to PROWAG for program accessibility as well

Program access: existing facilities

- Operate each program/service/activity so that, when viewed in its entirety, it is accessible.
- No exclusion/discrimination because of inaccessible facilities
 - Does not necessarily require physical changes
- Remember: Alterations standards are the measure of what is “accessible”



There are 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

Characteristics of program access

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



Multi-site programs

- DOJ 2010 regulation preamble: Entities have discretion in determining how many facilities of a multi-site program must be made accessible to achieve “accessibility in its entirety”
- Describes factors for evaluation of multi-site program
 - 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”

LOTS OF LAWSUITS

Courts are filling in the gaps

When things go wrong...



Typical title II/section 504 cases

Three elements

- Self evaluation and transition plan
- New construction/alterations 1992 and later
- Existing facilities/program access

Sidewalks and curb cuts are a “program, service, or activity”

- Federal government says so
- Most courts agree
- Examples
 - 9th Circuit, Barden v. City of Sacramento, 2002 (Supreme Court didn't hear, settled)
 - 6th Circuit, Johnson v. City of Saline, 1998
 - 5th Circuit, Frame v. City of Arlington, 2011



Examples of settlements of litigation



<http://www.flickr.com/photos/ubrayj02/3255529322/>

- Chicago: \$50,000,000 in curb cut improvements
- California (CALTRANS): \$1.1 billion (30 years)
- Los Angeles: \$4 million a year for 25 years
- Sacramento: 20% of transportation funds for 30 years (sidewalks, crosswalks, curb ramps)

Sidewalk and curb cuts: recent settlements

- City of Los Angeles (2016): \$1.4 billion for sidewalks over 30 years (40% of sidewalks)
- City of Denver (2016): 1500 ramps per calendar year until at all locations where walkways cross curbs
- St. Paul, MN (2016): 230 ramps, \$1 million in one year, failure to properly upgrade pedestrian curb ramps during street mill and overlay projects in 2014.
- County of Nassau, NH (2015): Install accessible pedestrian signals at 19 intersections along one street; install others as signals are altered; develop plan per NCHRP's tool

Recent right-of-way cases (1)

- City of Seattle (filed October 2015) – new, altered; maintenance; program access
- State of Oregon – Notice of proposed settlement December 2016 – 12,000 curb ramp locations to be brought into compliance over a 15-year period – with 75% of the curb ramps completed by 2027.
<https://droregon.org/odot-settlement/>

Recent right-of-way cases (2)

- New York City, filed July 2014, motion to dismiss denied June 2015
 - Focuses on fixing sidewalks and pedestrian routes below 14th street in Manhattan
 - Separate ongoing litigation re: all NYC curb cuts
- City of Long Beach, class certified 2015
 - Lack of curb cuts at intersections, uplifted and cracked sections of sidewalk
 - In particular, wheelchair users are frequently forced to travel in the street in order to avoid barriers, putting themselves at severe risk of injury.

DOJ: More and more PCA agreements

- Since 1999, 222 DOJ Project Civic Access (PCA) agreements resulting from comprehensive reviews of state/local governments
- Since 2013, DOJ had expanded scope to include --
 - Sidewalks/curb cuts constructed or altered since 1992
 - Sidewalk maintenance (obstructions, discontinuities)

Example: Cedar Rapids, Iowa (1)

- Press release identifies two people who had accessibility issues
 - Person who uses walker had problems with entrance door to parking pay system as well as sidewalks when visiting City office
 - Person who uses wheelchair and walker had several issues with sidewalks and entrances to City facilities

Example: Cedar Rapids, Iowa (2)

- *To correct non-complying curb cuts or install curb cuts at locations **constructed or altered since 1992** within four years*
- Within 6 months, implement *process for requesting and receiving input from people with disabilities re: accessibility of sidewalks, including curb cut requests*
- Changes throughout park system

How many curb ramps are “good enough?”

○ When a public entity –

- has constructed curb ramps where necessary to provide access along highly-trafficked routes
- has allocated funding and established a schedule for future curb ramp construction and
- is addressing the particular intersections identified by plaintiffs as well as other intersections in accordance with ADA priorities,

it is in compliance with its Title II obligations.

See Saundra Carter v. City of Los Angeles, 9th Circuit, 2/26/14, <http://www.courts.ca.gov/opinions/nonpub/B241060.DOC>, citing Schonfeld v. City of Carlsbad (1997), 978 F.Supp. 1329, 1341.

Kirola v. City and County of San Francisco (Nov. 2014) (1)

- First District Court decision after trial (5 weeks!) in a comprehensive program access case
- Addressed
 - Access to libraries, swimming pools, parks, PROW
 - Policies and practices for accessibility
 - Response to complaints
- Court ruled in favor of San Francisco
- On appeal to 9th Circuit

Kirola (2)

- 2000 miles of sidewalks; 7,200 intersections
- 27,500 corners, all evaluated by January 2011
- Installing 1200 curb cuts a year
 - By request and
 - Based on high utilization
- The City's proactive and reactive approach to ensuring sidewalk accessibility is reasonable, appropriate, and supports a finding that the City affords program access to its sidewalks.

If you're subject to review or investigation...

- It can go on for 20 to 30 years
- You lose control of –
 - Staff time
 - Process
 - Priorities
 - Spending

Program access: facilities and elements (1)

“Program access” (physical access)

- Streets and sidewalks (curb cuts, crossings)
- Current conditions
- Pedestrian signals
- On-street parking



Program access: facilities and elements (2)

Construction zones/alternate pedestrian routes



Program access: facilities and elements (3)

- Bus stops and shelters
- Office buildings
- Rest areas, welcome areas
- Harbors, waterways
- Parks
- Trails



FEDERAL EXPECTATIONS

DOJ suggests...

- Make a preliminary assessment of compliance
- Use Title II checklist in chapter 6 of ADA Tool Kit
 - Appendix 1, Survey Instructions: Curb Ramps
<http://www.ada.gov/pcatoolkit/app1curbramps.htm>
 - Appendix 2, Survey Forms: Curb Ramps
<http://www.ada.gov/pcatoolkit/app2curbramps.htm>
- Will alert you to red flags suggesting non-compliance
- Includes –
 - Review of standardized designs and specifications
 - Survey of representative sample of pedestrian crossings and curb ramps constructed or altered during various time periods post-ADA

FHWA guidance: Pedestrians and Accessible Design

Most current guidance, updated November 12, 2015

<http://www.fhwa.dot.gov/programadmin/pedestrians.cfm>

- Proposed PROW guidelines are best practice
- Pedestrian overpasses and underpasses: ramps not exceeding 1:12 grade and landings for every 30 inches of rise. DOJ standard R405.
- Buildings: All new and altered rest area facilities and parking facilities must comply with the DOJ Standard.

FHWA guidance on ADA transition plans (1)

“ADA Transition Plan,” November 12, 2015

https://www.fhwa.dot.gov/civilrights/memos/ada_transition_plan_111215.cfm

- Describes FHWA’s process to review ADA transition plans submitted by State Transportation Agencies (STAs) – good model for subrecipients as well
- In context of review of state self-certifications of compliance with ADA and Section 504 (every four years – when State Transportation Improvement Programs (STIPs) are submitted)

FHWA guidance on ADA transition plans (2)

ADA transition plan must have these minimum required attributes:

- Identification of official responsible for implementation of plan
- Inventory of barriers
- Prioritized schedule of when barriers will be eliminated and deficiencies corrected
- Description of methods of making facilities accessible

See also “Questions and Answers About ADA/Section 504”
http://www.fhwa.dot.gov/civilrights/programs/ada_sect504qa.cfm

Memorandum re: same topic November 2014

- Failure to have a compliant transition plan would violate DOT's ADA regulations
- DOT can withhold federal financial assistance for failure to comply with DOT regulations, including those as to transition plans
- Self-evaluations are to be regularly revised and updated

Attributes review guide (1)

- Identify intersection information as a starting point, including curb ramps and other elements
- Shows good faith
- Show movement and commitment toward developing a FULL inventory

Attributes review guide (2)

- Action Plan to develop inventory of –
 - *Sidewalks (slopes, obstructions, protruding objects, changes in level, etc.)*
 - Best practice: discussion of jurisdictional issues/responsibilities for sidewalks
 - *Signals (APS)*
 - *Bus stops (pads)*
 - Buildings
 - Parking
 - Rest areas (tourist areas, picnic areas, visitor centers)
 - Mixed use trails
 - *Links to transit*

Attributes review guide (3)

Inventory

- Sidewalks (slopes, obstructions, protruding objects, changes in level, etc.)
- Signals (APS)
- Bus stops (pads)
- Links to transit

Attributes review guide (4)

Schedule

- Show strong commitment toward
 - upgrading elements identified in inventory, in short term (planned projects) and
 - Prioritizing curb ramps, over time, at walkways serving entities covered by the ADA.

Attributes review guide (5)

- Describe methods to be used to make facilities accessible
 - Best practice: state the standard the STA is following (e.g., 2010 ADAAG, 2011 PROWAG)

Attributes review guide (6)

- Public involvement
 - Detailed list of individuals posted conspicuously on website (not necessarily in TP), both electronic and hard copy notice
- ADA policy statement – doesn't have to be in TP
- Clear identification of ADA Coordinator and contact information
- Clear complaint/grievance process

GOING FORWARD

Recommendations

- Track the ROW rulemaking
- For now, use proposed ROW guidelines
- Do a transition plan, following FHWA guidance
- Make it comprehensive, timely, realistic, and defensible
- Measure current features against DOJ regulation and proposed ROW guidelines
- Check FHWA website for updates/further guidance

Good luck moving forward!



CONTACT



Your ONE Source for ADA Guidance

Irene Bowen, J.D.

President, ADA One, LLC

9 Montvale Court, Silver Spring, MD 20904

IreneBowen@ADA-One.com

(301) 879 4542