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APPLICATION OF THE ADA MEANS OF EGRESS PROVISIONS TO NEW CONSTRUCTION, ALTERATIONS, AND EXISTING FACILITIES OF PUBLIC ENTITIES

Purpose and Application

The purpose of 28 CFR Part 35 is to effectuate the provisions of the Americans with Disabilities Act of 1990 (under Subtitle A of Title II of the Act) that prohibit discrimination on the basis of disability by **public** entities.¹

A *public entity* is defined in Section 35.104 as:

1. Any State or local government,
2. Any department, agency, special purpose district, or other instrumentality of a State or States or local government, and
3. Amtrack and commuter rail systems.^{2,3}

According to Section 35.102, this part (28 CFR Part 35) applies to all services, programs, and activities provided or made available by such entities (Appendix A clarifying that this includes public schools⁴ and airports⁵).

As stated in Section 35.103(b), this part 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 provides greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

New Construction

According to Section 35.151(a), each facility or part of a facility constructed by, or on behalf of, or for the use of a public entity shall be designed and constructed in such a manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction of a facility was commenced after January 26, 1992.

A *facility* is defined in Section 35.104 as any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

Alterations

Section 35.151(b) states that each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

Accessibility Standards

Section 35.151(c) states that design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS – Appendix A to 41 CFR part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG – Appendix A to 28 CFR Part 36) shall be deemed to comply with the requirements of this section with respect to those facilities.⁶ Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

Self-Evaluation

According to section 35.105, a public entity shall, within one year of the effective date of this part, 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.

Further, a public entity employing 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

1. A list of the interested persons consulted,
2. A description of areas examined and any problems identified; and
3. A description of any modifications made.

In addition, according to section 35.107, a public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging non-compliance with this part or alleging any action that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

Existing Facilities

Section 35.150(a), under the title *Existing Facilities*, states that a public entity shall operate each service, program, or activity, so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This stipulation does not necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities (35.150(a)(1)), or require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens (35.150(a)(3)).

Section 35.150(a)(3) goes on to state that in those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with 35.150(a) of this part would result in such alteration or burdens. This decision must be

made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

Methods of Compliance for Existing Facilities

Section 35.150(b) states that a public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services to alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. However, a public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section.

This section further states that alterations to existing facilities shall meet the accessibility requirements of 35.151 – that is, the accessibility requirements of the Uniform Federal Accessibility Standards (UFAS – Appendix A to 41 CFR part 101-19.6) or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG – Appendix A to 28 CFR Part 36). Additionally, in choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

Time Period for Existing Facility Compliance

According to section 35.150(c), where structural changes in facilities are undertaken to comply with the obligation established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

In addition, section 35.150(d) states that a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes, and a copy of this transition plan shall be made available for public inspection.

Further, if a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walkways cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

According to section 35.150(d)(3), the plan shall, at a minimum:

1. Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities,
2. Describe in detail the methods that will be used to make the facilities accessible,
3. Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period, and
4. Indicate the official responsible for implementation of the plan.

Historic Properties

While historic properties are covered under section 35.150 (Existing facilities), which requires them to be accessible, section 35.150(a)(2) further states a public entity is not required to take any action that would threaten or destroy the historic significance of a historic property. However, according to section 35.151(d), alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG that discusses both accessibility and historic preservation relative to such properties.

Section 35.150(b)(2), titled *Historic preservation programs*, states that a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to a historic property is not required because of paragraph 35.150(a)(2) or 35.150(a)(3) (discussed above), alternative methods of achieving program accessibility include:

1. Using audio-visual materials and devices to depict those portions of a historic property that cannot otherwise be made accessible,
2. Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible, or
3. Adopting other innovative methods.

Maintenance

Section 35.133(a) states that a public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.

Appendix A analysis further states that it is not sufficient to provide features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them. Inoperable elevators, locked accessible doors, or "accessible" routes that are obstructed by furniture, filing cabinets, or potted plants are neither "accessible to" nor "usable by" individuals with disabilities.

Section 35.133(b) states that it does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs. However, the analysis in Appendix A to this part states that allowing obstructions or "out of service" equipment to persist beyond a reasonable period of time would violate this part, as would repeat mechanical failures due to improper or inadequate maintenance. It further states that failure of the public entity to ensure that accessible routes are properly maintained and free of obstructions, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access would also violate this part.

Signage

Section 35.163 states that a public entity shall provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. Additionally, the international symbol for accessibility shall be used at each accessible entrance of a facility.

Technical Assistance

As stated in 35.177, a public entity shall not be excused from compliance with the requirements of this part because of any failure to receive technical assistance, including any failure in the development or dissemination of any technical assistance manual authorized by the Act.

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Footnotes

1. This purpose is stated in 28 CFR 35.101. Subtitle A of Title II refers to Public Law No. 101-336. Regarding the definition of **public** entity, 28 CFR 35.101 references 42 USC, Chapter 126, Section 12131. Sections 12131(1)(A), (B), and (C) define public entity as any State or local government; and department, agency, special purpose district, or other instrumentality of a State or States or local government, and the National Railroad Passenger Corporation (Amtrack per 49 USC, Subtitle V, Part C, Chapter 247, Section 24701), and any commuter authority, as defined in 49 USC, Subtitle V, Part C, Chapter 241, Section 24102(4), which defines “commuter rail passenger transportation,” as short-haul rail passenger transportation in metropolitan and suburban areas usually having reduced fare, multiple-ride, and commuter tickets and morning and evening peak period operations.

2. According to 28 CFR 35.104 (Definitions), the term *public entity* includes the National Railroad Passenger Corporation (Amtrack per 49 USC, Subtitle V, Part C, Chapter 247, Section 24701), and any commuter authority – as defined in Section 103(8) of the Rail Passenger Service Act (45 USC 502(8)). However, Section 502 was repealed (revised) by PL 103-272, Section 7(b) in 1994, which then cites 49 USC, Subtitle V, Part C, Chapter 241, Section 24102. Section 24102(3) defines “commuter authority” as a State, local, or regional entity established to provide, or make a contract providing for, commuter rail passenger transportation, which according to 24102(4) means short-haul rail passenger transportation in metropolitan

and suburban areas usually having reduced fare, multiple-ride, and commuter tickets and morning and evening peak period operations. Further, Public Law 101-336, The Americans with Disabilities Act of 1990 (as amended) as published in the ADA Handbook, under Section 241 (Definitions) also references 42 USC 12161 (see Footnote 3 below).

3. According to 28 CFR 35.102(b), to the extent that public transportation services, programs, and activities of public entities are covered by Subtitle B of Title II of the ADA (Public Law No. 101-336), as defined in 42 USC 12141, they are not subject to the requirements of this part (28 CFR Part 35), as according to Appendix A of 29 CFR 35, they are subject to the regulations of the Department of Transportation (DOT) at 49 CFR Part 37. Section 12141 defines the following – “demand responsive systems,” “designated public transportation” to include bus, rail, or other conveyance (other than transportation by aircraft or intercity or commuter rail transportation – as defined in Section 12161 of this title (42 USC, Chapter 126), that provides the general public with general or special service, including charter service, on a regular and continuing basis), “fixed route systems,” and “public school transportation.” Further, according to Appendix A of 29 CFR 35, DOT’s ADA regulation establishes specific requirements for construction of transportation facilities and acquisition of vehicles – however, matters not covered by Subtitle B, such as the provision of auxiliary aids, are covered by this rule (28 CFR Part 35).

4. According to section-by-section analysis in Appendix A of 28 CFR Part 35, public school systems must comply with the ADA in all of their services, programs, or activities, including those that are open to parents or to the public. Additionally, they must provide program accessibility to parents and guardians with disabilities to these programs, activities, or services (including graduation ceremonies, parent-teacher meetings, plays, and other events).

5. According to section-by-section analysis in Appendix A of 28 CFR Part 35, airports operated by public entities are not subject to DOT’s ADA regulation (that is, they are excluded from subtitle B), and therefore are covered under Subtitle A of Title II, and to this rule (28 CFR 35).

6. Except that the elevator exemption contained in section 4.1.3(5) and section 4.1.6(1)(k) of ADAAG shall not apply.

Reference

United States Department of Justice, 28 CFR Part 35, *Nondiscrimination on the Basis of Disability in State and Local Government Services*, 1998.