SIDEWALK COMPLIANCE FOR THE DISABLED -

WHAT TO DO WHEN THE FEDS COME KNKOCKING



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Ryan Henry graduated with honors from New Mexico State University with dual bachelor's degrees in Criminal Justice and Psychology in 1995. He attended law school at Texas Tech School of Law and graduated in May of 1998.

While attending law school, Ryan began clerking for the Lubbock City Attorney's Office. He received his third-year practice card and began prosecuting municipal court complaints and appearing in Justice of the Peace court for the City. As a result, he began defending governmental entities even before he graduated from law school and so began his career supporting local governments. Upon graduation, Ryan began working in Brownsville, Texas, with the same focus. In June of 2002, Ryan moved to San Antonio and joined a local law firm doing the same thing. In 2012, Ryan started the Law Offices of Ryan Henry, PLLC. In June 2016, and again in 2017, Ryan was listed as one of the best lawyers practicing municipal law in the San Antonio area by S.A. Scene Magazine. Ryan is also on the board for the State Bar of Texas - Government Law Council.

Sidewalk Compliance for the Disabled

By Ryan Henry

I. Scope

Various state and federal laws require municipal facilities and services to be accessible by people with disabilities. Most of the federal laws interweave with each other, although, some have minor differences. Entire treaties can be written on the variations and how each apply. However, for purposes of this paper, I am only going to focus on a specific type of application and federal agency – sidewalks and the U.S. Department of Transportation (DOT). I am also not going to focus this paper on the legal aspects, so much as the practical aspects of dealing with the DOT once a complaint is filed.

II. Statutory Structure

A. Nonexclusive Focus

When a municipality deals with accessibility of sidewalks by the disabled, it is easy to get confused with various aspects of the statutory scheme. Several laws appear to apply which actually do not and other laws appear not to apply when, in actuality, they do.

One of the practical tips within this subject matter I heard long ago and found helpful is to focus on the agency rules. Those rules dictate how any specific state or federal agency interacts with your entity. They also provide, in most cases, more details or guidance as to what the agency expects from the entity. To understand the agency rules, you must have at least some familiarity with the federal statutes. But the statutes are less likely to apply for the day-to-day logistic questions your city staff and officials will have to deal with during the year.

B. Federal Statutes

At least for sidewalks, there are three main federal statutes at play: 1) Title II of the ADA, 2) the Rehabilitation Act, and 3) the Architectural Barriers Act.

Title II of the ADA requires that local governments give people with disabilities an equal opportunity to benefits and access from all municipal programs, services, and activities. 42 U.S.C. § 12101 *et seq*. Specifically, Title II, 42 U.S.C. § 12132, provides 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." Public rights-of-way are covered by subpart A. Transportation aspects (typically with rail and train systems) is found in subpart B. The Department of Justice (DOJ) has rulemaking authority and enforcement responsibility for title II, while the Department of Transportation (DOT) has been designated to implement compliance procedures relating to transportation, including those for highways, streets and traffic management. See 28 C.F.R. § 35.190(b)(8). The Federal Highway Administration (FHWA) Office of Civil Rights oversees the DOT mandate in these areas.

In enacting Title II, Congress found that individuals with disabilities suffer from "various forms of discrimination," including "isolat[ion] and segregat [ion]," and that inaccessible transportation is a "critical area [ ]" of discrimination. *Frame v. City of Arlington*, 657 F.3d 215, 230 (5th Cir. 2011)(citing 42 U.S.C. § 12101(a)(2), (5)).

As a result, courts have found sidewalks qualify as "a service, program, or activity of a public entity." *Frame*, 657 F.3d at 227–28; *Cohen v. City of Culver City*, 754 F.3d 690, 696 (9th Cir. 2014); *Michigan Paralyzed Veterans of Am., Inc. v. Michigan Dep't of Transp.*, 15-CV-13046, 2017 WL 5132912, at *5 (E.D. Mich. Nov. 6, 2017).

The Rehabilitation Act imposes similar requirements of accessibility, but as it applies to programs receiving federal funding. Section 504 of the Rehabilitation Act makes each federal agency responsible for enforcing its own regulations, but also provides for enforcement through a private cause of action. 29 U.S.C. § 794. The Department of Transportation is responsible for investigating complaints and conducting compliance reviews under Section 504 relating to recipients of federal financial assistance. See 49 C.F.R. § 27.121 and 27.123. The Rehabilitation Act and the ADA are judged under the same legal standards, and the same remedies are available under both Acts. See *Delano-Pyle v. Victoria County, Tex.*, 302 F.3d 567, 574 (5th Cir. 2002). In fact, 42 U.S.C. § 12201(a) prohibitions courts from construing Title II to apply a lesser standard than the Rehabilitation Act and its implementing regulations. *Frame*, 657 F.3d at 228.

The Architectural Barriers Act (ABA) requires that buildings and facilities that are designed, constructed, or altered with federal funds comply with federal standards for physical accessibility. 42 U.S.C. § 4151 *et seq*. ABA requirements are limited to architectural standards in new and altered buildings and in newly leased facilities. The Access Board is an independent federal agency responsible for developing accessibility guidelines which are cross-adopted by many federal agencies to ensure uniform requirements. The Access Board is responsible for enforcing the Architectural Barriers Act. See 29 U.S.C. § 792(b)(1) and (e). The Public Rights-of-Way Access Advisory Committee (PROWAAC) was established in October 1999 as part of developing additional ADA compliant guidelines.

Depending on your sidewalk, where it is, what it leads to, when it was originally constructed, whether federal funds are involved, and the purpose of its last modification, the different above acts will apply. However, the bottom line, generally speaking, remains the same - your sidewalks must become accessible to individuals with different types of disabilities. The question is only when it must be compliant.

C. Agency Regulations

Part 35 of the CFR regulations is the subchapter applicable to the U.S. Department of Justice's power over nondiscrimination on the basis of disability. Subpart D deals with program accessibility. It is essentially only made up of 28 C.F.R. § 35.149, .150, & .151.

In relation to sidewalks, the main concept to be aware of is the interplay between the requirements applicable to existing facilities under §35.150 and the requirements for new construction or alterations under §35.151. the pivotal date separating "new" from "existing" is January 26, 1992.

The ADA's regulations and the ADA Standards for Accessible Design, originally published in 1991, set the minimum standard for what makes a facility accessible. Only elements that are built-in (fixed in place) are addressed in the Standards. The Standards are used when determining if a municipal

program or service is accessible. However, they apply differently depending on whether the entity is providing access to programs or services in existing facilities or is altering an existing facility or building a new facility.

From a practical standpoint, when new construction is initiated or completed, city inspectors should not sign off on any permits or forward for acceptance any dedications, which do not meet ADA compliant standards for sidewalks. However, when a sidewalk was constructed prior to January 26, 1992, any alterations of the street or sidewalk require the sidewalk to be brought into full ADA compliance. As roadways and travel paths continue to naturally degrade over time from use, such existing facilities will continue to need to be brought into compliance. The goal was that all existing facilities will eventually need modification so should cycle through the requirements for accessibility.

However, under §35.150(d) dealing with existing facilities, if a structure will need to have future modifications and the entity has fifty or more employees, it was required to adopt a transition plan within six months of the January 26, 1999 trigger date. Many entities failed to adopt any such plan and many still have not adopted any such plan.

A transition plan for existing facilities must set forth the steps necessary to complete all upgrades. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

As the transition plan relates to roads, sidewalks and other rights-of-way, it shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks 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. 28 C.F.R. § 35.150(d)(2).

All transition plans must include, at a minimum: (i) identified physical obstacles in the municipal facilities that limit the accessibility of its programs or activities to individuals with disabilities; (ii) a detailed listing of the methods that will be used to make the facilities accessible;(iii) a specific the schedule for taking the steps necessary to achieve compliance 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 (iv) identifying the public official (by title usually) who is responsible for implementation of the plan.

There are exceptions, of course, as to when it applies and what facilities do not need to be included in the transition plan. However, as a generalized “rule-of-thumb” when the U.S. Department of Transportation contacts your city regarding a complaint, you should immediately see if your city has 1) ever adopted a transition plan and 2) ever updated the plan. The plan is intended to be a living document, constantly adjusting to changes in circumstances. However, the goal is to have the plan eventually die of natural causes after you have eliminated all pre-existing facilities from the January 26, 1999 trigger date. These are the two things the DOT usually asks for if

they suspect the complaint location is not an isolated incident.

For those municipalities which have not enacted a transition plan, there is good news and bad news. The bad news is a plan is required by the law and the DOT has the ability to seek a court order to compel its implementation. While no private cause of action exists for damages solely for the lack of a transition plan, such non-compliance can be used as evidence of a willful violation of non-compliant sidewalks, entitling a plaintiff to compensatory damages. *Matthews v. Jefferson*, 29 F. Supp. 2d 525, 535 (W.D. Ark. 1998). It also can affect the City's federal funding levels, depending on the interpretation of the City's non-compliance by the US DOT and Department of Justice (DOJ). However, the good news is, at least as far as my own experience has been, the DOT typically understands the logistics of creating and implementing one.

One of the biggest expenses in creating a transition plan, at least in relation to the sidewalks, is creating an inventory of what areas need updating and what life-span they fall under. While 28 C.F.R. § 35.150(d)(2) does state a public entity must identify physical obstacles that limit accessibility, it does not state that identification is to be performed all at once or that the full list is required before a repair schedule is created. Title II imposes an obligation to accommodate, or a reasonable modification requirement but the application is not boundless. Further, with respect to altered sidewalks, the "altered portion" must be made "readily accessible" "to the maximum extent feasible" if it "could affect the usability of the facility." 28 C.F.R. § 35.151(b).

III. Practical Information

The requirements of the transition plan are very generalized since every municipality is different and not all sidewalks, ROWs and facilities are the same. As a result, municipalities have some leeway in how they create the plan and how the schedule for completion occurs. That is not necessarily a legal position, but more of a logistic one.

I've seen municipalities develop a plan to divide the City into sections and, each year, fund and do an inventory of each section in order to create the detailed compliance inventory. In the next year, while the inventory creation has moved to another section, the city can implement and fund the compliance repairs in the first section. Many times, the largest cost which prevents cities from doing a transition plan is the cost of creating the inventory up front. However, the inventory does not necessarily need to be created all at once.

I've seen cities decide to fund an inventory creation all in one year, then develop a schedule of upgrades over several years or even decades. Cities possess some level of discretion in developing and implementing a transition document. However, to utilize that discretion, the City must first develop and adopt a plan for its creation.

That includes attempts at out-of-the-box thinking to solve, even only temporarily, accessibility issues. While the development of a plan is underway, the city should analyze whether it has the ability to increase the accessibility of certain areas, even if the increase is not a perfect fit.

In developing how you are going to create a transition plan, keep in mind that continuous

forward moment is necessary. And utilize that discretion in good faith. If the DOT or DOJ see a city trying to develop a plan and taking steps to make areas accessible where it can, they can be lenient in enforcement options. However, if a city does not want to repair a minimal number of intersections and wants to wait five years before any reconstruction occurs, that will not fool anyone. In other words, if the city is practical with the federal agency involved, many times, the agency will be practical in response. At least, I've seen that with sidewalks and other facility access.

There are various reasons for this type of response. First, not everyone wants to fight about every single issue (although there are some who do). Second, from an enforcement standpoint, it is more difficult to convince a federal judge to issue an injunction order compelling compliance where the city is making good faith efforts to provide accessibility. The cities do have to demonstrate that good faith in comparison with their resources and the costs. Third, is the understanding that tax-payer funds are what are at stake. Forcing a city to bankrupt (or at least severely place into debt) citizens of community to the point of impacting necessary other public services is not in the best interest of either the DOT or DOJ (politically or otherwise). Fourth, all federal agencies, just like local governments, have a limited budget. They do not appear to like seeking expensive enforcement options against cities which are trying to comply- they save their budgets for the cities which are being obscenest or are being disingenuous. As a result, a certain level of leeway can be extended. However, the above reasons are non-exclusive, and no single factor controls the decision of the federal agency.

IV. Conclusion

There are various moving parts when it comes to dealing with sidewalk accessibility. The biggest one is there is no easy answer. Any course of action chosen should be specifically tailored to the needs of the specific city and the specific obstacles to accessibility. And above all, don't panic. Work, realistically, towards a solution.