INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



Work Session: II – The ADA Today

Title: Surviving an ADA Audit: Guiding Principles and Resources

By

Presenter: Louise M. DiMatteo and Shahriar Amiri

Presenters' Titles: Assistant County Attorney and Inspection Services Director

Presenters' Office: Arlington County, Virginia

© 2007 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2007 Annual Conference, held October 28-31, 2007 in Nashville, Tennessee. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

SURVIVING AN AMERICANS WITH DISABILITIES AUDIT

GUIDING PRINCIPLES AND RESOURCES

Louise M. DiMatteo
Assistant County Attorney
Arlington County, Virginia

Shahriar Amiri
Inspection Services Director
Arlington County, Virginia

International Municipal Lawyers Association Conference
Nashville, Tennessee
October 28-31, 2007

Surviving an Americans with Disabilities Act Audit: Guiding Principles and Resources

Introduction

While it may not be possible to perceive while in the throes of the process, your locality will survive a Department of Justice Americans with Disabilities Act compliance audit. When teams of investigators swarm your facilities with measuring tapes, calipers, levels and compliance manuals in tow you may worry, but you will come out at the other end.

The good news is that your locality has probably not yet been audited so there is time to refresh or learn for the first time what you are expected to understand and ultimately put into place if lapses in compliance are identified.

The purpose of this outline is not to give comprehensive advice on handling Americans with Disabilities Act matters generally, but to give the scope of a typical audit and some guidance for how to be prepared.

The Basics

The purpose of the Americans with Disabilities Act ("ADA") is

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Discrimination under the ADA is explained:

"Subject to the provisions of this subchapter, 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." *42 U.S.C. § 12132*.

It does not get any more basic than that; however this simple statement of purpose has led localities scrambling to understand what exactly they have to do to comply with this law and has led to thousands of pages of regulations and government issued guidelines

intended to interpret these goals and intentions of Congress. The information provided herein is an effort to provide some practical assistance to avoid the common missteps of other localities in trying to sort out what compliance really means and how to avoid costly errors.

What is an Americans with Disabilities Act audit?

An ADA audit as used here is a full scale compliance investigation of access to facilities owned and operated by a locality, access to programs funded and operated by a locality, policies for hiring and accommodating employees, accessibility to polling places, communication with citizens and general civic access. An audit can come about in a few ways. A complaint to a federal agency or the DOJ ("DOJ") may cause an investigation to expand to cover issues, areas and facilities beyond the actual complaint itself or the DOJ may invite a locality to participate in *Project Civic Access*. As of this writing the DOJ reports that it has 155 settlement agreements with 144 localities in all 50 states, the District of Columbia, and Puerto Rico.

All of the settlement agreements and reports are published on the DOJ's website at www.usdoj.gov/crt/ada/civicac.htm and it is very useful to look at a few of them to see the scope of the investigation and the outcomes. In addition to this, there is an abundance of other helpful information known as the *Tool Kit for State and Local Governments* on the DOJ website. But this is only an outline of what an attorney for a locality should understand. While this briefing is intended to be introductory in nature, attorneys and officials of the locality must be very familiar with the requirements of Title II of the ADA and the standards that DOJ uses to measure compliance.

Project Civic Access is an effort by the DOJ to engage localities in a voluntary audit or examination of their programs and facilities in order for all persons, but particularly persons with disabilities to be able to participate fully in their local government and the Department itself refers to these as "compliance reviews". *Project Civic Access* focuses on a smaller group of compliance areas than the ADA actually covers; those areas were identified by the DOJ as affecting a person's ability to be civically active in their community.

The Audit Itself

Once the locality has been selected for or agrees to an audit for compliance purposes with DOJ the investigators select an assortment of locations to determine physical accessibility: parks, recreation and community centers, shelters, human services centers, arts centers, libraries, courthouses, government offices, public housing, nursing facilities, which are owned or operated to provide public services. Then they continue to evaluate the other areas identified as necessary for civic access.

The following is an excerpt from the Arlington County, Virginia audit and is reflective of the scope of many of the audits conducted around the country under *Project Civic Access*:

The review was conducted by the Disability Rights Section of the Department's Civil Rights Division and focused on the County's compliance with the following title II requirements:

- to conduct a self-evaluation of its services, policies, and practices by July 26, 1992, and make modifications necessary to comply with the Department's title II regulation, 28 C.F.R. § 35.105;

- to notify applicants, participants, beneficiaries, and other interested persons of their rights and the County's obligations under title II and the Department's regulation, 28 C.F.R. § 35.106;

- to designate a responsible employee to coordinate its efforts to comply with and carry out the County's ADA responsibilities, 28 C.F.R. § 35.107(a);

- to establish a grievance procedure for resolving complaints of violations of title II, 28 C.F.R. § 35.107(b);

- to operate each program, service, or activity so that, when viewed in its entirety, it is readily accessible to and usable by individuals with disabilities, 28 C.F.R. § 35.150, by:

- delivery of services, programs, or activities in alternate ways, including, for example, redesign of equipment, reassignment of services, assignment of aides, home visits, or other methods of compliance or, if these methods are not effective in making the programs accessible,

- physical changes to buildings (required to have been made by January 26, 1995), in accordance with the Department's title II regulation, 28 C.F.R. § 35.151, and the ADA Standards for Accessible Design (Standards), 28 C.F.R. pt. 36, App. A, or the Uniform Federal Accessibility Standards (UFAS), 41 C.F.R. § 101-19.6, App. A.

- to ensure that facilities for which construction or alteration was begun after January 26, 1992, are readily accessible to and usable by people with disabilities, in accordance with 1) the Department's title II regulation and 2) the Standards or UFAS, 28 C.F.R. § 35.151;

- to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others, including furnishing auxiliary aids and services when necessary, 28 C.F.R. § 35.160;

- to provide direct access via TTY (text telephone) or computer-to-telephone emergency services, including 9-1-1 services, for persons who use TTY's and computer modems, 28 C.F.R. § 35.162;

- to provide information for interested persons with disabilities concerning the existence and location of the County's accessible services, activities, and facilities, 28 C.F.R. § 35.163(a); and

- to provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to information about accessible facilities, 28 C.F.R. § 35.163(b).

Areas of Audit and what to expect

Notification – One of the first areas that the DOJ reviews is whether a locality informs its citizens of its commitment to access and its policies regarding civic access in particular. The notice is required to include relevant information regarding Title II of the ADA and how it applies to the programs, services, and activities of the public entity.[1]

---

[1]This is the standard notice provision required by DOJ and this was the notice that Arlington County uses in accordance with the settlement agreement.

> In accordance with the requirements of title II of the Americans with Disabilities Act of 1990, the County will not discriminate against qualified individuals with disabilities on the basis of disability in the County's services, programs, or activities.
>
> ***Employment:*** The County does not discriminate on the basis of disability in its hiring or employment practices and complies with all regulations promulgated by the U.S. Equal Employment Opportunity Commission under title I of the Americans with Disabilities Act (ADA).
>
> ***Effective Communication:*** The County will generally, upon request, provide appropriate aids and services leading to effective communication for qualified persons with disabilities so they can participate equally in the County's programs, services, and activities, including qualified sign language interpreters, documents in Braille, and other ways of making information and communications accessible to people who have speech, hearing, or vision impairments.
>
> ***Modifications to Policies and Procedures:*** The County will make all reasonable modifications to policies and programs to ensure that people with disabilities have an equal opportunity to enjoy all County programs, services, and activities. For example, individuals with service animals are welcomed in County offices, even where pets are generally prohibited.

General Effective Communication Provisions – This includes an evaluation of whether a locality provides materials in Braille or large print; if sign language, oral interpretation or real-time transcriptions are available for citizens and patrons when requested; if TTY (text telephone) services are available and if procedures for use and training are in place.

Voting – The audit will focus on a disabled person's ability to access designated polling places. Understanding that certain such facilities may be churches or other privately owned buildings, the locality nonetheless must ensure access to the precinct's polling place. As well, the DOJ has evaluated how a person with a disability is able to access the voting machine itself and has made recommendations for installing such machines in a table top fashion or otherwise to accommodate a variety of disabilities. While not addressed in the Arlington County agreement, some jurisdictions have addressed the particulars of whether the voting machine itself is designed with maximum accessibility in mind.

Emergency Management Procedures and Policies – In a post 9/11 America, especially around our Nation's Capitol, this issue was particularly acute in Arlington County. This aspect of the audit focused on how evacuation, shelter, and temporary housing procedures will accommodate persons with disabilities. The Arlington County agreement, for example, identified how medications would be handled, how service animals would be accommodated and how special equipment which required electricity could be utilized under emergency conditions. Like many localities, emergency preparation plans have been in process and this audit highlighted the many needs of disabled citizens.

Anyone who requires an auxiliary aid or service for effective communication, or a modification of policies or procedures to participate in a County program, service, or activity, should contact the office of ***[name and contact info for ADA Coordinator]*** as soon as possible but no later than 48 hours before the scheduled event.

The ADA does not require the County to take any action that would fundamentally alter the nature of its programs or services, or impose an undue financial or administrative burden.

Complaints that a County program, service, or activity is not accessible to persons with disabilities should be directed to ***[name and contact information of ADA Coordinator].***

The County will not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of providing auxiliary aids/services or reasonable modifications of policy, such as retrieving items from locations that are open to the public but are not accessible to persons who use wheelchairs.

Sidewalks – The DOJ audit focuses on "curb ramps or other sloped areas" to comply with the ADA Standards or UFAS. These are primarily at intersections and the focus is on whether these curb cuts exist at all and if they are at the appropriate slope for wheelchair users. Note that some jurisdictions may not actually have responsibility for sidewalks and this has been represented by a number of audited localities.

Web-Based Services and Programs – Because so many localities use the web as a primary way of communicating with its citizens and to provide notice of important actions and activities of the local governing body, DOJ has developed guidelines for internet access and communication and advocates in these agreements the adoption of such guidelines. www.ada.gov/websites2.htm and www.access-board.gov/sec508/guide/1194.22.htm. In Arlington County, the settlement agreement incorporated these guidelines and policies and was incorporated in an attachment which is a standard DOJ form. www.usdoj.gov/crt/ada/websites2_prnt.pdf.

Physical Changes to Facilities – This is the biggest area of the audit in terms of actual changes and time committed to the audit and post-audit process. For newly constructed facilities, which means post-1992, a locality must be fully compliant and in accordance with all of the Standards or UFAS requirements under Title II. For altered facilities, which means those changes made post-1992, the altered portions must be in compliance with the Standards or UFAS. For program access in existing facilities a locality must make changes so that it is "readily accessible to and usable by" persons with disabilities.

Under the ADA an operator of an existing facility must remove architectural barriers where such removal is readily achievable. 42 U.S.C.S. § 12182(b)(2)(A)(iv). If the operator can demonstrate that the removal of a barrier is not readily achievable, the operator is required to use alternative methods to make its goods, services, facilities, privileges, advantages, or accommodations accessible to individuals with disabilities. 42 U.S.C.S. § 12182(b)(2)(A)(v).

Negotiating with the Department of Justice

After a compliance audit, the Department will insist upon the locality entering into an agreement which acknowledges the areas of non-compliance and the plan for remediation.

When the audit report is drafted by the Department it is not the final published record of the Department's findings. The report is a very detailed accounting of any and all items that the Department determines are out of compliance. Typically the report is a narrative list of physical deficiencies in the facilities and polling places, policies that are deficient and other items that require correction and attention. The report is usually lengthy and detailed and this should be expected. It is also not intended to be an audit or evaluation of every program or facility in a particular locality because the Department examines a sampling of facilities to get an understanding of the locality's general ability and effort to comply. The final settlement agreement however will require that localities make a

commitment to comply fully in all facilities for physical access and program access, irrespective of the fact that the scope of the evaluation was less than global.

The report is then provided to the locality for its review and consideration and for a response to the findings. At this point the locality is in a position to consider to what extent it will commit to make corrections and where the locality will challenge the findings. For example, if the report finds that a program requires a fundamental change in order to make it accessible, it is up to the locality to point out that a fundamental change is not required under the ADA and that this item should be removed from the report.

It is important to remember that the Department is interested in making a "settlement" with the locality *in lieu* of litigation. The Department expects the locality to agree that they are not in compliance and that they are willing to adopt policies and sweeping reform – not just the specific changes to parking spaces, toilets, ramps, and Braille signage – and they want commitments and a timetable for all agreed changes and remediation.

In reviewing the dozens of settlement agreements posted on the DOJ website, they are striking in their similarity and give a very good idea of the Department's expectations. They want corrections in a relatively short period of time. And, importantly, they want an enforceable agreement. These settlement agreements do not, however, provide a complete picture of the detail of the DOJ audit reports nor do they present the monetary cost that a locality may incur to comply with these agreements.

Because these settlement agreements are meant to be enforced, it is important to have a clear understanding of what the law requires for compliance when negotiating with DOJ. If your locality is small and does not have a compliance expert – although after an audit of this type your locality may be required to hire one – it may be necessary to invest in a consultant to provide assistance in interpreting whether the violations cited by DOJ are valid and if the changes are necessary. Familiarity with Title II, the ADA Standards published by DOJ and UFAS is critical to understanding if the audit report is reasonable or if the investigators are pushing the locality too far. Waivers and exemptions may be warranted but a complete understanding of the actual requirements is necessary to push back. Thus, if the locality is able to make these analyses, it is obviously important to get it right and make sure that the changes sought by DOJ are proper and apply. If not, it is worth negotiating to have those items removed from the report.

An ounce of prevention …

Do not wait until an audit is pending to become familiar with the ADA and its requirements. Surviving the audit process will be much easier if localities are familiar with the requirements of the law. That seems very basic, but various departments of a local government may not naturally be in a position to be very familiar with the Act's requirements and the guidelines published to assist. For example, because many of their clients are disabled, a department providing human services almost inherently

understands that persons with disabilities must be accommodated in their programming. They often are aware if a facility has ramp access or if audio enhancement devices should be available for those with a hearing impairment. On the other hand, a parks division may not understand that offering a recreation program on a playground that has no physical access for persons using wheelchairs fails to provide program access. It is important therefore to have a cohesive approach to ensuring compliance with the ADA and the local government attorney is in a position to recommend that to the chief executive or the governing body of the locality.

When the ADA was enacted in 1992 regulations required that states and localities conduct a self assessment to evaluate whether and how they would come into compliance with the ADA. Under the law it is every state and locality's responsibility to police itself and ensure that the requirements of the ADA are met so that individuals with disabilities can access its facilities, participate in the public programs offer and generally to participate fully in the civic activities that all citizens may enjoy.

If your state or locality has not yet undertaken an evaluation or if that evaluation should be updated, consider taking that opportunity.[2] Be sure to evaluate: physical access,

---

[2] The Title II Technical Manual suggests the following:

> Once a public entity has identified its policies and practices, it should analyze whether these policies and practices adversely affect the full participation of individuals with disabilities in its programs, activities, and services. In this regard, a public entity should be mindful that although its policies and practices may appear harmless, they may result in denying individuals with disabilities the full participation of its programs, activities, or services. Areas that need careful examination include the following:
>
> 1) A public entity must examine each program to determine whether any physical barriers to access exist. It should identify steps that need to be taken to enable these programs to be made accessible when viewed in their entirety. If structural changes are necessary, they should be included in the transition plan (see II-8.3000).
>
> 2) A public entity must review its policies and practices to determine whether any exclude or limit the participation of individuals with disabilities in its programs, activities, or services. Such policies or practices must be modified, unless they are necessary for the operation or provision of the program, service, or activity. The self- evaluation should identify policy modifications to be implemented and include complete justifications for any exclusionary or limiting policies or practices that will not be modified.

3) A public entity should review its policies to ensure that it communicates with applicants, participants, and members of the public with disabilities in a manner that is as effective as its communications with others. If a public entity communicates with applicants and beneficiaries by telephone, it should ensure that TDD's or equally effective telecommunication systems are used to communicate with individuals with impaired hearing or speech. Finally, if a public entity provides telephone emergency services, it should review its policies to ensure direct access to individuals who use TDD's and computer modems.

4) A public entity should review its policies to ensure that they include provisions for readers for individuals with visual impairments; interpreters or other alternative communication measures, as appropriate, for individuals with hearing impairments; and amanuenses for individuals with manual impairments. A method for securing these services should be developed, including guidance on when and where these services will be provided. Where equipment is used as part of a public entity's program, activity, or service, an assessment should be made to ensure that the equipment is usable by individuals with disabilities, particularly individuals with hearing, visual, and manual impairments. In addition, a public entity should have policies that ensure that its equipment is maintained in operable working order.

5) A review should be made of the procedures to evacuate individuals with disabilities during an emergency. This may require the installation of visual and audible warning signals and special procedures for assisting individuals with disabilities from a facility during an emergency.

6) A review should be conducted of a public entity's written and audio-visual materials to ensure that individuals with disabilities are not portrayed in an offensive or demeaning manner.

7) If a public entity operates historic preservation programs, it should review its policies to ensure that it gives priority to methods that provide physical access to individuals with disabilities.

8) A public entity should review its policies to ensure that its decisions concerning a fundamental alteration in the nature of a program, activity, or service, or a decision that an undue financial and administrative burden will be imposed by title II, are made properly and expeditiously.

9) A public entity should review its policies and procedures to ensure that individuals with mobility impairments are provided access to public meetings.

program access, hiring and employment policies and practices, access to polling places and machines, emergency management procedures and polices, notification, general communication provisions, construction policies for new facilities, web access and programs online as well as third party contracts for such services, and polices for new construction or renovation of older (pre 1992) facilities.

One of the hurdles that Arlington County encountered during the audit was that there are varying interpretations of what guidelines should and must be followed in constructing new public facilities. Arlington had a few new facilities that were discovered to be noncompliant in a number of ways based upon the DOJ's interpretation of the ADA. Virginia, for example, has a Uniform Statewide Building Code and those provisions were followed in these construction projects. The design and construction varied, however, from the requirements of the ADA Standards for Accessible Design and Uniform Federal Accessibility Guidelines (UFAS).

The DOJ's own website now warns localities of the danger of relying upon anything other than these ADA Standards because of the differences among them, ADAAG, UFAS and other building codes around the country.[3] The guidance necessary for state and local

---

10) A public entity should review its employment practices to ensure that they comply with other applicable nondiscrimination requirements, including section 504 of the Rehabilitation Act and the ADA regulation issued by the Equal Employment Opportunity Commission.

11) A public entity should review its building and construction policies to ensure that the construction of each new facility or part of a facility, or the alteration of existing facilities after January 26, 1992, conforms to the standards designated under the title II regulation.

12) A review should be made to ascertain whether measures have been taken to ensure that employees of a public entity are familiar with the policies and practices for the full participation of individuals with disabilities. If appropriate, training should be provided to employees.

13) If a public entity limits or denies participation in its programs, activities, or services based on drug usage, it should make sure that such policies do not discriminate against former drug users, as opposed to individuals who are currently engaged in illegal use of drugs.

[3] You may hear the acronym ADAAG used to refer to the ADA Standards. ADAAG stands for the Americans with Disabilities Act Accessibility Guidelines, which are issued by the United States Architectural and Transportation Barriers Compliance Board (called the "Access Board" for short). ADAAG is not the same as the ADA Standards. The Department's regulations must be consistent with the ADAAG, but the ADAAG

officials intending to build public and accessible facilities is to ensure that the correct standards are applied and that contractors designing and building these facilities are held accountable should they deviate from these requirements. Failures to comply in new facilities can result in tremendous costs to repair and the locality will ultimately be responsible for remediation as owners of the facilities.

The state or locality should insist in their contracts with architects that all buildings designed for them should be completely accessible and in compliance with the ADA. Contractors constructing these buildings and facilities should be contracted to build in accordance with the ADA compliant designs and that deviation from those specifications will require remediation at their expense. Lastly, construction managers hired by the locality should be contracted to ensure compliance with the ADA and manage any deviation from the ADA standards.

---

contains guidelines, not enforceable standards.

Uniform Federal Accessibility Guidelines (UFAS)
These are the architectural standards originally developed for facilities covered by the Architectural Barriers Act, a law that applies to buildings designed, built, altered or leased by the federal government. They also are used to satisfy compliance in new or altered construction under Section 504. State and local governments have the option to use UFAS or the ADA Standards to meet their obligations under Title II of the ADA. However, if states and local governments choose to use the ADA Standards, the elevator exemption contained in the ADA Standards may not be used. Also, only one set of standards may be used for any particular building. In other words, you cannot pick and choose between UFAS and the ADA Standards as you design or alter a building.
From the US Department of Justice Toolkit for state and local government
www.usdoj.gov/crt/ada/pcatoolkit/chap1toolkit.htm

Relevant and Helpful Reading

Americans with Disabilities Act – can be found online at http://www.ada.gov/pubs/ada.htm

42 U.S.C. Ch 126 – Equal Opportunity for Individuals with Disabilities – can be found online at http://www.access.gpo.gov/uscode/title42/chapter126_.html

Rehabilitation Act of 1973 – can be found online at http://www.access-board.gov/enforcement/Rehab-Act-text/intro.htm

ADA Standards for Accessible Design – can be found online at http://www.ada.gov/stdspdf.htm

Americans with Disabilities Act Accessibility Guidelines (ADAAG) has not yet been approved by the DOJ as definitive – can be found online at http://www.access-board.gov/adaag/html/adaag.htm#purpose

Uniform Federal Accessibility Standards (UFAS) – can be found online at http://www.access-board.gov/ufas/ufas-html/ufas.htm

28 CFR Ch 1 part 35 – Nondiscrimination on the Basis of Disability in State and Local Government Services

28 CFR Ch 1 part 36 – Nondiscrimination on the Basis of Disability by public accommodations and in commercial facilities

28 CFR Ch 1 part 37 - Procedures for coordinating the investigation of complaints or charges of employment discrimination based on disability subject to the Americans with Disabilities Act and section 504 of the Rehabilitation Act of 1973

28 CFR Ch 1 part 39 - Enforcement of nondiscrimination on the basis of handicap in programs or activities conducted by the DOJ

28 CFR Ch 1 part 41 - Implementation of Executive Order 12250, nondiscrimination on the basis of handicap in federally assisted programs

Title II Technical Assistance Manual Covering State and Local Government Programs and Services – can be found online at http://www.usdoj.gov/crt/ada/taman2.html

Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities – can be found at http://www.usdoj.gov/crt/ada/taman3.html