

An Overview of ADAAA and Other Disability Legislation Compliance Issues

**Prepared by:
Suzette Dyer
President Elect
OK-AHEAD**

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I. Overview

On September 25, 2008, President George W. Bush signed the ADA Amendments Act of 2008 (S. 3406, the ADAAA or Act). On January 1, 2009 the ADA Amendments Act (ADAAA) became effective as Public Law 110-335. With the passage of this Act, Congress intended to clarify the intended spirit of the ADA. This Act broadened the definition of disability and overturned a series of Supreme Court decisions (commonly referred to as the Sutton Trilogy) that had previously narrowed the definition of disability. When the ADA was initially passed in 1990 Congress had expectations that the courts would apply the same definition of disability under ADA as it had to “handicapped individuals” under the Rehabilitation Act of 1973. Many individuals, however, that were considered disabled under the Rehabilitation Act were excluded for protection against discrimination through a multitude of court decisions. The American Bar Association reported that employers prevailed in 91.6% of the cases brought under the ADA during the 1990’s due to this narrow definition of disability (Joiner, 2010). Much was the same for case law that addressed academic accommodation in that greater latitude was given

to institutional decisions. Most disability law analysts anticipate that under the Act there will be a significant shift with less emphasis on determining the issue of disability and more emphasis on a determination of discrimination. The Act now requires disability to be considered in its unmitigated state, that is, without consideration of the effect of things such as medication or prosthetic limb.

II. ADAAA of 2008 (S.3406) Preamble

Many analysts agree that the preamble piece of the Act may be more important than the final regulations themselves because of the emphasis on the expectation of a broad scope of protection for individuals with disabilities. The US Department of Justice already issued final regulations for Title II and III entities. The EEOC was directed to issue new regulations and those final regulations go into effect May 24, 2011. The preamble is as follows:

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

~~Sec. 12101 Findings and Purposes of the ADA Amendments Act of 2008~~

(a) Findings

Congress finds that—

- (1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and provide broad coverage;
- (2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;
- (3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;
- (4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;
- (5) the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;
- (6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;
- (7) in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term “substantially limits” to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term “substantially limits” as “significantly restricted” are inconsistent with congressional intent, by expressing too high a standard.

(b) Purposes

The purposes of this Act are–

(1) to carry out the ADA’s objectives of providing “a clear and comprehensive national mandate for the elimination of discrimination” and “clear, strong, consistent, enforceable standards addressing discrimination” by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court’s reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms “substantially” and “major” in the definition of disability under the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and that to be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”;

(5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for “substantially limits”, and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress’ expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term “substantially limits” as “significantly restricted” to be consistent with this Act, including the amendments made by this Act. (U.S. Department of Justice ADA Home Page, 2011)

III. Summary of Changes

- directs EEOC to revise that portion of its regulations defining the term "substantially limits";
- expands the definition of "major life activities" by including two non-exhaustive lists:

- the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
- the second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");
- states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability;
- clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- changes the definition of "regarded as" so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is "regarded as" disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor;
- provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.

(U.S. Equal Employment Opportunity Commission, 2009)

IV. Overview of Title II Regulations

Adoption of new standards for accessible design referred to as “The Book” includes the Access Board’s Accessibility Guidelines as well as additional guidelines from the DOJ (includes provisions for assembly areas, medical care facilities, and housing in postsecondary education). The first effective date is March 15, 2011, which applies to everything except the design standards. This includes changes to issues related to service animals, power driven mobility devices, effective communication, and event ticketing. The second effective date is March 15, 2012, the date by which new construction and alterations must comply with the 2010 Standards. Between now and the March 15, 2012 date, Title II entities must select one standard and use it consistently for any alterations or new construction. The guidelines include a provision of a “Safe Harbor” for elements that comply with the 1991 standards but a safe harbor doesn’t apply to elements for which there were no standards in 1991 such as residential facilities, play areas, and swimming pools.

V. Summary of Revised Title II ADA Regulations

A. Service Animals

Section 35.136

(a) *Γενικά*. Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

- (b) *Exceptions*. A public entity may ask an individual with a disability to remove a service animal from the premises if—
 - (1) The animal is out of control and the animal's handler does not take effective action to control it; or
 - (2) The animal is not housebroken.
- (c) *If an animal is properly excluded*. If a public entity properly excludes a service animal under § 35.136(b), it shall give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises.
- (d) *Animal under handler's control*. A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means).
- (e) *Care or supervision*. A public entity is not responsible for the care or supervision of a service animal.
- (f) *Inquiries*. A public entity shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public entity may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).
- (g) *Access to areas of a public entity*. Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.
- (h) *Surcharges*. A public entity shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.
- (i) *Miniature horses*.

- (1) *Reasonable modifications.* A public entity shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.
- (2) *Assessment factors.* In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public entity shall consider—
 - (i) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;
 - (ii) Whether the handler has sufficient control of the miniature horse;
 - (iii) Whether the miniature horse is housebroken; and
 - (iv) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.
- (C) *Other requirements.* Paragraphs 35.136 (c) through (h) of this section, which apply to service animals, shall also apply to miniature horses (U.S. Department of Justice ADA Home Page, 2011).

The Act expanded the definition of “service animal” and for the most part limited the definition to dogs with one exception for miniature horses. The definition of “work” was clarified in the Act and it specifies that crime deterrent effects of an animal’s presence emotional support, comfort or well being are not considered “work.” It is important to note, however, that other laws such HUD (residence halls), DOT (transportation), and EEOC (employment) may have other requirements or definitions. It is recommended that institutions have two separate policies to address service animals on campus as what may be appropriate for residential settings may not be appropriate for classes, laboratories, or other settings.

B. Mobility Devices

Section 35.137

- (a) *Use of wheelchairs and manually-powered mobility aids.* A public entity shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities in any areas open to pedestrian use.
- (b)
 - (1) *Use of other power-driven mobility devices.* A public entity shall make reasonable modifications in its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless the public entity can demonstrate that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements that the public entity has adopted pursuant to § 35.130(h).

- (2) *Assessment factors.* In determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under paragraph (b)(1) of this section, a public entity shall consider—
 - (i) The type, size, weight, dimensions, and speed of the device;
 - (ii) The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);
 - (iii) The facility's design and operational characteristics (e.g., whether its service, program, or activity is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user);
 - (iv) Whether legitimate safety requirements can be established to permit the safe operation of the other power-driven mobility device in the specific facility; and
 - (v) Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws and regulations.
- (c)
 - (1) *Inquiry about disability.* A public entity shall not ask an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual's disability.
 - (2) *Inquiry into use of other power-driven mobility device.* A public entity may ask a person using an other power-driven mobility device to provide a credible assurance that the mobility device is required because of the person's disability. A public entity that permits the use of an other power-driven mobility device by an individual with a mobility disability shall accept the presentation of a valid, State-issued, disability parking placard or card, or other State-issued proof of disability as a credible assurance that the use of the other power-driven mobility device is for the individual's mobility disability. In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a public entity shall accept as a credible assurance a verbal representation, not contradicted by observable fact, that the other power-driven mobility device is being used for a mobility disability. A “valid” disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance’s requirements for disability placards or cards. (U.S. Department of Justice ADA Home Page, 2011)

It is recommended that institutions develop a policy to address “other power driven mobility devices” and include language related to allowable inquiries.

C. Ticketing
Section 35.138

- (a)

- (1) For the purposes of this section, “accessible seating” is defined as wheelchair spaces and companion seats that comply with sections 221 and 802 of the 2010 Standards along with any other seats required to be offered for sale to the individual with a disability pursuant to paragraph (d) of this section.
- (2) *Ticket sales.* A public entity that sells tickets for a single event or series of events shall modify its policies, practices, or procedures to ensure that individuals with disabilities have an equal opportunity to purchase tickets for accessible seating—
 - (i) During the same hours;
 - (ii) During the same stages of ticket sales, including, but not limited to, pre-sales, promotions, lotteries, wait-lists, and general sales;
 - (iii) Through the same methods of distribution;
 - (iv) In the same types and numbers of ticketing sales outlets, including telephone service, in-person ticket sales at the facility, or third-party ticketing services, as other patrons; and
 - (v) Under the same terms and conditions as other tickets sold for the same event or series of events.
- (b) *Identification of available accessible seating.* A public entity that sells or distributes tickets for a single event or series of events shall, upon inquiry—
 - (1) Inform individuals with disabilities, their companions, and third parties purchasing tickets for accessible seating on behalf of individuals with disabilities of the locations of all unsold or otherwise available accessible seating for any ticketed event or events at the facility;
 - (2) Identify and describe the features of available accessible seating in enough detail to reasonably permit an individual with a disability to assess independently whether a given accessible seating location meets his or her accessibility needs; and
 - (3) Provide materials, such as seating maps, plans, brochures, pricing charts, or other information, that identify accessible seating and information relevant thereto with the same text or visual representations as other seats, if such materials are provided to the general public.
- (c) *Ticket prices.* The price of tickets for accessible seating for a single event or series of events shall not be set higher than the price for other tickets in the same seating section for the same event or series of events. Tickets for accessible seating must be made available at all price levels for every event or series of events. If tickets for accessible seating at a particular price level are not available because of inaccessible features, then the percentage of tickets for accessible seating that should have been available at that price level (determined by the ratio of the total number of tickets at that price level to the total number of tickets in the assembly area) shall be offered for purchase, at that price level, in a nearby or similar accessible location.
- (d) *Purchasing multiple tickets.*

- (1) *General*. For each ticket for a wheelchair space purchased by an individual with a disability or a third-party purchasing such a ticket at his or her request, a public entity shall make available for purchase three additional tickets for seats in the same row that are contiguous with the wheelchair space, provided that at the time of purchase there are three such seats available. A public entity is not required to provide more than three contiguous seats for each wheelchair space. Such seats may include wheelchair spaces.
- (2) *Insufficient additional contiguous seats available*. If patrons are allowed to purchase at least four tickets, and there are fewer than three such additional contiguous seat tickets available for purchase, a public entity shall offer the next highest number of such seat tickets available for purchase and shall make up the difference by offering tickets for sale for seats that are as close as possible to the accessible seats.
- (3) *Sales limited to less than four tickets*. If a public entity limits sales of tickets to fewer than four seats per patron, then the public entity is only obligated to offer as many seats to patrons with disabilities, including the ticket for the wheelchair space, as it would offer to patrons without disabilities.
- (4) *Maximum number of tickets patrons may purchase exceeds four*. If patrons are allowed to purchase more than four tickets, a public entity shall allow patrons with disabilities to purchase up to the same number of tickets, including the ticket for the wheelchair space.
- (5) *Group sales*. If a group includes one or more individuals who need to use accessible seating because of a mobility disability or because their disability requires the use of the accessible features that are provided in accessible seating, the group shall be placed in a seating area with accessible seating so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from their group.
- (e) *Hold-and-release of tickets for accessible seating*.
 - (1) *Tickets for accessible seating may be released for sale in certain limited circumstances*. A public entity may release unsold tickets for accessible seating for sale to individuals without disabilities for their own use for a single event or series of events only under the following circumstances—
 - (i) When all non-accessible tickets (excluding luxury boxes, club boxes, or suites) have been sold;
 - (ii) When all non-accessible tickets in a designated seating area have been sold and the tickets for accessible seating are being released in the same designated area; or
 - (iii) When all non-accessible tickets in a designated price category have been sold and the tickets for accessible seating are being released within the same designated price category.

- (2) *No requirement to release accessible tickets.* Nothing in this paragraph requires a facility to release tickets for accessible seating to individuals without disabilities for their own use.
- (3) *Release of series-of-events tickets on a series-of-events basis.*
 - (i) *Series-of-events tickets sell-out when no ownership rights are attached.* When series-of-events tickets are sold out and a public entity releases and sells accessible seating to individuals without disabilities for a series of events, the public entity shall establish a process that prevents the automatic reassignment of the accessible seating to such ticket holders for future seasons, future years, or future series so that individuals with disabilities who require the features of accessible seating and who become newly eligible to purchase tickets when these series-of-events tickets are available for purchase have an opportunity to do so.
 - (ii) *Series-of-events tickets when ownership rights are attached.* When series-of-events tickets with an ownership right in accessible seating areas are forfeited or otherwise returned to a public entity, the public entity shall make reasonable modifications in its policies, practices, or procedures to afford individuals with mobility disabilities or individuals with disabilities that require the features of accessible seating an opportunity to purchase such tickets in accessible seating areas.
- (f) *Ticket transfer.* Individuals with disabilities who hold tickets for accessible seating shall be permitted to transfer tickets to third parties under the same terms and conditions and to the same extent as other spectators holding the same type of tickets, whether they are for a single event or series of events.
- (g) *Secondary ticket market.*
 - (1) A public entity shall modify its policies, practices, or procedures to ensure that an individual with a disability may use a ticket acquired in the secondary ticket market under the same terms and conditions as other individuals who hold a ticket acquired in the secondary ticket market for the same event or series of events.
 - (2) If an individual with a disability acquires a ticket or series of tickets to an inaccessible seat through the secondary market, a public entity shall make reasonable modifications to its policies, practices, or procedures to allow the individual to exchange his ticket for one to an accessible seat in a comparable location if accessible seating is vacant at the time the individual presents the ticket to the public entity.
- (h) *Prevention of fraud in purchase of tickets for accessible seating.* A public entity may not require proof of disability, including, for example, a doctor's note, before selling tickets for accessible seating.
 - (1) *Single-event tickets.* For the sale of single-event tickets, it is permissible to inquire whether the individual purchasing the tickets for accessible seating has a mobility disability or a disability that requires the use of the accessible features that are provided in accessible seating, or is purchasing the tickets for an individual who has a mobility disability or a disability that requires the use of the accessible features that are provided in the accessible seating.

- (2) *Series-of-events tickets*. For series-of-events tickets, it is permissible to ask the individual purchasing the tickets for accessible seating to attest in writing that the accessible seating is for a person who has a mobility disability or a disability that requires the use of the accessible features that are provided in the accessible seating.
- (3) *Investigation of fraud*. A public entity may investigate the potential misuse of accessible seating where there is good cause to believe that such seating has been purchased fraudulently. (U.S. Department of Justice ADA Home Page, 2011)

There are significant changes in the Act that relate to ticketing regarding distribution outlets, clear seating charts, ticket transfers, “sell outs” and accessible seats, equivalent pricing and access limitations, verification, and captioning at large venues. These regulations will impact not only athletic events but other performances such as theater performances and concerts. It is recommended that institutions review and amend their policies to address these changes.

D. Safety and Direct Threat

Subpart B-General Requirements

Section 35.130 General prohibitions against discrimination

(h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

Section 35.139

(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk. (U.S. Department of Justice ADA Home Page, 2011)

These sections should be considered when an institution is taking any action to suspend or expel students under existing student codes of conduct... It is important that institutions are consistent in the application of their conduct codes and that students should not be suspended or expelled under any type of separate mental health or disability policy. If an institution has a threat assessment team and reviews any issues related to disability, the team should consider consultation with the disability

resource or disability services office before taking action.

E. Architectural Accessibility.

1. Subpart D -Program Accessibility

Section 35.10 Existing Facilities

2) (i) Safe harbor. Elements that have not been altered in existing facilities on or after March 15, 2012, and that comply with the corresponding technical and scoping specifications for those elements in either the 1991 Standards or in the Uniform Federal Accessibility Standards (UFAS), Appendix A to 41 CFR part 101–19.6 (July 1, 2002 ed.), 49 FR 31528, app. A (Aug. 7, 1984) are not required to be modified in order to comply with the requirements set forth in the 2010 Standards.

The safe harbor provided in § 35.150(b)(2)(i) does not apply to those elements in existing facilities that are subject to supplemental requirements (i.e., elements for which there are neither technical nor scoping specifications in the 1991 Standards). Elements in the 2010 Standards not eligible for the element-by-element safe harbor are identified as follows—

- (A) *Residential facilities dwelling units*, sections 233 and 809.
- (B) *Amusement rides*, sections 234 and 1002; 206.2.9; 216.12.**
- (C) *Recreational boating facilities*, sections 235 and 1003; 206.2.10.**
- (D) *Exercise machines and equipment*, sections 236 and 1004; 206.2.13.
- (E) *Fishing piers and platforms*, sections 237 and 1005; 206.2.14.
- (F) *Golf facilities*, sections 238 and 1006; 206.2.15.**
- (G) *Miniature golf facilities*, sections 239 and 1007; 206.2.16.**
- (H) *Play areas*, sections 240 and 1008; 206.2.17.**
- (I) *Saunas and steam rooms*, sections 241 and 612.**
- (J) *Swimming pools, wading pools, and spas*, sections 242 and 1009.**
- (K) *Shooting facilities with firing positions*, sections 243 and 1010.**
- (L) *Miscellaneous*.**
 - (1) *Team or player seating*, section 221.2.1.4.**
 - (2) *Accessible route to bowling lanes*, section. 206.2.11.**
 - (3) *Accessible route in court sports facilities*, section 206.2.12.**

(U.S. Department of Justice ADA Home Page, 2011)

Items designated in bold in the section quoted above may require attention under the new regulations. It is recommended that institutions develop a plan to document barrier removal efforts.

2. Section 35.151 New Construction and Alterations

- (a) *Design and construction*.
 - (1) Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.
 - **(2) *Exception for structural impracticability*.**

- **(i) Full compliance with the requirements of this section is not required where a public entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.**
- **(ii) If full compliance with this section would be structurally impracticable, compliance with this section is required to the extent that it is not structurally impracticable. In that case, any portion of the facility that can be made accessible shall be made accessible to the extent that it is not structurally impracticable.**
- **(iii) If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would be structurally impracticable, accessibility shall nonetheless be ensured to persons with other types of disabilities, (e.g., those who use crutches or who have sight, hearing, or mental impairments) in accordance with this section.**
- *(b) Alterations.*
 - **(1) 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 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.**
 - **(2) The path of travel requirements of § 35.151(b)(4) shall apply only to alterations undertaken solely for purposes other than to meet the program accessibility requirements of § 35.150.**
 - **(3)**
 - **(i) Alterations to historic properties shall comply, to the maximum extent feasible, with the provisions applicable to historic properties in the design standards specified in § 35.151(c).**
 - **(ii) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of § 35.150.**
 - **(4) *Path of travel.* An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration.**

- (i) *Primary function.* A “primary function” is a major activity for which the facility is intended. Areas that contain a primary function include, but are not limited to, the dining area of a cafeteria, the meeting rooms in a conference center, as well as offices and other work areas in which the activities of the public entity using the facility are carried out.
 - (A) Mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, and corridors are not areas containing a primary function. Restrooms are not areas containing a primary function unless the provision of restrooms is a primary purpose of the area, e.g., in highway rest stops.
 - (B) For the purposes of this section, alterations to windows, hardware, controls, electrical outlets, and signage shall not be deemed to be alterations that affect the usability of or access to an area containing a primary function.
- (ii) A “path of travel” includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility.
 - (A) An accessible path of travel may consist of walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of these elements.
 - (B) For the purposes of this section, the term “path of travel” also includes the restrooms, telephones, and drinking fountains serving the altered area.
 - (C) *Safe harbor.* If a public entity has constructed or altered required elements of a path of travel in accordance with the specifications in either the 1991 Standards or the Uniform Federal Accessibility Standards before March 15, 2012, the public entity is not required to retrofit such elements to reflect incremental changes in the 2010 Standards solely because of an alteration to a primary function area served by that path of travel.
- (iii) *Disproportionality.*
 - (A) Alterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds 20 % of the cost of the alteration to the primary function area.
 - (B) Costs that may be counted as expenditures required to provide an accessible path of travel may include:
 - (1) *Costs associated with providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;*

- (2) *Costs associated with making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes, or installing accessible faucet controls;*
- (3) *Costs associated with providing accessible telephones, such as relocating the telephone to an accessible height, installing amplification devices, or installing a text telephone (TTY); and*
- (4) *Costs associated with relocating an inaccessible drinking fountain.*
- (iv) *Duty to provide accessible features in the event of disproportionality.*
 - (A) **When the cost of alterations necessary to make the path of travel to the altered area fully accessible is disproportionate to the cost of the overall alteration, the path of travel shall be made accessible to the extent that it can be made accessible without incurring disproportionate costs.**
 - (B) **In choosing which accessible elements to provide, priority should be given to those elements that will provide the greatest access, in the following order—**
 - (1) **An accessible entrance;**
 - (2) **An accessible route to the altered area;**
 - (3) **At least one accessible restroom for each sex or a single unisex restroom;**
 - (4) **Accessible telephones;**
 - (5) **Accessible drinking fountains; and**
 - (6) **When possible, additional accessible elements such as parking, storage, and alarms.**
- (v) *Series of smaller alterations.*
 - (A) **The obligation to provide an accessible path of travel may not be evaded by performing a series of small alterations to the area served by a single path of travel if those alterations could have been performed as a single undertaking.**
 - (B)
 - (1) **If an area containing a primary function has been altered without providing an accessible path of travel to that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alterations to the primary function areas on that path of travel during the preceding three-year period shall be considered in determining whether the cost of making that path of travel accessible is disproportionate.**

- (2) Only alterations undertaken on or after March 15, 2011, shall be considered in determining if the cost of providing an accessible path of travel is disproportionate to the overall cost of the alterations.
- (c) *Accessibility standards and compliance date.*
 - (1) If physical construction or alterations commence after July 26, 1992, but prior to the September 15, 2010, then new construction and alterations subject to this section must comply with either the UFAS or the 1991 Standards except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of the 1991 Standards shall not apply. 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.
 - (2) If physical construction or alterations commence on or after September 15, 2010, and before March 15, 2012, then new construction and alterations subject to this section may comply with one of the following: the 2010 Standards, UFAS, or the 1991 Standards except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of the 1991 Standards shall not apply. 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.
 - (3) If physical construction or alterations commence on or after March 15, 2012, then new construction and alterations subject to this section shall comply with the 2010 Standards.
 - (4) For the purposes of this section, ceremonial groundbreaking or razing of structures prior to site preparation do not commence physical construction or alterations.
 - (5) *Noncomplying new construction and alterations.*
 - (i) Newly constructed or altered facilities or elements covered by §§ 35.151(a) or (b) that were constructed or altered before March 15, 2012, and that do not comply with the 1991 Standards or with UFAS shall before March 15, 2012, be made accessible in accordance with either the 1991 Standards, UFAS, or the 2010 Standards.
 - (ii) Newly constructed or altered facilities or elements covered by §§ 35.151(a) or (b) that are constructed or altered on or after March 15, 2012, and that do not comply with the 1991 Standards or with UFAS shall, on or after March 15, 2012, be made accessible in accordance with the 2010 Standards.
- Appendix to § 35.151(c)

Compliance Date for New Construction or Alterations	Applicable Standards
Before September 15, 2010	1991 Standards or UFAS

On or after September 15, 2010, and before March 15, 2012	1991 Standards, UFAS, or 2010 Standards
On or after March 15, 2012	2010 Standards

- **(d) *Scope of coverage.* The 1991 Standards and the 2010 Standards apply to fixed or built-in elements of buildings, structures, site improvements, and pedestrian routes or vehicular ways located on a site. Unless specifically stated otherwise, the advisory notes, appendix notes, and figures contained in the 1991 Standards and the 2010 Standards explain or illustrate the requirements of the rule; they do not establish enforceable requirements.**
- **(e) *Social service center establishments.* Group homes, halfway houses, shelters, or similar social service center establishments that provide either temporary sleeping accommodations or residential dwelling units that are subject to this section shall comply with the provisions of the 2010 Standards applicable to residential facilities, including, but not limited to, the provisions in sections 233 and 809.**
 - **(1) In sleeping rooms with more than 25 beds covered by this section, a minimum of 5% of the beds shall have clear floor space complying with section 806.2.3 of the 2010 Standards.**
 - **(2) Facilities with more than 50 beds covered by this section that provide common use bathing facilities, shall provide at least one roll-in shower with a seat that complies with the relevant provisions of section 608 of the 2010 Standards. Transfer-type showers are not permitted in lieu of a roll-in shower with a seat, and the exceptions in sections 608.3 and 608.4 for residential dwelling units are not permitted. When separate shower facilities are provided for men and for women, at least one roll-in shower shall be provided for each group.**
- **(f) *Housing at a place of education.* Housing at a place of education that is subject to this section shall comply with the provisions of the 2010 Standards applicable to transient lodging, including, but not limited to, the requirements for transient lodging guest rooms in sections 224 and 806 subject to the following exceptions. For the purposes of the application of this section, the term "sleeping room" is intended to be used interchangeably with the term "guest room" as it is used in the transient lodging standards.**
 - **(1) Kitchens within housing units containing accessible sleeping rooms with mobility features (including suites and clustered sleeping rooms) or on floors containing accessible sleeping rooms with mobility features shall provide turning spaces that comply with section 809.2.2 of the 2010 Standards and kitchen work surfaces that comply with section 804.3 of the 2010 Standards.**
 - **(2) Multi-bedroom housing units containing accessible sleeping rooms with mobility features shall have an accessible route throughout the unit in accordance with section 809.2 of the 2010 Standards.**

- **(3) Apartments or townhouse facilities that are provided by or on behalf of a place of education, which are leased on a year-round basis exclusively to graduate students or faculty, and do not contain any public use or common use areas available for educational programming, are not subject to the transient lodging standards and shall comply with the requirements for residential facilities in sections 233 and 809 of the 2010 Standards.**
- **(g) *Assembly areas.* Assembly areas subject to this section shall comply with the provisions of the 2010 Standards applicable to assembly areas, including, but not limited to, sections 221 and 802. In addition, assembly areas shall ensure that—**
 - **(1) In stadiums, arenas, and grandstands, wheelchair spaces and companion seats are dispersed to all levels that include seating served by an accessible route;**
 - **(2) Assembly areas that are required to horizontally disperse wheelchair spaces and companion seats by section 221.2.3.1 of the 2010 Standards and have seating encircling, in whole or in part, a field of play or performance area shall disperse wheelchair spaces and companion seats around that field of play or performance area;**
 - **(3) Wheelchair spaces and companion seats are not located on (or obstructed by) temporary platforms or other movable structures, except that when an entire seating section is placed on temporary platforms or other movable structures in an area where fixed seating is not provided, in order to increase seating for an event, wheelchair spaces and companion seats may be placed in that section. When wheelchair spaces and companion seats are not required to accommodate persons eligible for those spaces and seats, individual, removable seats may be placed in those spaces and seats;**
 - **(4) Stadium-style movie theaters shall locate wheelchair spaces and companion seats on a riser or cross-aisle in the stadium section that satisfies at least one of the following criteria—**
 - **(i) It is located within the rear 60% of the seats provided in an auditorium; or**
 - **(ii) It is located within the area of an auditorium in which the vertical viewing angles (as measured to the top of the screen) are from the 40th to the 100th percentile of vertical viewing angles for all seats as ranked from the seats in the first row (1st percentile) to seats in the back row (100th percentile).**
- **(h) *Medical care facilities.* Medical care facilities that are subject to this section shall comply with the provisions of the 2010 Standards applicable to medical care facilities, including, but not limited to, sections 223 and 805. In addition, medical care facilities that do not specialize in the treatment of conditions that affect mobility shall disperse the accessible patient bedrooms required by section 223.2.1 of the 2010 Standards in a manner that is proportionate by type of medical specialty.**
- **(i) *Curb ramps.***

- (1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.
- (2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.
- **(j) Facilities with residential dwelling units for sale to individual owners.**
 - **(1) Residential dwelling units designed and constructed or altered by public entities that will be offered for sale to individuals shall comply with the requirements for residential facilities in the 2010 Standards including sections 233 and 809.**
 - **(2) The requirements of paragraph (1) also apply to housing programs that are operated by public entities where design and construction of particular residential dwelling units take place only after a specific buyer has been identified. In such programs, the covered entity must provide the units that comply with the requirements for accessible features to those pre-identified buyers with disabilities who have requested such a unit.** (U.S. Department of Justice ADA Home Page, 2011)

Any new construction or alterations beginning on or after March 15, 2012, will have to comply with the 2010 Standards. Institutions may also consider documenting in writing whether they will use the 1991 Standards or the 2010 Standards between March 15, 2011 and March 15, 2012 since Title II entities must elect to follow one standard for all new construction and alterations during this transition period. It is also a good time to update self-evaluations and transition plans although the regulations do not require this. Section 35.151 of the regulations does provide exceptions for structural impracticability. There is also a “path of travel” requirement or the “20%” rule whereby if a Title II entity alters a “primary function area” then it must comply with standards for that area plus spend up to 20% on path of travel access. Additional areas of change included in new access standards that may impact institutions are: elevator exceptions, employee work areas, exceptions for press boxes 500 sq ft. or less, reach ranges, toilet and bathing rooms, parking spaces (restriping is considered an alteration), assembly areas, housing at places of education, and recreation facilities.

D. Program Accessibility

Subpart E-Communications

Section 35.161 Telecommunications

- (a) Where a public entity communicates by telephone with applicants and beneficiaries, text telephones (TTYs) or equally effective telecommunications systems shall be used to communicate with individuals who are deaf or hard of hearing or have speech impairments.
- (b) When a public entity uses an automated-attendant system, including, but not limited to, voice mail and messaging, or an interactive voice response system, for

receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and all forms of FCC-approved telecommunications relay system, including Internet-based relay systems.

- (c) A public entity shall respond to telephone calls from a telecommunications relay service established under title IV of the ADA in the same manner that it responds to other telephone calls. (U.S. Department of Justice ADA Home Page, 2011)

It is recommended that institutions examine the telecommunications system for compliance with this section. It does not appear that the automated attendant systems (systems with prerecorded voice options) used by many entities are accessible to individuals who are deaf or hard of hearing. Accessible provisions should be made for providing the same information in a text messaging mode that would support equivalent information access by TDD (Telecommunication Device for the Deaf and used interchangeably with TTY) users. Either a single-line configuration designed to handle both TDD and voice callers or two separate phone lines may be used. In either case, the phone number should be identified as being TDD accessible. (U.S. Department of Energy, 2011) Of course telephone emergency services such as 911 services must be accessible to individuals who use TDD's.

The Act also expanded the definition of auxiliary aides and services for persons who are deaf or hard of hearing to include: exchange of written notes, accessible electronic and information technology, computer-aided transcription services, Brailled displays, screen software, video interpreting, as well as standards for performance.

VI. Emergency Preparedness

Analysts have noted that the new regulations do not address the issue of emergency preparedness. Under the Act and Section 504, however, institutions are required to make all programs and services accessible. There is much to consider for individuals with disabilities when planning for emergency situations including accessible facilities, accessible transportation attendant care needs, medication needs, and provision for service animals. A review of some institutional policies recommend the need to pre-identify staff, faculty, and students with disabilities and where they are located so that determinations on areas of refuge and how these individuals will evacuate from the building can be made in advance of an emergency situation.

VII. Electronic and Information Technology Access

There has been significant emphasis on the compliance environment related to information technology. Certainly IT accessibility is covered under the Act, Sections 504 and 508 of the

Rehabilitation Act and Oklahoma House Bill 2197. Of note in the past several years were the Kindle complaints, the U.S. Department of Education and U.S. Department of Justice joint “Dear Colleague Letter” in June 2010, and the Penn State complaint. The joint letter states, “As officials of the agencies charged with enforcement and interpretation of the ADA and Section 504, we ask that you take steps to ensure that your college or university refrains from requiring the use of any electronic book reader, or other similar technology, in a teaching or classroom environment as long as the device remains inaccessible to individuals who are blind or have low vision. It is unacceptable for universities to use emerging technology without insisting that this technology be accessible to all students.” (U.S. Department of Education, 2010)

“The Department of Justice entered into settlement agreements with colleges and universities that used the Kindle DX, an inaccessible, electronic book reader, in the classroom as part of a pilot study with Amazon.com, Inc. In summary, the universities agreed not to purchase, require, or recommend use of the Kindle DX, or any other dedicated electronic book reader, unless or until the device is fully accessible to individuals who are blind or have low vision, or the universities provide reasonable accommodation or modification so that a student can acquire the same information, engage in the same interactions, and enjoy the same services as sighted students with substantially equivalent ease of use.” (U.S. Department of Education, 2010)

The Penn State complaint was filed by the National Federation of the Blind. In the complaint Dr. Marc Maurer, President of the National Federation of the Blind, said: “The number and scope of the accessibility problems at Penn State demonstrate the institution’s blatant—and unlawful—lack of regard for the equal education of its blind students and failure to accommodate its blind faculty members and employees. There is simply no excuse for blind students and faculty to be denied the same access to information and technology as their sighted peers. Sadly, this cavalier attitude toward accessibility is found not only at Penn State, but at many of our nation’s colleges and universities. That is why we have asked the United States Department of Education to act swiftly and decisively to ensure that blind students and faculty members are given the same access and opportunity to succeed as their sighted peers.” (National Federation of the Blind, 2010) The Penn State complaint addressed inaccessibility on the Library’s website, departmental websites, the course management system, clickers, campus ATM machines, “smart” podiums with inaccessible touch screens and cabinet locks.

It is essential that all institutions learn from these complaints and settlements and that they examine the scope of their electronic and IT policies as they relate to academic programs and services, student services, auxiliary programs and services, information resources and technology, and the procurement of goods and services.

VII. Conclusion

There is no doubt that the Act will present significant challenges to higher education in general. The broadened definition of disability under the Act will cause more employees and more students to qualify as individual with disabilities.

The U. S. Department of Education in the OCR annual Report to Congress stated that over the past decade, from FY 1998 to 2008, OCR's complaint receipts have risen 28 percent, from 4,847 to 6,194. Over the last decade, more than 50 percent of OCR's complaint receipts have alleged disability discrimination. (U.S. Department of Education, 2011) The EEOC is hiring 225 new investigators over the course of the next two years and expects more than 9,000 additional disability discrimination charges to be filed in 2011 as compared to 2009 (www.HRhero.com, 2011). With these types of projected increases it is recommended that institutions examine all policies related to the Act. .

Resources

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