ADA Issues in Government Buildings (and Elsewhere)

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Agenda

- Overview of the ADA.
- Rising enforcement of the ADA.
- Remedies for violations.
- Critical Title II regulations.
- The ADA Accessibility Guidelines (ADAAG).
- How to avoid ADA lawsuits.
- How to defend ADA lawsuits.

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Overview of the Americans with Disabilities Act

- Enacted in 1992 to "to address the major areas of discrimination faced day-to-day by people with disabilities." Amended in 2009 to broaden the definition of "disability."
- Outlaws **explicit discrimination:** "You can't come in here because you are in a wheelchair."
- Outlaws **implicit discrimination** (also called "failure to accommodate"): "You are welcome to come in, but that wheelchair won't fit through the door."
- Divided into five titles of coverage areas.

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Statutory Scheme

- **Title I** requires covered **employers** to provide reasonable accommodations for applicants and employees with disabilities and prohibits discrimination on the basis of disability in all aspects of employment. See 42 U.S.C. § 12111.
- **Title II** requires **public entities** (which include state and local government agencies, schools, etc.) to ensure disabled persons can participate in the **programs, services, and activities** offered by the public entity. Public entities are covered **regardless of size.** See 42 U.S.C. § 12132.

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Statutory Scheme

- **Title III** applies to **public accommodations** (restaurants, hotels, grocery stores, retail stores, private schools, etc.) and requires that many of the same things as Title II. Among other requirements, all new construction and modifications must be accessible to individuals with disabilities. See 42 U.S.C. § 12181.
- **Titles IV and V** cover telecommunications and retaliation. 42 U.S.C. § 12201.

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What is a Title II "Public Entity"?

Under 28 C.F.R. § 35.104, **public entity** includes (1) any State or local government; (2) any department, agency, special purpose district, or other instrumentality of a State or local government. Note that there is **NO SIZE LIMITATION** under the public entity definition.

Public entities therefore include city and county governments and all facilities where programs, services, or activities are offered.

- Courthouses and city halls.
- Schools.
- Parks and pools.
- Police departments.
- Publicly run museums.
- Public transportation.
- Sidewalks (more on this later).

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Line Between Public and Private

- A defendant may only be held liable under Title II of the ADA if it is a public entity, not if defendant merely leases or operates a public accommodation.
- When an entity appears to have both public and private features, courts examine the relationship between the entity and the governmental unit:
  - Is the entity is operated with public funds?
  - Are the entity's employees considered government employees?
  - Does the entity receive significant assistance from the government by provision of the property or equipment?
  - Is the entity is governed by an independent board elected by members of a private organization or a board elected by the voters or appointed by elected officials?

DOJ Title II *Technical Assistance Manual,* § 1.2000 (1993); *Obert v. The Pyramid,* 2005 WL 1009567 (W.D. Tenn. 2005).

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Who Can Enforce the ADA?

- The ADA's protection applies primarily to individuals who meet the ADA's definition of disability (as amended by the ADAAA).
- Under 42 U.S.C. § 12102(1), an individual has a disability if—
  - He or she has a physical or mental impairment that substantially limits one or more of his/her major life activities;
  - He or she has a record of such an impairment; or
  - He or she is regarded as having such an impairment*; **AND**
  - In the case of a request for accommodations or barrier removal, the individual meets the "essential eligibility requirements" for the receipt of services or the participation in programs or activities provided by a public entity. See 42 U.S.C. § 12131(2).**

*The reasonable accommodation requirements do not apply to individuals who are merely "regarded as" disabled. See 42 U.S.C. § 12201(h).

** Not intended to connote "voluntariness." *Bircoll v. Miami-Dade County*, 480 F.3d. 1072 (11th Cir 2007).

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Who Else Can Enforce the ADA?

- In addition to disabled persons, individuals who have an association with an individual known to have a disability, such as parents, can be covered in certain circumstances.
  - Typically, such individuals are able to take action to enforce the anti-retaliation provisions or to enforce a requirement on behalf of a qualified disabled person.
- The Department of Justice (DOJ) has standing to enforce the ADA through administrative action or federal court litigation.

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DOJ Enforcement on the Rise

- Department of Justice website lists settlements and lawsuits: www.ada.gov/settlemt.htm.
- In 2012, the U.S. Attorney for Northern District of Alabama announced a new **Civil Rights Enforcement Division** in Birmingham to focus on ADA enforcement and other issues.
- DOJ intervened in two North Alabama lawsuits defended by Yours Truly.

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Private Enforcement on the Rise in Alabama, Too

- **2011:** Madison County sued over inaccessible courthouse.
- **2009, 2010:** Huntsville sued repeatedly for various ADA violations at civic center, museums, and sidewalks.
- **2010:** Birmingham sued over sidewalks.
- **2010:** Decatur sued for alleged violations at Point Mallard Park.
- **2008:** Bessemer sued for assorted violations.

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Remedies Available Under Title II

- Either individuals OR the DOJ may file lawsuits in federal court to enforce the Title II.
- Injunctive relief is the most common remedy.
- Compensatory damages available against Title II entities where deliberate indifference is present. See *Wolfe v. Florida Dept. of Corrections,* 2012 WL 4052334 (M.D. Fla. 2012).
- Civil penalties not permitted against Title II entities, and punitive damages not available.
- Cost- and fee-shifting applies in private actions. See 42 U.S.C. § 12205. This means expert fees plus legal fees.

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Title II's Expansive Regulatory Framework

- Most of the meat of Title II is contained in the regulations promulgated by the Attorney General. Indeed, the actual statute says little more than "thou shalt not discriminate."
- Regulations appear at 28 C.F.R. Part 35.
- Eleventh Circuit has explained the regulations promulgated under Title II were intended to "grant wide enforcement powers" to the Department of Justice to "ensure that the ADA's purposes would be effected." *American Ass'n of People with Disabilities v. Harris,* 605 F.3d 1124, 1134, *superseded on reh'g*, 647 F.3d 1093 (11th Cir. 2011).

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Enforceability of the Regulations?

- The expansive nature of the regulations when compared to the limited language of the statute itself has led to much debate as to both the permissibility and private enforceability of these regulations. Indeed, in the original decision in *Harris,* the Eleventh Circuit held that much of the regulatory specifics were not privately enforceable, but it then deleted that part of its opinion on rehearing.
- The law appears to be that "insofar as those regulations validly and reasonably construe and implement the statutory mandate, they are enforceable in a private cause of action along with the statutes themselves." *Gaylor v. Georgia Dept. of Natural Resources,* 2013 WL 4790158 (N.D. Ga. 2013).
- Still, certain regulations have been targeted as unenforceable.

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Important Title II Regulations (1)

- **Self-Evaluation (28 C.F.R. § 35.105)**
  - All public entities were required by approximately 1993 to evaluate, in writing, current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of Title II.
- **Designation of Responsible Employee and Creation of Grievance Procedures (28 C.F.R. § 35.107)**
  - All public entities with 50 or more employees must designate one employee to coordinate ADA efforts and to investigate complaints, and must advertise that person's contact information.
  - All such public entities must adopt a grievance procedure.

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Important Title II Regulations (2)

- **Anti-Discrimination Regulation (28 C.F.R. § 35.130)**
  - No qualified individual with a disability shall, on the basis of 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 public entity**.
    - Note catch-all conclusion: *Bircoll v. Miami-Dade County,* 480 F.3d 1072, 1084-85 (11th Cir. 2007) ("The final clause of § 12132 "protects qualified individuals with a disability from being 'subjected to discrimination by any such entity,' and is not tied directly to the 'services, programs, or activities' of the public entity.").

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Important Title II Regulations (3)

- **Examples of Discrimination under 28 C.F.R. § 35.130**
  - A public entity may not place a surcharge on any group or person to cover the costs of measures, such as the provision of auxiliary aids or program accessibility.
  - A public entity shall not exclude or otherwise deny equal services because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.
  - 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 stereotypes.
  - Public entity must consider needs of disabled in selecting site for programs and services.

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Important Title II Regulations (4)

- **Access Inequality (28 C.F.R. § 35.149)**
  - No qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, 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 public entity.
  - See *Shotz v. Cates,* 256 F.3d 1077, 1080 (11th Cir. 2001) ("If the Courthouse's wheelchair ramps are so steep that they impede a disabled person or if its bathrooms are unfit for the use of a disabled person, then it cannot be said that the trial is 'readily accessible,' **regardless whether the disabled person manages in some fashion to attend the trial."**) (emphasis added).

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Important Title II Regulations (5)

- **Maintenance of accessible features (28 C.F.R. § 35.133)**
  - A public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.
- **Service Animals (28 C.F.R. § 35.136)**
  - Public entity must modify policies to permit use of service animals.
  - More on this later.

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Important Title II Regulations (6)

- **Ticketing (28 C.F.R. § 35.138)**
  - Public entities selling tickets shall modify policies to ensure individuals with disabilities have equal opportunity to purchase tickets on same terms as able-bodied individuals and shall identify available accessible seating and limit sale of accessible seating to able-bodied.
- **Prohibition on employment discrimination in public programs and services (28 C.F.R. § 35.140)**
  - Little known regulation that has been interpreted to permit employment claims against public entities without requiring EEOC exhaustion.

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Important Title II Regulations (7)

- **Program Accessibility Regulations (28 C.F.R. § 35.149–35.151)**
  - In summary, "[f]or facilities constructed *on or* ***before*** **January 26, 1992** [the effective date of Title II], a public entity need not necessarily modify each facility so as to make it accessible for disabled individuals, but must operate a service, program, or activity such that it is *readily accessible* and usable by such individuals *when viewed in its entirety*." *American Ass'n of People With Disabilities v. Smith,* 227 F. Supp. 2d 1276, 1290 (M.D. Fla. 2002) (emphasis in original).

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Important Title II Regulations (8)

- However, "[f]or facilities altered or constructed ***after* January 26, 1992**, a "'heightened standard is applied.'" *Id*. (emphasis supplied) (quoting *Ass'n for Disabled Americans v. City of Orlando,* 153 F. Supp. 2d 1310, 1318 (M.D. Fla. 2001)). This "heightened standard" is created by 28 C.F.R. § 35.151(a) and (b).
  - Section 35.151(a): "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*." 28 C.F.R. § 35.151(a).
  - Section 35.151(b): "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 useable* by individuals with disabilities, if the alteration was commenced after January 26, 1992." 28 C.F.R. § 35.151(b).

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Title II Regulatory Defenses

- **Fundamental Alteration / Undue Financial and Administrative Burdens (28 C.F.R. § 35.150, § 35.164)**
  - A public entity attempting to modify a service, program or activity at an existing facility need not take any such action. Very high standard.
  - For either new, existing, or alteration, the ADA regulations disclaim any intention to require fundamental alteration of the nature of a service, program or activity, or undue financial and administrative burdens.
- **Structural Impracticability for New Construction and Alterations (28 C.F.R. § 35.151)**
  - Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.
- **Historic Properties (28 C.F.R. § 35.151)**
  - Nationally recognized historic places need not be altered in a manner that would destroy the historic significance of the property, but alternative access means should be provided to the maximum extent feasible.

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Americans with Disabilities Act Accessibility Guidelines (ADAAG)

- To assist in implementation of the **heightened standard,** the Department of Justice created a set of technical standards called the ADAAG. It governs alterations and new construction.
- ADAAG does not apply specifically to **existing facilities,** *Ass'n for Disabled Americans v. City of Orlando,* 153 F. Supp. 2d 1310, 1320 (M.D. Fla. 2001).
- However, ADAAG remains persuasive even for "existing facilities". *Access Now, Inc. v. South Florida Stadium Corp.,* 161 F. Supp. 2d 1357, 1368 (S.D. Fla. 2001) ("The Act does not require ADAAG compliance of existing facilities; accordingly, the Court cannot determine the Defendants' liability from finding that elements of the Stadium deviate from those Standards. The Standards *nevertheless provide valuable guidance* for determining whether an existing facility contains architectural barriers.")

Overview of the ADAAG

- First developed in 1991 (“the 1991 Standards”), and revised in 2004.
- Revised and expanded in March 2010 (“the 2010 ADAAG”).
- Extremely detailed, running 10 chapters and over 100 pages, complete with architectural diagrams.
- Governs everything from assistive listening devices, to the height of urinals, to ticket sales, to mini-golf facilities, to the slope of parking spaces.

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ADAAG Urinal Dimensions

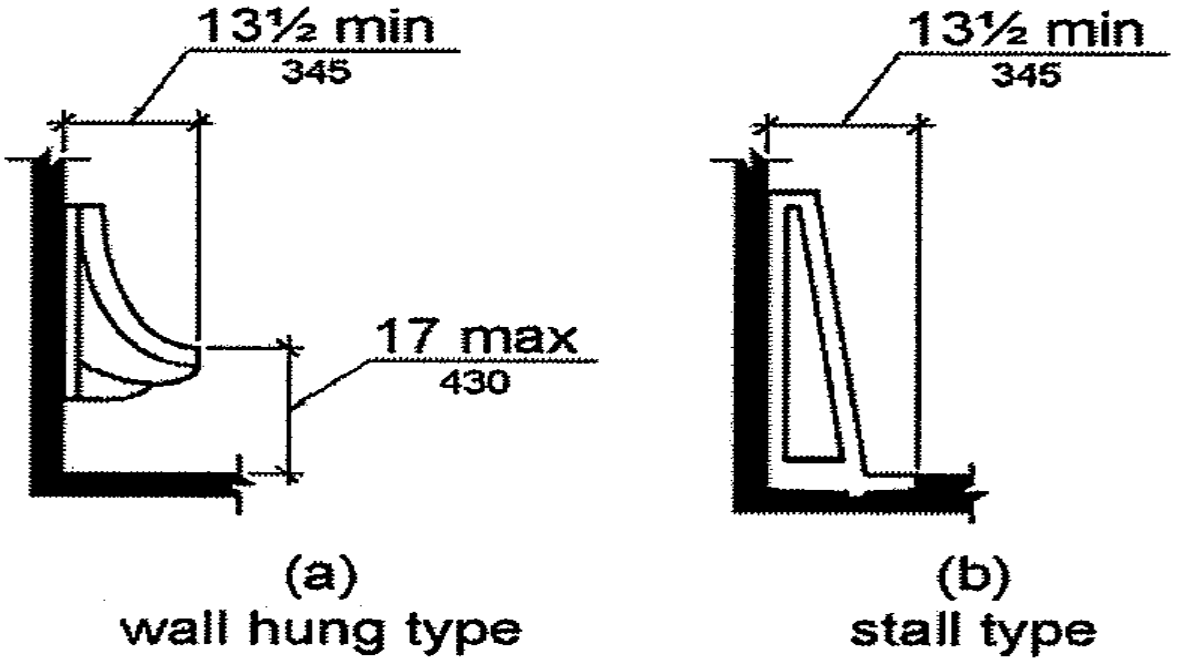


Figure 605.2
Height and Depth of Urinals

ADAAG Washing Machine Specs

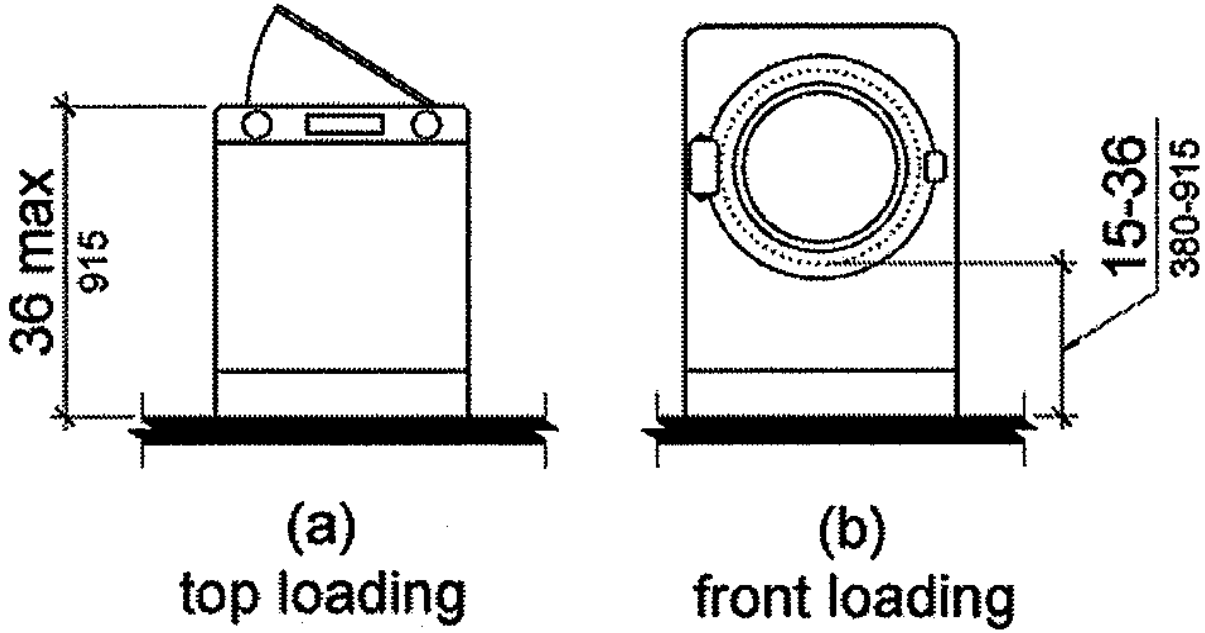
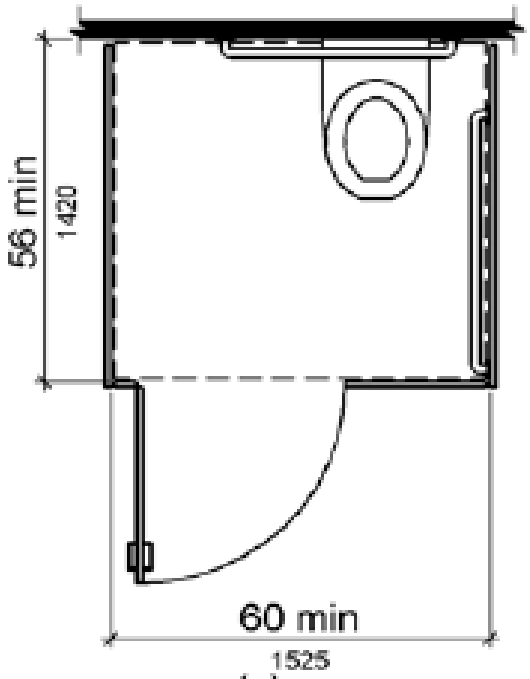
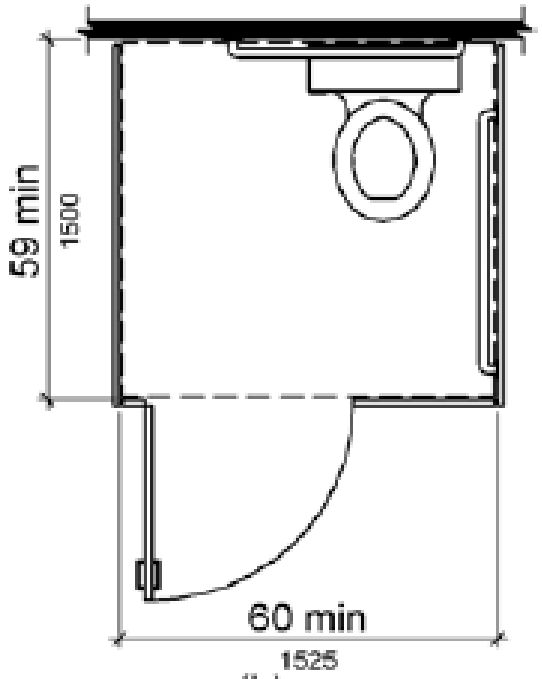


Figure 611.4
Height of Laundry Compartment Opening

ADAAG Accessible Water Closet Specs



(a)
adult wall hung
water closet



(b)
adult floor mounted water closet
and children's water closet

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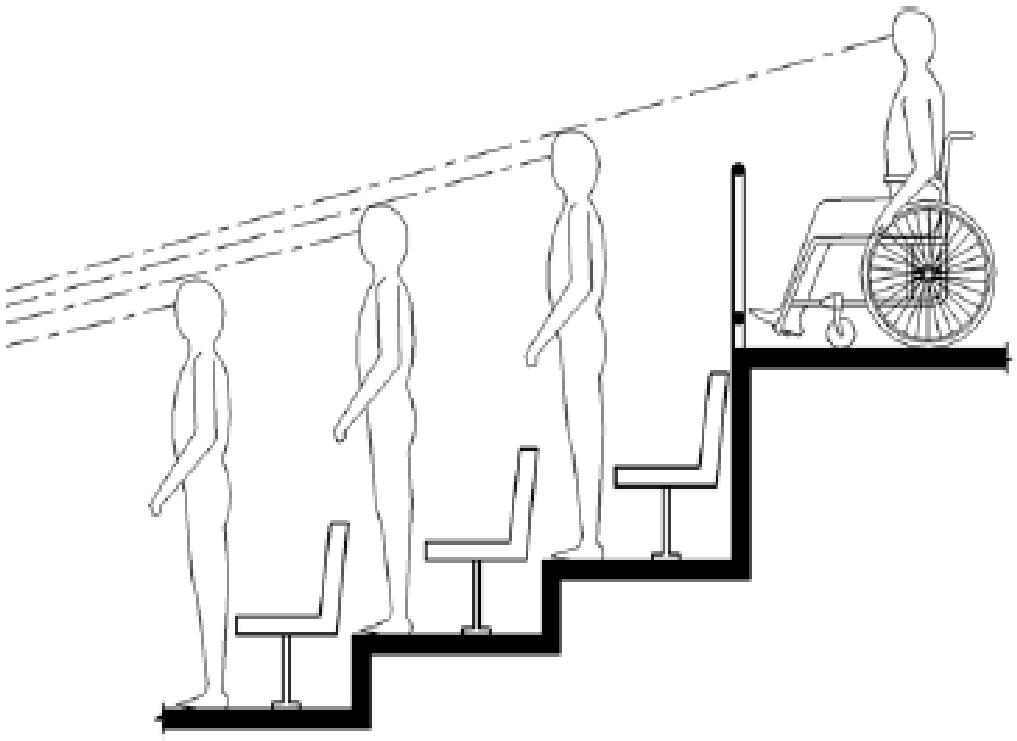
ADAAG Line of Sight Requirements



High-Profile ADAAG Regulations

- It isn't possible to go through every ADAAG standard.
- ADAAG is riddled with exceptions that cannot be summarized here.
- I would highly recommend you download a copy for yourself.
- However, there are a few items that should be easy to identify even for the average city attorney who travels to various locations in a city.
- The next few slides will go through some common problems. This is just a summary, with some exceptions not noted.

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ADAAG Parking Regulations

- Certain number of accessible parking spaces required per number of spaces in a parking facility (ADAAG Table 208.2).
- Slope of parking spaces must not exceed 2.083% in any given direction.
- Accessible spaces must be at least 8 feet wide with 5 foot access aisle, and must also have van accessible spaces.
- Accessible spaces to be located on shortest accessible route.

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ADAAG Path of Travel Regulations

- Accessible route must connect all buildings on site.
- Path of travel with slope in excess of 5% must have handrails, edge protection, and slope no greater than 8%. Also must have level landing at set distances.
- Changes in level more than ¼" and less than ½" must be beveled, and greater than ½" must be ramped.
- Generally, passages must be 36" wide, and in many cases wider (such as at turns). Doors must be 32" (face of door to stop) with certain clear approach space.
- Protruding objects between 27" and 80" AFF must not protrude further than 4".
- Elevator buttons generally should be between 15" and 48".

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ADAAG Curb Ramp Regulations

- Curb ramps are required at all crossings.
- In general, a curb ramp should be 36" wide, with a running slope not to exceed 8.33%, a cross-slope not to exceed 2.083%, and flared sides not to exceed 10%.
- Curb ramps must have a level landing at least 36".
- Curb ramps and the flared sides should not protrude into vehicular traffic or parking spaces or access aisles.
- Ideally, appropriate truncated domes should be provided.

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ADAAG Bathroom Regulations

- Too complicated to list here, but read ADAAG Chapter 6.
- One of the most common sets of complaints from disabled individuals.
- Most bathrooms in existence (even new ones) do not comply.
- This is a high-risk area for lawsuits.

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NEW Coverage Areas in 2010 ADAAG

- Pools.
- Updated bathroom requirements, reach range requirements, and other changes.
- Recreational area guidelines.
- Jails and detention facilities.
- Residential dwelling unit requirements for Title II entities.
- Service animal regulations.

Seen one of these?

http://www.guidehorse.com/

Service Animals

- Defined for the first time: must be a dog or miniature horse.
- Must be allowed to accompany disabled person wherever they go (even where food is served) unless animal is out of control or not housebroken.
- Ask questions only if it's not obvious**.**
  - Apparently cannot ask for proof of vaccinations under text of regulations.
- **Can only ask:**
  1. Is animals required because of a disability?
  2. What task has the dog (or horse) been trained to perform?

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ADA Lawsuits

- Compliance is key, but lawsuits are almost unavoidable under the complicated and exhaustive regulatory scheme.
- Generally do not seek damages, but do seek injunctive relief and fee-shifting, which can be quite expensive.
- Public perception problem stemming from lawsuits.

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How To Avoid ADA Lawsuits

- Think about ADA in design phase for new construction. Make sure contractor and architects are aware and have agreed to abide by 2010 ADAAG.
- Allocate annual allowance to ongoing ADA improvements (focus on high-visibility items like sidewalks and city hall).
- Know dates of alteration and construction and know that major renovations trigger compliance issues.
- Have an active ADA coordinator who responds meaningfully at first citizen complaint.
- In settling ADA lawsuits, require plaintiff to follow grievance procedure in the future.

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How To Defend ADA Lawsuits

1. Does the plaintiff have “standing”?
2. Can you moot the case?
3. Is the regulation enforceable?
4. Statute of limitations?
5. Congruence and proportionality?
6. Is it a program, service, or activity?

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Assessing a Plaintiff's Standing: Was S/he Exposed to the Barrier Before Filing Suit?

- Plaintiffs often bring claims attacking entire facility after being exposed to just one or two barriers, and rely upon an expert survey of the remainder of the facility. This is improper.
- A plaintiff must have been personally exposed to the barrier. Moreover, the existence of standing is determined as of the date suit is filed," *Moyer v. Walt Disney World, Co.,* 146 F.Supp.2d 1249, 1253 (M.D.Fla.2000), and "[b]elated efforts to bolster standing are futile."
- See generally *Wood v. Briarwinds Condominium Ass'n Bd. of Directors,* 369 Fed. Appx. 1, 2 (11th Cir. 2010) ("Further, the district court correctly dismissed Wood's claim that the design of the guest parking spaces were discriminatory, because he did not have standing to bring that claim. His complaint contains no allegation that he ever used those parking spots or suffered any injury himself from their design."); *Norkunas v. Seahorse NB, LLC,* No. 11-12402, 2011 WL 5041705 (11th Cir. Oct. 25, 2011) (same).

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Assessing a Plaintiff's Standing: Are the Requirements for Injunctive Relief Met?

- Because damages are rarely available, almost all ADA access claims seek merely attorneys' fees. However, "[b]ecause injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate—as opposed to merely conjectural or hypothetical—threat of future injury." *Church v. City of Huntsville,* 30 F.3d 1332, 1337 (11th Cir. 1994).
- Many times, there will be inadequate evidence of future injury. *Moranos v. Royal Caribbean Cruises, Ltd.,* 565 F. Supp. 2d 1337, 1339 (S.D. Fla. 2008) (finding plaintiffs "failed to adequately allege facts necessary to establish standing to bring an ADA claim for injunctive relief" where they did not plausibly "indicate that they have any plans to go on another cruise in the future," and only stated in "conclusory" terms that the discrimination they experienced was anything more than "isolated"); *Equal Access for All, Inc. v. Hughes Resort, Inc.,* 2005 WL 2001740, * (N.D. Fla. Aug. 10, 2005) ("[U]nless the plaintiff allege facts giving rise to a plausible inference that he will suffer future disability discrimination by the defendant, he fails to demonstrate the required constitutional 'irreducible minimum.'").

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Mooting the Case

- If a defendant comes into compliance with the ADA during the pendency of the lawsuit, and before the court grants the plaintiff relief, the court loses subject matter jurisdiction based on mootness, and the plaintiffs will not be prevailing parties.
  - *American Ass'n of People with Disabilities v. Harris,* 647 F.3d 1093, 1108 n.33 (11th Cir. 2011) (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.,* 532 U.S. 598, 610 (2001) (rejecting the "catalyst" theory)); see also *Access for the Disabled, Inc. v. Shiv Shraddha, LLC,* No. 8:11–cv–1960–T–33TBM, 2012 WL 2865491, at *4 (M.D. Fla. July 11, 2012) ("Because the Supreme Court invalidated the 'catalyst theory' in Buckhannon, Plaintiffs cannot obtain attorneys' fees merely by demonstrating that Defendant agreed to implement certain property modifications Plaintiffs requested.").
  - But be careful: ANY continuing ADA violation will result in a fee award.

Is the Regulation Relied Upon Privately Enforceable?

- Unless the DOJ is suing, there may be an argument that the regulation is not enforceable.
- *Abrahams v. MTA Long Island Bus,* 644 F.3d 110, 119–20 (2d Cir.2011) (regulation requiring creation of mechanism for ongoing public participation in development and assessment of services for disabled individuals not privately enforceable).
- *Lonberg v. City of Riverside,* 571 F.3d 846, 851–52 (9th Cir.2009) (regulation requiring transition plan for making necessary structural changes not privately enforceable); see also *Ability Ctr. of Toledo v. City of Sandusky,* 385 F.3d 901, 914 (6th Cir.2004) (same).
- *Three Rivers Ctr. for Indep. Living, Inc. v. Housing Auth. of the City of Pittsburgh,* 382 F.3d 412, 430 (3d Cir.2004) (regulation requiring public housing authorities to make certain percentage of units accessible not privately enforceable).
- *Brennan v. Reg'l Sch. Dist. No. 1 Bd. of Educ.,* 531 F.Supp.2d 245, 278 (D.Conn.2007) (regulation requiring establishment of grievance procedures not privately enforceable).

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Statute of Limitations Defense

- The ADA does not have a statute of limitations, so Alabama's default 2-year statute applies. *Hall v. Alabama,* 2010 WL 582076 at *5 (M.D. Ala. Feb. 18, 2010).
- It is generally the rule that that "[c]laims of discrimination accrue when the plaintiff is informed of the discriminatory act." *Everett v. Cobb Cnty. Sch. Dist.,* 138 F.3d 1407, 1410 (11th Cir. 1998).
- So, was the plaintiff exposed to the barrier for the first time more than 2 years ago? If so, you may have a SOL argument. *Moyer v. Walt Disney World Co.,* 146 F. Supp. 2d 1249, 1254 (M.D. Fla. 2000) (holding claims against EPCOT Center accrued when plaintiff alleged he personally encountered ADA violations at specific locations).

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Congruence and Proportionality?

- The ADA was enacted pursuant to Congress' powers under Section 5 of the Fourteenth Amendment and the Commerce Clause.
- I have argued in two cases that Congress exceeded its powers under those provisions, at least with regard to requiring that facilities are *not* associated with the exercise of a fundamental right be modified.
- See generally *McBay v. City of Decatur,* Case No. 5:11-CV-03273-CLS (N.D. Ala.) (pending on motion to dismiss).

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Program, Service or Activity?

- It is possible to argue that the plaintiff's claim fails because the barriers do not preclude access to a recognized "service, program or activity."
- A few courts have rejected sidewalk claims on the basis that a sidewalk is not a "service," but this is increasingly a minority view. See *Iverson v. City of Boston,* 452 F.3d 94, 102-03 (1st Cir. 2006) ("The plaintiffs' complaint offered no meaningful explanation as to how—if at all—the conditions of municipal *streets* and *sidewalks* deprived Iverson (or anyone else) of access to any public *service*, *program*, or *activity*. For that reason alone, the plaintiffs' barrier-removal claim fails as a matter of pleading.") (emphasis supplied); *New Jersey Protection & Advocacy, Inc. v. Township of Riverside,* No. 04-5914, 2006 WL 2226332, at *3 (D.N.J. Aug. 2, 2006) ("[T]his court deigns to find that sidewalks are, in and of themselves, programs, services, or activities for the purpose of the ADA's implementing regulations").
- Moreover, the Eleventh Circuit has rejected this argument in the contexts of arrest cases. (*Bircoll* holds that an arrest can be "discrimination" and thus there is no need to examine whether it is a service, program, or activity.)

Questions?

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