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Federal Highway Administration ADA Compliance

Scoping Study

The Federal Highway Administration

The Federal Highway Administration (FHWA) is an agency within the U.S. Department of Transportation (USDOT) that supports State and local governments in the design, construction, and maintenance with the public right-of-way of the Nation's highway system (Federal Aid Highway Program) and various federally and tribal owned lands (Federal Lands Highway Program). FHWA meets this responsibility through financial and technical assistance to State and local governments. This report focuses and presents the findings with respect to the FHWA and the public right-of-way, although doing so with respect to the USDOT is likewise applicable in most cases.

FHWA Regulatory Authority

As part of FHWA's regulatory responsibility under Title II, Subpart A, of the Americans with Disabilities Act (ADA) (42 USC 12132) and Section 504 of the Rehabilitation Act of 1973 as amended in 1978 (Section 504) (29 USC 794(a)), the FHWA ensures that recipients of Federal aid and State and local entities that are responsible for roadways and pedestrian facilities do not discriminate on the basis of disability in any highway transportation program, activity, service or benefit they provide to the general public; and to ensure that people with disabilities have equitable opportunities to use the public rights-of-way system.¹

Title II of the ADA prohibits States and other public entities from discriminating on the basis of disability in the entities' services, programs, or activities, including access to the public right-of-way (42 USC 12132) regardless of receipt of Federal funding or assistance. The Department of Justice (DOJ) is the Federal agency responsible for coordinating the activities of Federal agencies with respect to State and local government compliance with Title II of the ADA. In 2010, DOJ adopted the 2004 ADA Accessibility Guidelines (2004 ADAAG) as a component of its standards for accessible design. These accessibility standards were developed primarily for buildings but are to be used for the features in the public right-of-way covered by the standards.² FHWA's implementing regulations for the ADA are found in 49 CFR Part 37.

Section 504 prohibits discrimination on the basis of disability in Federally funded or assisted programs (29 USC 794(a)). FHWA's implementing regulations for Section 504 are found in 49 CFR Part 27. In 2006, FHWA adopted the 2004 ADAAG as accessibility standards under Section 504, but in doing so, FHWA added Section 406.8, which requires detectable warnings at curb ramps.³

¹ <https://www.fhwa.dot.gov/civilrights/programs/ada.cfm>

² <https://www.fhwa.dot.gov/programadmin/pedestrians.cfm>

³ <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/ada-standards/chapter-4-accessible-routes>

In 2013, FHWA and DOJ issued Joint Technical Assistance on the ADA requirements to provide curb ramps when streets, roads, or highways are altered through resurfacing.⁴

The U.S. Access Board is in the process of developing guidelines specifically for the public right-of-way⁵. A draft of the proposed guidelines is posted on the Access Board's web site⁶ as the Public Rights-of-Way Accessibility Guidelines (PROWAG). After completion of the Access Board's rulemaking, the DOJ and FHWA will need to adopt the PROWAG guidelines into their respective ADA and Section 504 regulations before the guidelines can be considered enforceable standards. Until the proposed guidelines are adopted as standards, FHWA considers the proposed PROWAG guidelines to represent best practices for accessibility issues in the public right-of-way not covered by DOJ's or FHWA's currently adopted standards.⁷ The currently adopted standards are primarily the 2004 ADAAG (also adopted under Section 504) and 2013 Joint Technical Assistance memorandum.

⁴ https://www.fhwa.dot.gov/civilrights/programs/doj_fhwa_ta.cfm

⁵ A detailed history of the development of accessibility guidelines for the public right-of-way may also be found in Quiroga, C., & Turner, S. (2008). ADA compliance at transportation agencies: A review of practices. *College Station: Texas Transportation Institute*.

⁶ <https://www.access-board.gov/guidelines-and-standards/streets-sidewalks/public-rights-of-way/proposed-rights-of-way-guidelines>

⁷ <https://www.fhwa.dot.gov/programadmin/pedestrians.cfm>

FHWA ADA Compliance Requirements for Funding Opportunities

FHWA's implementing regulations for both the ADA (42 USC) and Section 504 (29 USC) in the public right-of-way are found in 49 CFR Part 37 and Part 27 respectively, and require any project, regardless of whether notice is provided or not, for construction or alteration of the public right-of-way that provides access to pedestrians must be made accessible to persons with disabilities. These regulations will NOT generally be noted within the specific wording of a FHWA, or other USDOT administration as applicable, funding opportunity. Rather, the funding opportunity announcement will contain the following language, often under the *Federal Award Administration Information* section, *Administrative and National Policy Requirements* subsection;

For an illustrative list of the applicable laws, rules, regulations, executive orders, policies, guidelines, and requirements as they relate to a [funding opportunity title] administered by the FHWA, please see [web address to the funding opportunity's Agreements Exhibit].

The funding opportunity's Agreements Exhibits, found at the given web address, will contain the Legislative Authority, General Terms and Conditions, Applicable Federal Laws and Regulations, and Assurances. FHWA's implementing regulations for the ADA and Section 504 will be found under Applicable Federal Laws and Regulations, and will read;

By entering into the agreement for a [funding opportunity title], the Recipient assures and certifies, with respect to this Grant, that it will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance, and use of Federal funds for this Project. Performance under this agreement shall be governed by and in compliance with the following requirements, as applicable, to the type of organization of the Recipient and any applicable sub-recipients. The applicable provisions to the agreement include, but are not limited to, the following:

General Federal Legislation (only those relevant shown here)

Americans with Disabilities Act of 1990 – 42 U.S.C. § 12101, et seq.

Section 504 of the Rehabilitation Act of 1973, as amended – 29 U.S.C. § 794

General Federal Regulations (only those relevant shown here)

Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance – 49 C.F.R. Part 27

DOT's implementing ADA regulations for transit, including the ADA Accessibility Guidelines in Part 37, Appendix A – 49 C.F.R. Parts 37 and 38

The language presented here is relevant to the FHWA's BUILD-TIGER Discretionary Grants programs for capital investments in surface transportation infrastructure, the most common funding used for improvements to the pedestrian infrastructure in the public right-of-way. For an example of the Agreements Exhibit for the most recent *Notice of Funding Opportunity for the Department of Transportation's National Infrastructure Investments Under the Consolidated*

*Appropriations Act, 2018*⁸ visit

https://ops.fhwa.dot.gov/Freight/infrastructure/tiger/fy2016_gr_exhbt/index.htm. Please note that the narratives present here may not reflect the exact wording for individual funding opportunities, there may be minor differences in phrasing.

Various funding opportunities may be used to meet ADA and Section 504 requirements. Each program has its own specific requirements and provisions. Further details on these sources of funding may be found at

https://www.fhwa.dot.gov/environment/bicycle_pedestrian/funding/funding_opportunities.cfm.

⁸ https://www.transportation.gov/sites/dot.gov/files/docs/policy-initiatives/build/114796/fed-reg-build-nofo-2018_0.pdf

FHWA ADA Oversight and Compliance Procedures

The FHWA is legally obligated to implement compliance procedures relating to transportation, including those for highways, streets, and traffic management. The FHWA Office of Civil Rights oversees compliance.⁹

The FHWA follows consolidating guidance concerning FHWA's oversight of States' and localities' compliance with the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504) to ensure that persons with disabilities may access the public right of way without discrimination.¹⁰ The FHWA called for nondiscrimination in the nation's transportation system in 2000 and provided clarification of FHWA's oversight role in 2006 through memorandum¹¹⁻¹².

Key FHWA oversight responsibilities include¹³;

- Ensure that FHWA recipients and subrecipients are informed of their responsibilities to provide accessibility in their programs, activities, and facilities (i.e., public rights-of-way).
- Ensure that recipients and subrecipients are applying appropriate accessibility standards to all transportation facilities.
- Ensure that all complaints filed under Section 504 or the ADA are processed in accordance with established complaint procedures.

Specifically, the FHWA has regulatory responsibility for ensuring compliance with the ADA and Section 504 in four areas¹⁴:

- For surface transportation projects under direct FHWA control (e.g., Federal Lands projects): FHWA is responsible for ensuring that project planning, design, construction, and operations adequately address pedestrian access for people who have disabilities.
- For Federally funded surface transportation projects that provide pedestrian facilities within the public right-of-way: FHWA is responsible for ensuring that the public agencies' project planning, design, and construction programs provide pedestrian access for persons with disabilities. FHWA-funded projects outside of the public right-of-way, such as Transportation Enhancement projects, must also adhere to these requirements.
- For pedestrian facilities within the public right-of-way, or any other FHWA enhancement project, regardless of funding source: FHWA is responsible for investigating complaints. 28 CFR 35.170 – 35.190.

⁹ <https://www.fhwa.dot.gov/civilrights/programs/ada.cfm>

¹⁰ https://www.fhwa.dot.gov/civilrights/memos/ada_memo_clarification.cfm

¹¹ <https://www.fhwa.dot.gov/civilrights/programs/ada.cfm>

¹² https://www.fhwa.dot.gov/civilrights/programs/ada_sect504qa.cfm#q1

¹³ <https://www.fhwa.dot.gov/civilrights/programs/ada.cfm>

¹⁴ https://www.fhwa.dot.gov/civilrights/programs/ada_sect504qa.cfm#q1

- FHWA should provide or encourage accessibility training for Federal, State, and local agencies and their contractors.

FHWA does not have ADA oversight responsibilities for projects outside of the public right-of-way that do not use Federal surface transportation program funds.¹⁵

The FHWA meets in regulatory responsibility by ensuring that recipients of Federal aid and State and local entities that are responsible for roadways and pedestrian facilities (1) have a transition plan setting forth the steps necessary to make its existing facilities accessible to persons with disabilities, typically referred to as updates¹⁶, (2) that new construction or alteration of the public right-of-way be made accessible to persons with disabilities as per the ADA and Section 504, (3) investigating external complaints of discrimination, and (4) providing training on ADA and Section 504 compliance.

1. Transition Plans

The FHWA is responsible to ensure that any public transportation agency with more than 50 employees conduct a self-evaluation and make a transition plan setting forth the steps necessary to make its existing facilities accessible to persons with disabilities (28 CFR 35.150(d))¹⁷. These public agencies are primarily each State's Transportation Agency (State DOT) and local or regional transportation agencies such as those for metropolitan areas.

The transition plan must include a schedule for providing access features, which should first provide for pedestrian access upgrades to existing State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas. The transition plan should accomplish the following four tasks:

- conduct a self evaluation to identify physical obstacles in the public agency's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
- describe in detail the methods that will be used to make the facilities accessible to the maximum extent feasible;
- specify the schedule for taking the steps necessary to upgrade pedestrian access to meet ADA and Section 504 requirements in each year following the transition plan; and
- indicate the official responsible for implementation of the plan.

The transition plan and its identified needs should be fully integrated into the public agency's Statewide Transportation Improvement Program (STIP) and metropolitan Transportation Improvement Program (TIP). The public agency should specifically target any local community groups representing persons with disabilities for comment, to ensure that the agency is meeting the local priorities of the persons with disabilities in that community. Agencies should incorporate accessibility improvements into the transportation program on an ongoing basis

¹⁵ https://www.fhwa.dot.gov/civilrights/programs/ada_sect504qa.cfm#q1

¹⁶ https://www.fhwa.dot.gov/civilrights/programs/ada_sect504qa.cfm#q1

¹⁷ https://www.fhwa.dot.gov/civilrights/programs/ada_sect504qa.cfm#q1

An agency's transition plan should have been completed by January 26, 1992, and should be based on updates of the self-evaluation conducted to comply with the requirements of Section 504. The ADA deadline for completing the improvements listed in the transition plans was January 26, 1995. However, the ADA transition plan process is ongoing and should be updated periodically to ensure the needs of the community continue to be met. As of 2006, not all State's and localities' had completed their self-evaluation and transition plans. In 2015, FHWA issued a memorandum clarifying FHWA's policies and procedures with regard to State DOT ADA transition plan requirements and requested that FHWA Division Offices review their State's transition plan for compliance with regulatory requirements.¹⁸

The FHWA monitors the compliance of the self-evaluation and transition plans of Federal-aid recipients (49 CFR 27.11). The FHWA Division offices review pedestrian access compliance with the ADA and Section 504 as part of its routine oversight activities as defined in their stewardship plan. Loss of Federal aid eligibility may result from non-compliance.

2. Planning, Design, and Construction Program Review

FHWA works to include ADA and Section 504 requirements in States' and localities' transportation codes, whereby enforcement of state codes is the responsibility of state or local officials – usually through plan reviews and construction inspections. This is done by cooperative agreements between FHWA and State DOTs, whereby State DOTs adopt FHWA's ADA and Section 504 compliance standards as part of their standards and enforcement, or State DOTs adopt standards that are equal to or exceed FHWA's. The cooperative agreement certifies that State or local standards meet or exceed FHWA's ADA and Section 504 requirements. In this way, ADA and Section 504 compliance is reviewed for each program as part of the state or local planning, design, and construction process without either delegating enforcement authority to the State DOTs or eliminating an individual's right to seek relief through legal processes.¹⁹ The cooperative agreement is often referred to as the *Stewardship and Oversight Agreement*.

FHWA will conduct a program review of State DOT and local transportation agencies' planning, design, and construction projects at the request of the agency. However, FHWA may also determine compliance through a program review, including site inspections, without the request of the agency as deemed necessary by FHWA.

State DOT may sometimes be referred to as STA, or State Transportation Agency, and local transportation agency may sometimes be referred to as LPA, or Local Planning Authority.

¹⁸ https://www.fhwa.dot.gov/civilrights/memos/ada_transition_plan_111215.cfm

¹⁹ <https://www.ada.gov/certcode.htm>

3. Complaint Investigation

The FHWA has a formal process and procedures for investigating external complaints of discrimination under the ADA and Section 504 to provide due process for complainants and respondents; *Procedures Manual for Processing External Complaints of Discrimination*²⁰.

Any person, or representative, that believe they, or a specific class of person, have been subjected to discrimination prohibited by the ADA or Section 504 may submit a written complaint to the FHWA, USDOT, State Transportation Agency (State DOT), or Department of Justice within 180 days of the last date of the alleged discrimination, generally. Complaints should be in writing and provide an explanation of what happened, the complainant's contact information, basis of the complaint, identification of the respondent, sufficient information regarding the allegation(s), date(s) of the alleged act(s), and be signed by the complainant or the complainant's representative. Complaints may be filed in person, via mail, fax, e-mail (which includes a copy of the signed/dated complaint as an attachment), or by other alternatives for any person requiring a reasonable accommodation²¹.

FHWA Headquarters
Office of Civil Rights
1200 New Jersey Avenue, SE. (HCR-40)
Washington, DC 20590

Sharon Field
ADA Program Team Leader
(202) 366-4634
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Contact information as of October 3, 2018.

4. Training

FHWA maintains all available training, information, and resources that relate to the ADA and Section 504 which may affect the research, planning, design, construction, or operations of any Federal Highway Administration project at <https://www.fhwa.dot.gov/accessibility/#train>.

²⁰ <https://www.fhwa.dot.gov/civilrights/programs/finalcomplaintmanual110410.cfm>

²¹ <https://www.fhwa.dot.gov/civilrights/programs/iecd.cfm>

FHWA ADA Non-Compliance Actions

Where noncompliance is determined to exist for Federal-aid recipients, FHWA can withhold Federal money after enforcement process required in 49 CFR 27.121-27.129 under Section 504. Specifically, FHWA may suspend, terminate, or refuse to grant or continue Federal financial assistance, in addition to any other enforcement. The compliance process is described in 49 CFR 27 Subpart C.

For State or local governments, regardless of Federal funds, FHWA seeks written voluntary compliance with public agencies, first informally and second formally through a 'Letter of Findings'. If voluntary compliance negotiations are unsuccessful, FHWA reports the case to the Attorney General for appropriate action under the ADA (28 CFR 35.173-35.174). Appropriate action may be a civil suit to enforce Title II of the ADA.

Private parties may also bring a suit to enforce their rights at any time, regardless of whether the FHWA has found a violation²².

In 2013, FHWA and DOJ issued Joint Technical Assistance on the ADA requirements to provide curb ramps when streets, roads, or highways are altered through resurfacing, a primary means by which the public right-of-way is updated.²³ Resurfacing constitutes an update to the public right-of-way, as determined by case law in *Kinney v. Yerusolim*, 9F.3d 1067 (3d Cir. 1993). Cert. Denied sub nom., *Hoskins v. Kinney*, 511 U.S. 1033.

²² Bleyer, K. (1992). The Americans with Disabilities Act: Enforcement Mechanisms. *Mental and Physical Disability Law Reporter*, 16(3), 347-350.

²³ https://www.fhwa.dot.gov/civilrights/programs/doj_fhwa_ta.cfm

Transportation Administrations Responsible for ADA Compliance

The Department of Justice regulations designate the U.S. Department of Transportation (USDOT) as the agency responsible for overseeing transportation agencies' compliance with the ADA (28 CFR 35.190(b)(8)). The USDOT issues and enforces the ADA and Section 504 transportation regulations²⁴. There are a number of administrations within the USDOT. The USDOT had delegated responsibility to these administrations for ADA compliance within the scope of each administration.

Federal Transit Administration – Most of the ADA provisions fall under the Federal Transit Administration (FTA). The FTA Office of Civil Rights is responsible for civil rights compliance and monitoring to ensure nondiscriminatory provision of public transit services.

Federal Highway Administration – Oversees ADA compliance in the public right-of-way (roadway travel lanes, medians, planting strips, sidewalks) and on projects using surface transportation funds. Compliance and monitoring is through the FHWA Office of Civil Rights whose mission is to lead the multidisciplinary highway community in ensuring all programs are delivered in a nondiscriminatory manner.

Federal Railroad Administration – Administers intercity and commuter rail compliance with ADA.

Federal Motor Carrier Safety Administration – Administers ADA regulations requiring accessible, timely Over-the-Road Bus service for passengers with disabilities.

²⁴ https://www.fhwa.dot.gov/civilrights/programs/ada_sect504qa.cfm#q1

Additional Materials and Definitions

FHWA Consolidating Guidance (eliminates duplicative guidance found across FHWA guidance)

Pedestrian Facilities in the Public Right-of-Way (proposed) - <https://www.access-board.gov/guidelines-and-standards/streets-sidewalks/public-rights-of-way/proposed-rights-of-way-guidelines>

FHWA Accessibility Guidance (unconsolidated) -

https://www.fhwa.dot.gov/ENVIRONMENT/transportation_enhancements/guidance/accessibility_guidance/

49 CFR

Code of Federal Regulations title for the broad area of Transportation subject to regulation.

Part 27 – Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance. Authority for is Section 504 of the Rehabilitation Act of 1973, as amended (29 USC 794).

Part 37 – Transportation Services for Individuals with Disabilities (ADA). Authority for is the ADA (49 USC 12101-12213).

Part 38 – Americans with Disabilities ACT Accessibility Specifications for Transportation Vehicles. Authority for is the ADA (49 USC 12101-12213).