

DEPARTMENT OF JUSTICE**Office of the Attorney General****28 CFR Part 35**

[Order No. 1999-95]

Nondiscrimination on the Basis of Disability in State and Local Government Services**AGENCY:** Department of Justice.**ACTION:** Proposed rule.

SUMMARY: This proposed rule would amend the Department of Justice regulation implementing Title II of the Americans with Disabilities Act to clarify the requirement for installation of curb ramps at existing pedestrian walkways. The proposal would extend the time period for compliance to January 26, 2000, for curb ramps serving State and local government facilities, transportation, places of public accommodation, other places of employment, and at the residences of individuals with disabilities. It would extend the time period for providing curb ramps at existing pedestrian walkways in other areas until January 26, 2005, and it would require public entities to include a schedule for the implementation of these requirements in their transition plans.

DATES: To be assured of consideration, comments must be in writing and must be received on or before January 26, 1996. Comments that are received after the closing date will be considered to the extent practicable.

ADDRESSES: Comments on this proposed rule should be sent to: John L. Wodatch, Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, Rulemaking Docket 007, P.O. Box 65485, Washington, DC 20035.

Comments may also be sent to the Civil Rights Division via the Internet. Comments should be addressed to: Comments_ADA@justice.usdoj.gov. If your comment is transmitted in a word processing file, please specify the format. Flat ASCII files are preferred.

Comments submitted to the Department of Justice will be available for inspection in the offices of the Disability Rights Section, 1425 New York Avenue NW., Washington, DC from 9:00 a.m. to 5:00 p.m., Monday through Friday, except legal holidays from December 13, 1995, until the Department publishes the rule in final form. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or magnification devices.

To be included in the record of this rulemaking, comments must include the

name and address of the commenter. Commenters who choose to transmit their comments via the Internet should include their name and address in the text of the comment. Electronically transmitted comments that identify the commenter by screen name only will not be included in the record.

FOR FURTHER INFORMATION CONTACT: Janet Blizard, (202) 307-0663. The ADA Information Line, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, Washington, DC 20530, (800) 514-0301 (voice), (800) 514-0383 (TDD). These telephone numbers are toll-free numbers.

SUPPLEMENTARY INFORMATION:**Availability of Accessible Format**

Copies of this rule are available in the following accessible formats: large print, Braille, electronic file on computer disk, and audio-tape. Copies may be obtained from the Disability Rights Section at the telephone numbers listed above. The rule is also available on the Civil Rights Division's electronic bulletin board at (202) 514-6193. This telephone number is not a toll-free number. The rule is also available on the Internet. It can be accessed with gopher client software (gopher.usdoj.gov), through other gopher servers using the University of Minnesota master gopher (under North America, USA, All, Department of Justice), with World Wide Web software (<http://www.usdoj.gov>), or through the White House WWW server (<http://www.whitehouse.gov>).

Background

The Department of Justice's (Department) regulation implementing title II of the Americans with Disabilities Act of 1990, Pub. L. 101-336, 42 U.S.C. 12131-12134 (ADA), provides that a public entity may not deny the benefits of its programs, activities, and services to individuals with disabilities because its facilities are inaccessible. 28 CFR 35.149. Under this regulation, maintenance of pedestrian walkways by public entities is a covered program that is required to be made accessible by the installation of curb ramps where pedestrian walkways cross curbs. Because of the unique and significant capital expenses involved in the installation of curb ramps where existing pedestrian routes cross curbs, Senators Bob Dole, Tom Harkin, Orrin Hatch, Edward Kennedy, and John McCain, who were among the principal Senate sponsors of the ADA, have asked the Department to amend the title II regulation to provide additional time for public entities to meet their obligation to provide access to public pedestrian

walkways. The Department considers the suggested extension to be a reasonable and appropriate modification and accordingly is issuing this proposed rule.

On July 26, 1991, the Department published its final rule implementing subtitle A of title II of the ADA. 56 FR 35694. This regulation was codified at 28 CFR Part 35. Subtitle A of title II protects qualified individuals with disabilities from discrimination on the basis of disability in the services, programs, or activities of all covered public entities. It extends the prohibition of discrimination established by section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, to all activities of State and local governments, including those that do not receive federal financial assistance, and incorporates specific prohibitions of discrimination on the basis of disability from titles I, III, and V of the ADA.

This proposed rule would revise the program accessibility requirements currently published at 28 CFR 35.150 to incorporate specific guidance with respect to the installation of curb ramps at intersections that are not otherwise being altered. This proposed rule would not affect the requirements of 28 CFR 35.151(e), which requires that if walkways are provided, curb ramps or other sloped areas must be installed at all newly constructed or altered streets, roads, highways, and street-level pedestrian walkways. Thus, the ADA would continue to require that, whenever a State or local government puts in a new street or alters an existing street, it must also construct curb ramps at any intersection that has curbs that bar entry from a pedestrian walkway.

This proposed rule is distinct from the Department's June 20, 1994 (59 FR 31808) proposal to amend 28 CFR 35.151. The Department's June 1994 proposal would adopt, as the ADA Standards for Accessible Design, the ADA Accessibility Guidelines for Buildings and Facilities, revised and published in an interim final rule of the same date by the Architectural and Transportation Barriers Compliance Board (Access Board). Comments on the Department's proposed rule and the Access Board's interim final rule are now being considered. This proposal to amend 28 CFR 35.150 does not affect the Department's June 20, 1994, notice of proposed rulemaking or the Access Board's interim final rule.

Program Accessibility

Title II of the ADA prohibits discrimination on the basis of disability in any of the services, programs, or activities of a covered public entity.

Subpart D of the title II regulation, Program Accessibility, provides that a public entity may not deny the benefits of its programs, activities, and services to individuals with disabilities because its facilities are inaccessible. A public entity's services, programs, or activities, when viewed in their entirety, must be readily accessible to and usable by individuals with disabilities. This standard, known as "program accessibility," applies to all programs operated in existing facilities by a public entity. Public entities, however, are not necessarily required to make each of their existing facilities accessible.

In addition, a public entity does not have to take any action that it can demonstrate would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. This determination can only be made by the head of the public entity or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. The determination that undue burdens would result must be based on all resources available for use in the program. If an action would result in such an alteration or such burdens, the public entity must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits and services of the program or activity.

Installation of curb ramps to provide access to existing pedestrian walkways on existing streets that are not otherwise being altered may be necessary in order to provide access to the "program" of using public streets and walkways. As explained in the preamble to the final title II regulation—

The legislative history of title II of the ADA makes it clear that, under title II, "local and state governments are required to provide curb cuts on public streets." Education and Labor report at 84. As the rationale for the provision of curb cuts, the House report explains, "The employment, transportation, and public accommodation sections of * * * [the ADA] would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." Id. Section 35.151(e), which establishes accessibility requirements for new construction and alterations, requires that all newly constructed or altered streets, roads, or 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, and all newly constructed or altered street level pedestrian walkways must have curb ramps or other sloped areas at intersections to streets, roads, or highways. A new paragraph (d)(2) has been added to the final rule to

clarify the application of the general requirement for program accessibility to the provision of curb cuts at existing crosswalks. This paragraph requires that the transition plan include a schedule for providing curb ramps or other sloped areas at existing pedestrian walkways, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, public accommodations, and employers, followed by walkways serving other areas. Pedestrian "walkways" include locations where access is required for use of public transportation, such as bus stops that are not located at intersections or crosswalks. 56 FR 35710.

The Department further explained the application of the concept of program accessibility in its Title II Technical Assistance Manual, which advises that:

Public entities that have responsibility or authority over streets, roads, or walkways must prepare a schedule for providing curb ramps where pedestrian walkways cross curbs. Public entities must give priority to walkways serving State and local government offices and facilities, transportation, places of public accommodation, and employees, followed by walkways serving other areas. This schedule must be included as part of a transition plan. * * *

To promote both efficiency and accessibility, public entities may choose to construct curb ramps at every point where a pedestrian walkway intersects a curb. However, public entities are not necessarily required to construct a curb ramp at every such intersection.

Alternative routes to buildings that make use of existing curb cuts may be acceptable under the concept of program accessibility in the limited circumstances where individuals with disabilities need only travel a marginally longer route. In addition, the fundamental alteration and undue burdens limitations may limit the number of curb ramps required.

To achieve or maintain program accessibility, it may be appropriate to establish an ongoing procedure for installing curb ramps upon request in areas frequented by individuals with disabilities as residents, employees, or visitors. Section II-5.3000.

The title II regulation requires public entities to achieve program accessibility by January 26, 1992. Where structural changes to existing facilities are required to provide program accessibility, section 35.150(c) provides that such structural changes must be made as expeditiously as possible, but in no event later than January 26, 1995, unless the public entity can demonstrate that meeting this deadline would result in a fundamental alteration of its program or would impose undue financial and administrative burdens.

This proposed amendment responds to concern expressed by Senators Dole, Harkin, Hatch, Kennedy, and McCain

that the requirement to provide program accessibility to existing intersections by installing curb ramps requires structural alterations to a substantial portion of the existing infrastructure of most cities, and imposes an obligation that many jurisdictions were unable to meet by January 26, 1995. After due consideration, the Department has concluded that modification of the regulation to permit additional time for public entities to achieve compliance is appropriate. This proposed rule would therefore revise 28 CFR 35.150(c) to extend to January 26, 2000, the time period for compliance with the requirements for structural alterations to provide curb ramps in pedestrian walkways to provide access to State and local government facilities, transportation, places of public accommodation, other places of employment, and the residences of individuals with disabilities. The proposed rule would extend the deadline for providing access to existing pedestrian walkways in other residential and non-commercial areas to January 26, 2005. It is the Department's hope that this extension will provide the additional flexibility necessary for State and local governments to comply with the ADA in light of strained fiscal resources, and that it will actually increase the number of curb ramps that will be installed on this nation's streets.

The Department seeks comments from State and local governments on the difficulties caused by the present deadline for curb ramps. While anecdotal evidence is useful, the Department would like to receive comprehensive information about the fiscal impact of the curb ramp requirement on the budgets of State and local governments, including the cost of installing curb ramps on existing pedestrian walkways, the number of curb ramps installed, the number of curb ramps that are planned to be added, and the amount of funds used for this requirement, both in terms of gross numbers and percentage of the State or local government budget.

The Department also requests information from people with disabilities and the organizations that represent them on the effect that this proposal will have on their ability to travel in their communities. We would profit from hearing specific, detailed reports, rather than generalized statements.

This proposed rule would require public entities to ensure that providing curb ramps serving the residences of individuals with disabilities shall be given priority over the installation of curb ramps in other residential or non-

commercial areas by requiring the former category of curb ramps to be installed by January 26, 2000. After that date, if a public entity receives a request from an individual with a disability for a curb ramp serving that individual's residence, installing a curb ramp in response to that request should take precedence over the installation of other curb ramps serving residential or non-commercial areas.

It has been suggested that this proposed rule should require public entities to establish a formal process through which individuals with disabilities may request the installation of curb ramps at pedestrian walkways serving their residences, and should further require that curb ramps requested through this process be installed within one year of the request. This would represent a significant change from the Department's current policy, which recommends, but does not require, the development of a request procedure, and does not require the installation of curb ramps at the residences of individuals with disabilities to be given priority over the installation of curb ramps serving public and commercial facilities.

The Department recognizes that it may be beneficial to individuals with disabilities to be assured that they will be able to have curb ramps installed in the public pedestrian routes serving their residences. However, the Department is concerned, given the limitations on available public funds, that the imposition of a requirement to provide curb ramps at private residences within a year of a request may inhibit the ability of a public entity to give priority to installing curb ramps on more heavily traveled routes serving public and commercial facilities.

The Department is specifically seeking public comment on this issue to assist us in determining whether the installation of curb ramps at private residences should be given priority over the installation of curb ramps in public and commercial areas. The Department also invites recommendations about ways in which such a process could be implemented fairly and efficiently.

Concern has been expressed about the possible effect of this rule on the usability of transportation systems because bus stops may lack curb ramps for a longer period of time. It is feared that a lack of accessible municipal bus stops may defeat transportation providers' efforts to make their systems accessible. The Department is specifically seeking comments regarding the impact of this rule on such systems and suggestions regarding how to address that impact.

Finally, the proposed rule requires public entities with 50 or more employees that choose to take advantage of this extension of time to amend their transition plans to establish specific schedules for providing access to public pedestrian walkways in compliance with the deadlines established by this proposed rule.

This proposed rule, while extending the deadline for constructing curb ramps necessary to provide program access, expressly provides that access to pedestrian walkways shall be provided as expeditiously as possible. By requiring public entities that take advantage of the new deadlines to develop a transition plan with a specific compliance schedule, the Department anticipates that public entities will not use the extension as a means of delaying compliance, but will view their obligation to provide access to public pedestrian walkways as an ongoing process that will result in a steady improvement in the accessibility of public pedestrian routes.

In developing a revised transition plan, public entities must comply with 28 CFR 35.150(d)(1), which requires public entities to provide an opportunity for interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. Public entities should be aware that individuals with disabilities who rely on curb ramps to enable them to use the public walkways may provide valuable insight on the accessibility of public programs, activities, and services. For example, individuals with mobility impairments may be the best source of information about locations where existing curbs constitute significant barriers to their use of public streets and pedestrian walkways.

Regulatory Process Matters

This proposed rule has been drafted in accordance with the principles of Executive Order 12866. The Department has determined that it is a significant regulatory action. Accordingly, it has been reviewed and approved by the Office of Management and Budget.

Executive Order 12875 prohibits executive departments and agencies from promulgating any regulation that is not required by statute and that creates a mandate upon a State, local, or tribal government unless certain conditions are met. This proposed rule creates no new mandates. Consistent with the spirit of Executive Order 12875, this regulation modifies an existing regulatory requirement to provide

flexibility to covered public entities in meeting their obligations under title II of the ADA.

The Department has also determined that this proposed rule would not have a significant economic impact on a substantial number of small entities because it imposes no new obligations. Instead, it provides greater flexibility in the implementation of requirements now established in 28 CFR 35.150. Therefore, it is not subject to the Regulatory Flexibility Act, 5 U.S.C. 601-611.

The transition plan required by this proposed rule is an information collection that is subject to the Paperwork Reduction Act and the regulations established by the Office of Management and Budget in 5 CFR part 1320. Therefore, the Department has submitted this proposed information collection to the Office of Management and Budget for its review and approval.

List of Subjects in 28 CFR Part 35

Administrative practice and procedure, Buildings and facilities, Civil rights, Communications equipment, Individuals with disabilities, Reporting and recordkeeping requirements, State and local governments.

Accordingly, Part 35 of Chapter I of Title 28 of the Code of Federal Regulations is proposed to be amended as follows:

PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

1. The authority citation for 28 CFR Part 35 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; Title II, Pub. L. 101-336 (42 U.S.C. 12134).

2. In § 35.150, paragraphs (c) and (d)(2) are revised to read as follows:

§ 35.150 Existing facilities.

* * * * *

(c) *Time period for compliance.* (1) Except as provided in paragraph (c)(2) of this section, where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made no later than January 26, 1995, but in any event as expeditiously as possible.

(2)(i) A public entity shall comply with the obligations of this section relating to provision of curb ramps or other sloped areas where existing public pedestrian walkways cross curbs at locations serving State and local government offices and facilities, transportation, places of public accommodation, employers, and the residences of individuals with

disabilities no later than January 26, 2000, but in any event as expeditiously as possible.

(ii) A public entity shall comply with the obligations of this section relating to provision of curb ramps or other sloped areas where existing public pedestrian walkways cross curbs at areas not subject to paragraph (c)(2)(i) of this section no later than January 26, 2005, but in any event as expeditiously as possible.

(d) * * *

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a specific schedule for the installation of curb ramps or other sloped areas where pedestrian walkways cross curbs that complies with the requirements of paragraphs (c)(2)(i) and (c)(2)(ii) of this section.

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Dated: November 10, 1995.

Janet Reno,

Attorney General.

[FR Doc. 95-28679 Filed 11-24-95; 8:45 am]

BILLING CODE 4410-01-M