



# Memorandum

**Subject:** INFORMATION: Public Rights-of-Way Access Advisory

**Date:** January 23, 2006

**From:** // Original signed by //  
Frederick D. Isler  
Associate Administrator for Civil Rights

**Reply to:** HCR-1

**To:** Division Administrators  
Resource Center Directors  
Federal Lands Highway Division Engineers

The purpose of this notice is to inform you that the Architectural and Transportation Barriers Compliance Board (Access Board) published revised draft accessibility guidelines (the Draft Guidelines) for public rights-of-way in the Federal Register on November 23, 2005. The Draft Guidelines are available at <http://www.access-board.gov/prowac/index.htm>. They cover pedestrian access to sidewalks and streets, including crosswalks, curb ramps, street furnishings, pedestrian signals, parking, and other components of public rights-of-way.

The Access Board published the Draft Guidelines to incorporate public comment received in response to the draft guidelines published in June 2002. The Access Board placed these revised draft guidelines on its website (<http://www.access-board.gov/prowac/index.htm>) for public information. The Draft Guidelines are under consideration by the Board, and the Board could change these guidelines in its final rule.

The purpose of placing the Draft Guidelines in the docket is to facilitate gathering of additional information for the regulatory assessment and the preparation of technical assistance materials to accompany a future rule. The Board is not seeking comments on the Draft Guidelines. The Board will issue a notice of proposed rulemaking at a future date and will solicit comments at that time, prior to issuing a final rule.

The Draft Guidelines are not standards until adopted by the U.S. Department of Justice and the U.S. Department of Transportation. The present standards to be followed are the ADA Accessibility Guidelines (ADAAG) standards. However, the Draft Guidelines are the currently recommended best practices, and can be considered the state of the practice that could be followed for areas not fully addressed by the present ADAAG standards. Further, the Draft Guidelines are consistent with the ADA's requirement that all new facilities (and altered facilities to the maximum extent feasible) be designed and constructed to be accessible to and useable by people with disabilities.

The FHWA is responsible for implementation of pedestrian access requirements under the Americans with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). This is accomplished through stewardship and oversight over all Federal, State, and local governmental agencies that build and maintain highways and roadways, whether or not they use Federal funds on a particular project.

Please distribute this information to the States, and work with the States to distribute these revised draft guidelines widely.

**FHWA Point of Contact:** Ms. Lisa MacPhee, Attorney-Advisor, Office of Chief Counsel (202) 366-1392, and Ms. Candace Groudine, Special Assistant to the Associate Administrator for Civil Rights (202)-366-4634.

**Subject: ACTION:** Clarification of FHWA's Oversight Role in  
Accessibility

**Date:** 9-12-06

**From:** Frederick D. Isler

Associate Administrator for Civil Rights

King W. Gee  
Associate Administrator for Infrastructure

**In Reply Refer to:** HCR-1

HIF-1

**To:** Associate Administrators

Chief Counsel  
Chief Financial Officer  
Directors of Field Services  
Resource Center Director and Operations Managers  
Division Administrators  
Federal Lands Highway Division Engineers

The Federal Highway Administration (FHWA) recognizes the need for the transportation system to be accessible to all users. The purpose of this memorandum is to clarify FHWA's role and responsibility to oversee compliance on pedestrian access required by the Americans with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). Since 1978, FHWA has promoted accessible transportation systems through technical assistance and guidance on ADA and Section 504. In addition, accessibility improvements are eligible for Federal-aid funding.

The FHWA is responsible for implementation of pedestrian access requirements from the ADA and Section 504. This is accomplished through stewardship and oversight over all Federal, State, and local governmental agencies ("public agencies") that build and maintain highways and roadways, whether or not they use Federal funds on a particular project.

## **Policy**

In February 2000, the FHWA issued a policy providing technical guidance to integrate facilities for pedestrians, including persons with disabilities, into the transportation infrastructure. The guidance can be found at [www.fhwa.dot.gov/environment/bikeped/design.htm#d4](http://www.fhwa.dot.gov/environment/bikeped/design.htm#d4).

The ADA and Section 504 do not require public agencies to provide pedestrian facilities. However, where pedestrian facilities exist they must be accessible. Furthermore, when public agencies construct improvements providing access for pedestrians, the completed project also must meet accessibility requirements for persons with disabilities to the maximum extent feasible.

## **Planning**

Title 23 requires that long-range transportation plans and transportation improvement programs, in both statewide and metropolitan planning processes, provide for the development and integrated management and operation of accessible transportation systems and facilities.

Additionally, State DOTs and Metropolitan Planning Organizations (MPOs) must certify (at least biennially for State DOTs and annually for MPOs) that the transportation planning process is being carried out or conducted in accordance with all FHWA, Federal Transit Administration and other applicable Federal statutory and regulatory requirements [see 23 CFR 450.220 and 23 CFR 450.334, respectively]. Further, 23 CFR 450.316(b)(3) requires the metropolitan planning process to identify actions necessary to comply with the ADA and Section 504.

## **Transition Plans**

The ADA and Section 504 require State and local governments with 50 or more employees to perform a self-evaluation of their current services, policies, and practices that do not or may not meet ADA requirements. The public agency must develop a Transition Plan addressing these deficiencies. This plan assesses the needs of persons with disabilities, and then schedules the required pedestrian accessibility upgrades. The Transition Plan is to be updated periodically, with its needs reflected in the processes utilized by State DOTs, MPOs, and transit agencies to develop the Statewide Transportation Improvement Programs and metropolitan Transportation Improvement Programs.

## **Projects**

Public agencies should work to meet accessibility requirements throughout the project delivery process. Issues surrounding pedestrian accessibility should be addressed at the earliest stage possible to reduce or prevent conflicts with other right-of-way, planning, environmental, and design considerations. This could include the acquisition of right-of-way and use of special plan details for specific locations to remove barriers. Projects requiring pedestrian accessibility include projects for new construction and projects altering existing street and highway facilities.

## **New Construction**

All projects for new construction that provide pedestrian facilities must incorporate accessible pedestrian features to the extent technically feasible, without regard to cost. The development process should ensure accessibility requirements are incorporated in the project.

## **Alterations**

Alterations shall incorporate accessibility improvements to existing pedestrian facilities to the extent that those improvements are in the scope of the project and are technically feasible, without regard to cost. Projects altering the usability of the roadway must incorporate accessible pedestrian improvements at the same time as the alterations to the roadway occur. See **Kinney v. Yerusalim**, 9 F.3d 1067 (3d Cir. 1993), cert. denied, 511 U.S.C. 1033 (1994). Alterations are changes to a facility in the public right-of-way that affect or could affect access, circulation, or use by persons with disabilities.

The FHWA has determined that alterations are projects that could affect the structure, grade, function, and use of the roadway. Alteration projects include reconstruction, major rehabilitation, structural resurfacing, widening, signal installation, pedestrian signal installation, and projects of similar scale and effect.

## ***Maintenance***

Maintenance activities are not considered alterations. Therefore, maintenance projects do not require simultaneous improvements to pedestrian accessibility under the ADA and Section 504. The U.S. Department of Justice (DOJ) and the courts consider maintenance activities to include filling potholes. The FHWA has determined that maintenance activities include actions that are intended to preserve the system, retard future deterioration, and maintain the functional condition of the roadway without increasing the structural capacity. Maintenance activities include, but are not limited to, thin surface overlays (nonstructural), joint repair, pavement patching (filling potholes), shoulder repair, signing, striping, minor signal upgrades, and repairs to drainage systems.

As part of maintenance operations, public agencies' standards and practices must ensure that the day-to-day operations keep the path of travel open and usable for persons with disabilities, throughout the year. This includes snow and debris removal, maintenance of pedestrian traffic in work zones, and correction of other disruptions. Identified accessibility needs should be noted and incorporated into the transition plan.

## **Accessibility Design Criteria for Sidewalks, Street Crossings, and Trails**

### ***Sidewalks and Street Crossings***

Where sidewalks are provided, public agencies shall provide pedestrian access features such as continuous, unobstructed sidewalks, and curb cuts with detectable warnings at highway and street crossings. 28 CFR 35.151(c), referencing 28 CFR Part 36, App. A, ADA Accessibility Guidelines (ADAAG). The FHWA encourages the use of ADAAG standards. If pedestrian signals are provided, they must have a reasonable and consistent plan to be accessible to persons with visual disabilities.

Sidewalks and street crossings generally should use the guidelines the Access Board is proposing for public rights-of-way. The FHWA distributed an information memorandum on November 20, 2001, stating that ***Designing Sidewalks and Trails, Part II, Best Practices Design Guide*** can be used to design and construct accessible pedestrian facilities. This report provides information on how to implement the requirements of Title II of the ADA. *Designing Sidewalks and Trails for Access* is the most comprehensive report available for designing sidewalks and street crossings and contains compatible information on providing accessibility with information published by the Access Board in the ADAAG. This report can be found at [www.fhwa.dot.gov/environment/sidewalk2](http://www.fhwa.dot.gov/environment/sidewalk2).

When the Access Board completes guidelines for public rights-of-way and they are adopted by the United States Department of Transportation and DOJ as standards under the ADA and Section 504, they will supersede the currently used standards and criteria.

When Federal-aid highway program funds are used for parking facilities, or buildings such as transit facilities, rest areas, information centers, transportation museums, historic preservation projects, or other projects where pedestrians are expected, the project must meet the current applicable accessibility standards, whether or not the project is within the public right-of-way. The ADAAG includes special provisions for building alterations and for historic preservation projects.

### ***Shared Use Paths and Trails***

The design standards for shared use paths and trails are specific to the function of the path or trail:

- Shared use paths and pedestrian trails that function as sidewalks shall meet the same requirements as sidewalks. Where shared use paths and pedestrian trails cross highways or

streets, the crossing also shall meet the same requirements as street crossings, including the provision of detectable warnings.

- Shared use paths and pedestrian trails that function as trails should meet the accessibility guidelines proposed in the Access Board's *Regulatory Negotiation Committee on Accessibility for Outdoor Developed Areas Final Report* found at [www.access-board.gov/outdoor/outdoor-rec-rpt.htm](http://www.access-board.gov/outdoor/outdoor-rec-rpt.htm). This report also has guidelines for Outdoor Recreation Access Routes (routes connecting accessible elements within a picnic area, camping area, or a designated trailhead).
- Recreational trails primarily designed and constructed for use by equestrians, mountain bicyclists, snowmobile users, or off-highway vehicle users, are exempt from accessibility requirements even though they have occasional pedestrian use.

Most trailside and trailhead structural facilities (parking areas, restrooms) must meet the ADAAG standards.

### **Technical Feasibility and Cost**

When constructing a new transportation facility or altering an existing transportation facility, a public agency should consider what is included within the scope of the project. For elements that are within the scope of the project, the ADAAG provides that "Any features of a . . . facility that are being altered and can be made accessible shall be made accessible [i.e., made to conform with ADAAG] within the scope of the alteration." ADAAG 4.1.6(j). The only exception to this rule is where conformity with ADAAG is "technically infeasible," meaning that "existing structural conditions would require removing or altering a load-bearing member which is an essential part of the structural frame [e.g., in the case of a highway project, a bridge support]; or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility." ADAAG 4.1.6(j).

Where making an alteration that meets accessibility requirements is technically infeasible, the public agency must ensure that the alteration provides accessibility to the "maximum extent feasible." If a public agency believes that full ADAAG compliance is technically infeasible, the public agency should document that the proposed solution to the problem meets the "maximum extent feasible" test. With respect to any element of an alteration that is within the scope of the project and is not technically infeasible, DOJ guidance provides that under ADAAG standards "cost is not a factor." DOJ Technical Assistance Manual for Title II of the ADA, II-6.3100(4). Consequently, if the accessibility improvement is technically feasible, the public agency must bear the cost of fully meeting ADAAG standards.

However, cost may be a factor in determining whether to undertake a stand-alone accessibility improvement identified in a Transition Plan. For example, if an existing highway, not scheduled for an alteration, is listed in the public agency's Transition Plan as needing curb cuts, the public agency may consider costs that are "unduly burdensome." The test for being unduly burdensome is the proportion of the cost for accessibility improvements compared to the agency's overall budget, not simply the project cost.

If the project alters any aspect of the pedestrian route, it must be replaced with accessible facilities. Additional work outside of the scope and limits of the project altering a facility is at the discretion of the agency. However, any features not conforming to ADA requirements outside the project scope should be added to the Transition Plan.

## **FHWA Responsibilities**

The FHWA is responsible for ensuring public agencies meet the requirements of the ADA and Section 504 for pedestrian access for persons with disabilities. Under DOJ regulations, FHWA divisions must work with their State DOTs, MPOs, and local public agencies to ensure ADA and Section 504 requirements are incorporated in all program activities for all projects within the public right-of-way regardless of funding source. Program activities include project planning, design, construction, and maintenance. Furthermore, FHWA is responsible for ensuring accessibility requirements for projects that are not within public right-of-way, but use funding through FHWA. This includes parking areas, information centers, buildings, shared use paths, and trails. Divisions have a legal responsibility to work with State agencies or other recipients to ensure ADA and Section 504 requirements are incorporated into all projects using funding through FHWA.

For all projects that use Federal funds as part of the financing arrangements, the division offices need to periodically:

- Review those projects, where they have oversight responsibilities, for accommodation of pedestrians. The divisions shall not approve Federal funding for projects that do not adequately provide pedestrian access for persons with disabilities where the project scope and limits include pedestrian facilities in the public right-of-way.
- Review the Stewardship Agreement to ensure pedestrian accessibility requirements are included, as appropriate.
- Review the State DOT, MPO, and/or local jurisdiction processes, procedures, guidelines, and/or policies that address ADA in transportation planning and programming processes and how accessibility commitments are addressed in transportation investment decisions.
- Assist transportation agencies in updating their Transition Plans. The United States Department of Transportation Section 504 regulation requires FHWA to monitor the compliance of the self-evaluation and Transition Plan of Federal-aid recipients (49 CFR 27.11). The ADA deadline for completing the accessibility improvements within the Transition Plan was in 1995. For those State and local governments that have not performed the self-evaluation and prepared a plan, it is critical that they complete the process.
- Encourage and facilitate training for FHWA personnel on accessible pedestrian features.
- Ensure pedestrian accessibility compliance through periodic program reviews of recipients' highway planning, design, and construction activities.
- In addition, the Federal Lands Highway Divisions should ensure that each direct Federal construction project fulfills both policy guidance on pedestrian access and meets the minimum ADA and Section 504 accessibility requirements.

For all highway, street and trail facilities, regardless of whether Federal funds are involved, the division offices need to:

- Perform onsite review of complaints about accessibility and report the findings of the review to HCR-1.
- Make presentations and offer training on pedestrian accessibility at meetings, conferences, etc.
- In contacts with State and local officials, encourage them to develop procedures for incorporating pedestrian accessibility into their projects.

## **Additional Information and Resources**

A Web site with questions and answers concerning recurring issues, training opportunities, and background legal information on FHWA's responsibilities under the ADA and Section 504 is located at <http://www.fhwa.dot.gov/civilrights/index.htm>. This memorandum has been reviewed and approved by the U.S. Department of Transportation General Counsel as consistent with applicable disability law.

Questions concerning these obligations may be directed to:

- For Accessibility Policy: Candace Groudine, Bob Cosgrove, Office of Civil Rights
- For Design Standards: William A. Prosser, Office of Program Administration
- For Trails: Christopher Douwes, Office of Natural and Human Environment
- For Construction and Maintenance: Christopher Newman, Office of Asset Management
- For Legal: Lisa MacPhee, Office of the Chief Counsel