

The Battle Against Pedestrian Barriers

Do you have a published Transition Plan to comply with the Americans with Disabilities Act? If not, you are likely exposed to more liability risk than is necessary, even if you are making some progress removing pedestrian barriers in the public right of way. The good news is that the Delaware T2/LTAP Center can provide free assistance to Delaware local agencies.



The Equal Opportunity for Individuals with Disabilities Act, better known as the Americans with Disabilities Act (ADA), was signed into law July 26, 1990 by President George H.W. Bush. A civil rights act, it is far reaching in its requirements, but as a transportation center, we focus on the public right of way aspects in Title II of the Act. The implementing regulations (28 CFR Part 35) required that all public entities, within one year, “evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.”

The regulation goes on to say that the public agency must provide opportunities for interested parties to participate in the self-evaluation process by submitting comments. Indeed, a public entity that employs 50 or more persons must maintain on file for three years and make available for public inspection: a list of the interested persons consulted; a description of areas examined and any problems identified; and a description of any modifications made.

Also for public entities that employ 50 or more persons, 28 CFR §35.150(d) requires development of a Transition Plan setting forth the steps necessary to correct barriers to disabled pedestrians. By law, the Transition Plan was to be in place by July 26, 1992.

If you are a smaller local agency, you may be thinking that you fall under the “50 or more” language. However, your employee count must extend to all employees that the public entity pays, including seasonal workers. So, you may think, “there are only twelve of us in the Streets Department.” Fair enough, but it probably does not say Streets Department on your paycheck; it probably says City of... or Town of... and however many unique employees that entity writes checks to a year is likely the tally. You have to be a genuinely small public entity to remain under that number. Regardless, ADA applies to your public entity and a Self-Evaluation is required, whether you are seven people or seventy thousand.

If your Self-Evaluation is current, your Transition Plan is up to date, and you are substantially in keeping with its schedule for removing pedestrian barriers in the public right of way, you are in pretty good shape. Chances are, your agency wants to progressively reduce pedestrian barriers in the public right of way and you are making at least some progress towards removing them. But if you don't have a Transition Plan (okay, let us imagine you are small enough to squeak under



that requirement for the moment) or at least have completed your Self-Evaluation, your progress will be severely clouded with risk should the Department of Justice or a plaintiff's attorney pay a visit.

A Self-Evaluation need not be an exhausting or expensive undertaking. Why is that? Early on, a public entity finds at least some legacy intersections where no curb ramps exist at all and unless these are in truly fringe areas, they are readily recognized as first tier priorities. Similar high priority locations will become readily apparent – the narrow curb ramps in front of the library or the school, or City Hall, for example. After progress has been made on these obvious barriers, an update to the Self-Evaluation at a later date will be more intricate to identify the next round of priorities, but the early priorities are usually fairly clear.



Another reason to be comfortable with the Self-Evaluation is that the Municipal Engineering Circuit Rider is a free service to Delaware public agencies and Matt can provide advice and tools to get you on the right path. Simply contact him and he will be happy to stop down or over or up and discuss how to get started.

A Transition Plan needn't be a crushing task either. First, except for truly large or complex jurisdictions, the plan does not need to be lengthy and it does not require special skills to prepare. Second, the Municipal Engineering Circuit Rider can help you draft the plan.

You may have heard that a Transition Plan has to be a big, complicated, complex document. Who told you that? Let us look at what the actual regulation (28 CFR §35.150(d)) says:



Transition plan contents:

1. Physical obstacles that limit accessibility
2. Description of methods that will be used to remedy
3. Schedule of upgrades in each following year
4. Identify the official responsible for implementation

Done right, that seems like a short plan. Think of it this way – which is more likely to be consulted and implemented in your annual planning and work plans, the 400-page bluster report in 3-ring binders or the 15-30 page, stapled plan that can be easily shared throughout the organization for reference.

Now, there are a handful of other things you need to do, some of them triggered by the “50 or more” thing, but they are all normal fair for a public agency.

- Development & postings of an ADA Policy Statement (49 CFR §27.15 & 28 CFR §35.106) – you are knee deep in similar policy statements and this is no more difficult.
- Development & postings of Grievance Procedures/Complaint Procedures (28 CFR Parts § 35.107 & § 35.170) – simply put, there are legitimate inquiries, questions,

complaints, and even grievances that will be directed somewhere and isn't it far better that they come directly to your agency so you can avoid miscommunication?

- Designate an “ADA Coordinator” (Responsible Employee – 28 CFR Part § 35.107) – this is the “official responsible for implementation” in the Transition Plan and you need to make available the name, office address, and telephone number to all interested persons.
- Involve the public by inviting them into the process, particularly interested parties.

For many local entities, the most difficult elements in this are not the Self-Evaluation, the Transition Plan, the Policy Statement, or any of the rest of it. Instead, there is a great deal of confusion about what they must do versus what they should ideally do – start with the must and work towards the ideal because the alternative is just standing there looking bewildered. Finally, there is some decision making in the process – a schedule for improvements is needed and some financial commitment should be expressed – but these are probably already being debated in the annual planning and budgeting process, so draw from those discussions and work the results into the Transition Plan. Because of the active involvement of interested parties in the development of these tools, the transparency should support that your approach, at least for now, is reasonable in the community's view.

The bottom line – your focus should be on removing pedestrian barriers as quickly as you can, but you cannot neglect the need to involve interested persons in your decision-making, and completing a Self-Evaluation (probably followed by a Transition Plan) is essential for guiding your forward plans and limiting your legal exposure.

The Delaware T²/LTAP Center's Municipal Engineering Circuit Rider is intended to provide technical assistance and training to local agencies, so if you have ADA questions or other transportation issues, contact Matt Carter at matheu@udel.edu or (302) 831-7236.

