



U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

JAN 5 2010

Victor M. Mendez, Administrator
Federal Highway Administration
Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Dear Mr. Mendez:

We wish to bring to your attention a conflict between longstanding Department of Justice (Department) policy with respect to the application of the requirements of 28 C.F. R. § 35.151(e), which requires the provision of curb ramps when roads are being altered, and recent guidance provided by the Federal Highway Administration (FHWA). We are seeking your assistance in resolving this conflict.

The Department is the Federal agency authorized by Congress to promulgate and interpret regulations implementing title II, Subtitle A, of the Americans with Disabilities Act (ADA). The Department enforces title II in conjunction with designated Federal agencies that are authorized to investigate and resolve title II complaints in their respective program areas. The Department's regulation is published at 28 C.F.R. part 35. The regulation requires the Assistant Attorney General to coordinate the compliance activities of Federal agencies with respect to the activities of state and local governments and to "provide policy guidance and interpretations to designated agencies to ensure the consistent and effective implementation of the requirements of this part."¹

The title II regulation makes it clear that alterations that affect or could affect the usability of a facility shall be made in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities and specifies that newly constructed or altered streets, roads, and 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. It has been the Department's longstanding position that street resurfacing is considered an

¹ Under Executive Order 12250, the Department is also responsible for coordinating Federal agency enforcement of section 504 of the Rehabilitation Act of 1973. Section 504 imposes requires Federal agencies to ensure that recipients of Federal financial assistance (including state and local governments), meet accessibility standards when making alterations.

alteration that triggers ADA requirements for curb ramps.² The one appellate court decision that addresses this issue held that resurfacing “requires the laying of a new asphalt bed spanning the length and width of a city block. Kinney v. Yerusalim, 9 F 3d 1067 (3rd Cir. 1993) (cert. denied), 511 U.S. 1033 (1994).

Over the past decade, under the Department’s Project Civic Access initiative, the Department has entered into a number of title II voluntary settlement agreements with state and local governments that specifically acknowledge the obligation to install curb ramps where roads have been resurfaced. None of these agreements have provided exceptions for road resurfacing projects that involved asphalt layers of less than a particular depth.³

The Department recently became aware that the FHWA takes the position that road resurfacing projects that involve asphalt overlays of no more than 1.5 inches qualify as normal maintenance, and therefore do not constitute alterations.⁴ The Department is deeply concerned that the FHWA’s position on asphalt overlays of less than 1.5 inches directly conflicts with the Department’s legal interpretations of title II. There have been several instances recently, in which localities have challenged the Department’s title II enforcement efforts with respect to curb ramps, arguing that, because of the FHWA policy in this regard, they do not have to install curb ramps, so long as they are not installing more than 1.5 inches of new road surface.

We would like to meet with you as soon as possible to discuss mechanisms for restoring consistency between the Department’s interpretation of its title II regulation and the FHWA’s

² See, e.g., “ADA Best Practices Tool Kit,” Chapter 6 [“Resurfacing a roadway beyond normal maintenance is an alteration.” By contrast, filling potholes is not.”] See also, “The ADA and City Governments: Common Problems.”

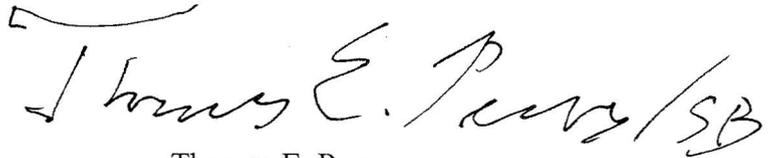
³ See, e.g., Settlement Agreement Between the United States and Newark, NJ (<http://www.ada.gov/NewarkNJpca.htm>) . See also, Settlement agreement with the Delaware Department of Transportation, which specifically involved a claim that the respondent failed to install curb ramps for all road resurfacing projects that involved removal of less than three inches of asphalt, and required the addition of curb ramps for those projects. (<http://www.ada.gov/deldot.htm>.)

⁴ In its “Questions and Answers on Section 504 and the ADA,” posted on the FHWA’s website, the FHWA advises the public that maintenance activities include, but are not limited to, “*thin surface treatments (nonstructural)*, joint repair, pavement patching, (filling potholes) shoulder repair, signing, striping minor signal upgrades, and repairs to drainage systems.” (Question 18, emphasis added). The Questions and Answers do not define “thin surface treatments.” However, in a Letter of Finding issued to the City of Sandpoint, Idaho in response to a title II complaint, the FHWA found that the City had not violated the ADA for failing to provide curb ramps at certain road improvement projects because “[t]he FHWA has determined that overlays of up to 1.5 inches could be considered maintenance, rather than alterations or improvements.”(See LOF, dated June 02, 2009, copy attached.).

application of this regulation in its investigations of title II complaints as well as in the technical assistance it provides to state transportation agencies. We believe that it is essential that there be no conflicts between the positions of our two agencies on this issue. Please have your staff contact John L. Wodatch, Section Chief, or Janet L. Blizzard, Deputy Chief, of the Division's Disability Rights Section to arrange this meeting. Mr. Wodatch and Ms. Blizzard may be reached at 202-307-0663.

We also request that, in the future, the FHWA consult with the Department before publicly announcing policy provisions intended to have general application. This will enable our agencies to avoid creating the appearance of conflicting enforcement policies that will undermine both of our enforcement efforts. We look forward to working with you to resolve this matter.

Sincerely,

A handwritten signature in black ink that reads "Thomas E. Perez / SB". The signature is written in a cursive style with a large, sweeping initial "T".

Thomas E. Perez
Assistant Attorney General