

Public Law Research Institute Report:



LEASING ACCESSIBLE SPACE FROM THE MILITARY: THE APPLICATION OF FEDERAL ACCESSIBILITY LAWS TO FEDERAL LESSORS

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INTRODUCTION

This memorandum addresses the responsibilities of federal lessors to lease space accessible to persons with disabilities. The context of this inquiry is military base closure. As bases are converted to other uses, Department of Defense (DoD) property and facilities will be leased to civilian tenants. In preparation for this transition, the Department of Defense seeks to learn whether it falls within the Americans with Disabilities Act [No. 1] (ADA) in its role as lessor.

This memorandum is divided into two parts: Part One addresses the potential liability of the federal lessor under the Architectural Barriers Act of 1968 [No. 2] (Barriers Act) and the Rehabilitation Act of 1973 [No. 3] (Rehabilitation Act); Part II analyzes the liability of the tenant under the ADA and the allocation of liability between lessor and lessee. The conclusion includes questions important for determining liability. Finally, appendix A illustrates in chart form the relationship of the three statutes discussed.

This memorandum does not address the DoD's responsibilities as an employer under federal law. Also note that state governments are plainly covered by the title II of the ADA; [No. 4] where ownership of federal lands reverts to the state, the state government would assume the legal duties created by the ADA and under state law. [No. 5] Finally, this paper does not focus on the technical requirements of federal accessibility standards.

ISSUES

1. How does the ADA apply to federal (DoD) lessors, especially in situations where a facility is occupied by both federal and civilian tenants? If the ADA does not apply to federal lessors, is there complementary legislation applicable to the federal government?

2. Assuming federal lessors have a duty to comply with accessibility standards in theory, is there an enforcement mechanism?

SHORT ANSWER

The ADA does not apply specifically to the federal government. However, the federal government is prohibited from discriminating against persons with disabilities under other legislation, for example, the Architectural Barriers Act of 1968 (Barriers Act) and the Rehabilitation Act of 1973 (Rehabilitation Act). These two Acts would cover federal lessors as well as federal lessees. The Barriers Act requires that federal and federally financed buildings be accessible to person with disabilities. The Rehabilitation Act requires that all federal and federally assisted programs and activities (including employment) be accessible to persons with disabilities. Since the passage of the ADA in 1990, the Department of Defense has adopted accessibility standards that incorporate the ADA standards.

Compliance with the Barriers Act is enforced by the Architectural and Transportation Barriers Compliance Board (Access Board). A complainant is required to exhaust administrative remedies before seeking judicial review. Only equitable relief is available under the Barriers Act. The Rehabilitation Act is enforced by the DoD, the Attorney General and through a private right of action; it provides primarily injunctive relief.

Finally, since both federal lessors and civilian tenants are potentially liable for failure to provide access to persons with disabilities, their joint responsibilities should be allocated by the lease agreement.

DISCUSSION

PART ONE: LIABILITY OF THE FEDERAL LESSOR

I. Applicability of the ADA to the Federal Government

The ADA ensures equal opportunity for persons with disabilities. The Act targets three areas: title I covers employment, title II covers public services and title III covers public accommodations and services operated by private entities. The definition of employer in title I explicitly excludes the United States. [No. 6] The definition of public entity in title II means "any state or local government;" [No. 7] title II does not exempt or cover the federal government. Section 12134(b) states that title II regulations "shall be consistent with [regulations] . . . applicable to recipients of Federal financial assistance under section 794 of title 29 (the Rehabilitation Act of 1973)." The standards applied in title II shall be consistent with the standards issued by the Access Board. [No. 8] Since the Rehabilitation Act covers the federal government, its inclusion in title II would be duplicative. Finally, the term "private entity" in title III, defined as "any entity other than a public entity (as defined in sec. 12131(1) of this title)," would seem unlikely to include the federal government. [No. 9]

II. Accessibility of Federally Leased Space

Two relevant federal statutes prohibit the Department of Defense from discriminating against persons with disabilities: the Architectural Barriers Act of 1968 and the Rehabilitation Act of 1973. These two Acts apply to federal buildings and programs; the ADA extends the same nondiscrimination policy to private, state and local government entities.

A. The Architectural Barriers Act

The federal government's obligation to maintain accessible buildings and facilities is covered under the Barriers Act. [No. 10] The Barriers Act requires "buildings" owned, leased or funded by the federal government to be accessible to the public. The term "building" refers to a building's use; it means any building or facility the intended use for which requires that it be accessible to the public, or where physically handicapped persons might live or work. [No. 11] Furthermore, the definition describes "buildings" that are (1) constructed or altered by or on behalf of the United States; (2) leased in whole or in part by the United States; or (3) financed by the United States. The lease and finance sections above, added by amendment in 1976 (effective January 1, 1977), considerably broadened the scope of the Barriers Act. The term "building" does not include (A) a privately owned residential structure not leased by the government for subsidized housing programs and (B) any building or facility on a military installation designed and constructed primarily

for use by able bodied military personnel.

The Act requires that the Secretary of Defense prescribe standards for buildings in order "to ensure whenever possible that physically handicapped persons will have ready access to, and use of, such buildings." [No. 12] To ensure compliance with the standards, the Act requires that the Secretary of Defense establish a system of continuing surveys and investigations; [No. 13] and prescribes that the Access Board [No. 14] report annually to Congress "on its activities and actions to insure compliance with the standards" [No. 15]

The scope of the Barriers Act is limited. The definition of building excludes many structures: it does not cover all military buildings or older structures which pre-dated the Act, and may allow some buildings to remain generally inaccessible despite compliance with accessibility standards for a particular alteration. [No. 16] The Barriers Act allows for "waivers and modifications of standards" on a case by case basis upon a finding that such variance is "clearly necessary." [No. 17] Moreover, the Act does not absolutely ensure accessibility, rather it requires the Secretary of Defense to issue standards to "insure whenever possible that physically handicapped persons will have access to and use of such buildings." [No. 18]

1. Military Bases under the Barriers Act

Because the Barriers Act applies to the DoD, yet excludes certain military buildings, the application of the Act to the buildings leased to civilian tenants is unclear. An examination of the statutory language, the military's own policies and guidelines, as well as case law provide some insights which suggest that current accessibility standards would apply to all leased buildings.

a. Statutory Language

Under section 4151, the term "building" means:

any building or facility (other than . . . any building or facility on a military installation designed and constructed primarily for use by able bodied military personnel) the intended use for which either will require that such building or facility be accessible to the public, or may result in the employment or residence therein of physically handicapped persons.

Arguably, the military exception would describe a large number of existing buildings which were used primarily for able bodied military personnel and for which a public use was not "intended." However, even those buildings that fit into the military exception might now be subject to the statute because the "intended use" of those buildings has changed. The change in use may trigger a new duty where previously none existed.

b. Military Regulations and Policy

The military's accessibility standards indicate that (1) the intended use of buildings may change over time, and (2) the ADA standards for accessibility shall be met.

(1) Change in Use

The military's regulations suggest that the military exception discussed above should be construed narrowly. The Military Handbook prescribes:

In general, all facilities worldwide which are open to the public, or which may be visited by the public in the conduct of normal business, shall be designed and constructed to be accessible to physically handicapped persons including facilities constructed with non-appropriated funds, privately financed facilities on military installations, and contractor-owned facilities where the Department is funding all or any part of the construction. In fact, every facility should be designed to assure access to physically handicapped persons unless its intended use is specifically restricted to able-bodied military personnel. [No. 19]

These provisions state, "Waivers will be granted only in exceptional circumstances." [No. 20]

The Navy's regulations use some of the same language and note that even those buildings excepted from the accessibility requirements should be accessible. "The following facilities need not be so designed to be accessible, but accessibility is recommended where feasible since the intended use of the facility may change with time" [No. 21] The leasing of federal facilities to civilian tenants is one such "intended use" that may not have been anticipated at the time the building was constructed. Whether the leasing of such a building would trigger compliance with newer accessibility standards is unclear; but there is case law suggesting this possibility. [No.

(2) Incorporation of ADA Standards into Military Standards**(a) Background on Military Accessibility Standards**

In accordance with the Barriers Act [No. 23] the Department of Defense and three other federal agencies jointly published the Uniform Federal Accessibility Standards (UFAS). The UFAS replaced "all existing standards utilized by the Federal Government." The Department of Defense incorporated the UFAS into the Department of Defense Construction Criteria Manual, "by reference in a memorandum dated May 8, 1985, from the Deputy Secretary of Defense." [No. 24]

The memorandum stated that individuals with leadership responsibilities for the Handicapped Program in Federal Agencies should insure that facilities covered by the Barriers Act are in compliance with the new standards. This responsibility is shared by the Access Board.

(b) Current DoD accessibility standards

The current DoD accessibility standards incorporate the ADA accessibility standards. The DoD, although not covered by the ADA, adopted standards that are consistent with that Act as a matter of policy. In 1993, Secretary of Defense Les Aspin issued a memorandum to the Department of Defense which stated, "[T]his Memorandum updates our standards for making buildings and facilities accessible to people with disabilities." The memorandum sets forth a policy relating to standards; it does not apply the ADA to the DoD.

According to Secretary Aspin:

[This memorandum] prescribes the manner in which the requirements of the Americans with Disabilities Act Accessibility Guidelines (ADAAG) and the Uniform Federal Accessibility Standards (UFAS) are to be met in providing access for people with disabilities in buildings and facilities designed, constructed, altered, leased or funded by the Department of Defense.

[You] are hereby directed not only to meet the requirements of the UFAS as required by 42 U.S.C. 4151-4157 [Architectural Barriers Act] and consistent with 29 U.S.C. 794 [Rehabilitation Act] but also to meet the requirements of the ADAAG in facilities subject to the UFAS whenever the ADAAG provide equal or greater accessibility than the requirements of the UFAS. In addition, you are directed to require recipients of financial assistance from your organization to do the same. Recipients include only those private sector programs and activities covered by 29 U.S.C. 794.

This policy applies to the Office of the Secretary of Defense, the Military departments [No. 25]

The ADAAG, like the UFAS, supplies guideline standards for implementation of the ADA.

Accompanying Secretary Aspin's memorandum was a resolution made by the Access Board that provided the rationale for the new policy:

Whereas, the Federal Government should hold itself to the same standard of accessibility as private entities, and State and local government entities in the design construction and alteration of buildings and facilities

* * *

Now, therefore be it resolved that the Access Board recommends that the Administration immediately adopt a policy to use ADAAG . . . until such time the Access Board, the four federal standard setting agencies under the Architectural Barriers Act, and Federal agencies which have regulations implementing section 504 of the Rehabilitation Act for federally conducted programs complete rule making to adopt ADAAG and its revisions as the applicable standard for Federal facilities. [No. 26]

The military's policy is clear: the DoD planned to make buildings as accessible as the ADA requires. This policy, in conjunction with judicial review of the Barriers Act, imply that together the ADA, the Rehabilitation Act and the Barriers Act should eliminate most of the existing discrepancies in accessibility to buildings for persons with disabilities.

2. Enforcement of the Barriers Act

The Barriers Act is enforced by the Access Board. The Access Board was established under the Rehabilitation Act to ensure compliance with the Barriers Act. [No. 27] The Access Board is made up of federal agency members and public members, five of whom must be disabled. [No. 28] The Access Board makes policy and enforces accessibility standards. [No. 29] Voluntary compliance with the accessibility standards is encouraged. [No. 30]

The Executive Director of the Access Board has authority to issue a citation that commences administrative proceedings requesting relief (withholding of funds or corrective action) or to decide not to proceed: issuance of a citation commences administrative proceedings; the decision not to issue a citation means the complaint is closed. [No. 31] The Access Board has no power to make final determinations regarding compliance. [No. 32]

If the administrative process begins, "any person" that claims an interest may petition the administrative judge to be permitted to participate in the proceedings. [No. 33] Although the complainant "shall be permitted to participate" upon petition to the judge, the judge has the discretion to limit the extent of participation of the petitioner.

Once the administrative judge issues an order, the complainant has exhausted administrative remedies and can seek judicial review. [No. 34] The Executive Director also can seek court enforcement of a final compliance order. [No. 35] The complainant's remedy under the Act is limited to specific corrective relief; a compliance order may include the withholding or suspension of Federal funds for the particular building that is not in compliance with the Act. [No. 36] The administrative law judge determination is a final order for the purposes of judicial review.

It should be noted that where a plaintiff is denied access due to an architectural barrier, and thereby denied access to a program or activity as defined under section 504 of the Rehabilitation Act, the plaintiff may pursue her claim under either Act and need not exhaust administrative remedies under the Barriers Act in order to pursue the section 504 claim. [No. 37] However, it is not clear that federal leases with civilian tenants would give rise to liability under Section 504.

3. Case Law

The issue facing federal lessors is as follows: if the building leased does not comply with accessibility standards, does the act of leasing to a civilian tenant impose a duty on the federal government to bring that building up to code? This issue is two fold: (1) Does leasing trigger duties to bring a building up to code? (2) Does the duty to comply fall on the lessor, the lessee, or both?

The act of leasing may trigger the federal lessor's duty to make a building accessible to persons with disabilities. In Rose v. United States Postal Service, the Ninth Circuit held that the act of leasing triggered the Government's duty to comply with the standards of the Barriers Act. [No. 38] Rose presented a situation inverse to the federal lessor/civilian tenant issue at hand. In Rose, the Postal Service leased buildings (from a private lessor) that were not accessible to persons with disabilities. Plaintiff sued on behalf of disabled persons, alleging that buildings leased after January 1, 1977 -- the date the "leased" amendment took effect -- must comply with the accessibility standards.

The dispute centered on whether leasing or alteration triggered the Government's duty under the Act. The analysis focused on the interpretation of the definition of "building" under section 4151:

[T]he term building means any building or facility . . . which is:

- (1) to be constructed or altered by or on behalf of the United States;
- (2) to be leased in whole or in part by the United States . . . ;
- (3) to be financed in whole or in part by a loan or a grant by the United States . . . ; or
- (4) to be constructed under the authority of the National Capital Transportation Act

The Postal Service argued that the Act required leased buildings to comply when they were altered for some reason other than handicapped access. [No. 39] The Postal Service read the statute as covering those buildings (1) altered and constructed, "and" (2) leased. Plaintiffs argued that the Government must have required compliance as a condition of the lease. [No. 40]

The court's decision for Plaintiffs essentially closed a possible gap in the language of the statute. The Court looked to the disjunctive "or" between items (3) and (4), above, and concluded: "[b]ecause the items are a list, all must be read as having an "or." [No. 41] The court bolstered their reading of the statute with policy reasons:

The USPS interpretation would, in essence, nullify the 1976 amendments to the ABA and perpetuate the evils (inaccessibility [particularly in leased buildings]) the statute intended to eliminate . . . The Postal Service admits that its position would mean that some buildings would never

be required to be accessible if they were not altered. We cannot believe that Congress would intentionally create such a loophole in the Act. [No. 42]

Finally the court noted: "In any event, Congress intended that the alterations be done by the private lessor as a condition of doing business with the Postal Service." [No. 43] This point introduces the relationship of landlord and tenant which is discussed below, in Part Two.

After Rose, one must ask whether the act of leasing would change the "intended use" of a building, even though the original use of that building may have been exempted from meeting accessibility requirements. The Rose court suggests that statutes should be read broadly so as to achieve the legislative purpose and close any gaps left open by legislation. [No. 44] Passage of the ADA clearly evidences Congress' commitment to eliminate accessibility barriers altogether.

B. The Rehabilitation Act

Whereas the Barriers Act requires access to federal buildings, section 504 of the Rehabilitation Act prohibits discrimination against individuals with disabilities under any "program or activity" conducted or funded by the Federal government. [No. 45] Although the primary purpose of the Rehabilitation Act was to redress employment discrimination, the Act broadly protects persons with disabilities from unintentional exclusion as well. [No. 46] The Rehabilitation Act states that persons with disabilities shall not be excluded from "any program or activity receiving Federal financial assistance or under any program conducted by any Executive agency." [No. 47] The Rehabilitation Act may require that architectural barriers be removed in order to ensure access to individuals with disabilities. [No. 48] The Rehabilitation Act requires that agencies ensure that the entities they fund comply with federal accessibility standards and do not discriminate against persons with disabilities.

Application of the Rehabilitation Act, to federal lessors and their tenants depends on 1) whether leasing of military base property constitutes a federally conducted "program or activity"; or 2) whether tenants are "recipients" of Federal financial assistance under the Act. [No. 49]

In theory, the Rehabilitation Act could apply to two forms of discrimination in the instant situation: 1) where an applicant lessee, on account of her disability, is denied participation in the federally conducted leasing program; or 2) where an individual is discriminated against by a tenant who receives federal financial assistance. In the first situation, the discrimination by the federal lessor is direct; the relevant program or activity would be the leasing itself. Hypothetically, this kind of discrimination might occur if an applicant lessee could not access the building in order to apply for the lease, even though the applicant was "otherwise qualified" to participate in the program. [No. 50] Alternatively, the applicant could be excluded from the leasing program because there was no accessible space to lease. The second form of discrimination is more indirect (from the federal lessor's perspective); plaintiff's ability to pursue a section 504 claim would depend on whether the tenant is a "recipient" of federal financial assistance under the Act.

1. Definition of "Program or Activity"

Leasing of DoD property during the process of base closure, for example under the Defense Base Closure and Realignment Act of 1990 [No. 51] (Defense Base Closure Act), could constitute a federal "program or activity." Section 504 prohibits discrimination under "any program or activity conducted by any Executive agency." [No. 52] The Department of Defense regulations that implement section 504 of the Rehabilitation Act cover "various programs involving the loan or other disposition of surplus, obsolete, or unclaimed property." [No. 53] Thus, the Defense Base Closure Act could constitute a federal program.

2. Federal financial assistance

Lease of military base property at below fair market value could constitute federal financial assistance under section 504. [No. 54] The Department of Defense regulations which implement section 504 state that leasing at below fair market value is a form of federal financial assistance. [No. 55] Those regulations define one form of federal financial assistance as "Real and personal property or any interest in or use of such property, including: (i) transfers or leases . . . for less than fair market value, (ii) proceeds from subsequent transfer or lease of such property, if the Federal share of its fair market value is not returned to the government." [No. 56] The regulations define recipient as any private or public group or

person that "receives Federal financial assistance directly or through another recipient . . . but not the ultimate beneficiary of the assistance." [No. 57]

Several cases illustrate how the Court identifies "recipients" of Federal funds. Recipients must "actually receive federal financial assistance;" those who benefit from federal funding may not be recipients. [No. 58] Courts look closely at the terms of the statute which grants the federal assistance.

In Paralyzed Veterans, [No. 59] the Court held that commercial airlines were not recipients of Federal financial assistance under section 504 of the Rehabilitation Act because the "recipients" of the federal funds were the operators of the airport and not its users. Following this precedent, the Ninth Circuit, in Independent Housing Services of San Francisco v. Fillmore Center Associates, [No. 60] held that defendants were not "recipients" under the Rehabilitation Act because even though the federal aid made the privately owned housing project possible, the private owners (defendants) purchased the land at fair market value. The court did not comment on whether the result would have been different had defendants bought the property at below fair market value.

In the Fillmore case, the court noted that "Federal financial assistance" has been broadly construed to encompass assistance of any kind, direct or indirect. The Court frankly supported the dissenting opinion in Paralyzed Veterans, which focused on the discrimination at hand not defendants' "recipient" status. The Fillmore court held that the fact that the recipient of the federal assistance did not currently own or possess the housing project proved to be dispositive. [No. 61] Thus, whether a section 504 claim would exist against DoD tenants who discriminate against persons with disabilities would depend on the circumstances of that tenant's possession, and whether the tenant leases the property at fair market value.

Where the tenant is a "recipient" of federal funding, that tenant could be liable under both the ADA -- as either a public entity or a privately owned organization -- as well as the Rehabilitation Act. The federal lessor could be liable under the Rehabilitation Act and the Architectural Barriers Act. Coordination of the ADA and the Rehabilitation Act is discussed below.

The nondiscrimination protections for disabled persons under the Rehabilitation Act are not absolute. An agency must not comply with the Rehabilitation Act if such action would result in an "undue financial burden." Agencies may apply for a waiver based on the existence of an "undue financial burden." Waivers are permitted by the Department of Justice and have been viewed as consistent with section 504, despite the fact that the Act itself does not provide for them. [No. 62]

3. Enforcement of the Rehabilitation Act

The Rehabilitation Act is enforced by administrative process and a private right of action. This section discusses the DoD's administrative process; however, an individual need not exhaust administrative remedies prior to exercising her private right of action.

Within the DoD, compliance section 504 is primarily enforced by an administrative process under the direction of the Assistant Secretary of Defense and the Heads of "DoD components" (which includes the Military Departments and Defense Agencies). [No. 63] The Heads of the Departments are responsible for ensuring compliance and investigating complaints brought against recipients. [No. 64] Complaints against the DoD itself are filed directly with the Assistant Secretary. [No. 65] Upon a finding that the recipient or the "component" is not in compliance, the recipient or component is notified that an enforcement procedure could begin if compliance is not voluntarily achieved. [No. 66]

Voluntary compliance is encouraged. If voluntary compliance is not achieved, the DoD may impose sanctions, terminate or suspend financial assistance to the recipient, or refer the case to the Department of Justice, and allow the complainant to pursue state or local remedies. Termination or suspension of funding applies only to the particular "program or activity" where the violation exists. [No. 67] After an initial decision, the record is reviewed by a DoD official; a decision to terminate or suspend Federal financial assistance is reviewed by the Secretary of Defense, who can approve, vacate or remit the decision. [No. 68] To ensure compliance, the Assistant Secretary or the DoD components may take remedial action to ensure that the complainant is no longer excluded from or discriminated against in the relevant program or activity. [No. 69]

PART TWO: LESSOR AND LESSEE RESPONSIBILITIES

I. Applicability of the ADA to Tenants

The ADA extends the application of the Rehabilitation Act to state, local and private entities. The ADA is closely modelled after the Rehabilitation Act as well as the Civil Rights Act of 1964. Although federal lessors are not covered under the ADA, most tenants would be. Thus, the landlord and tenant relationship will depend on how the ADA interacts with the Barriers Act and the Rehabilitation Act. In order to understand how these statutes relate, one must understand the tenant's responsibilities under titles II and III of the ADA. Section II, below, discusses the interaction of these statutes in the landlord tenant relationship. Because the ADA regulations are so expansive, the following discussion is limited to those aspects that are important in considering the potential liability of a federal lessor.

A. Title II of the ADA: Public Entities

1. Definition and coverage of the public entity

Title II [No. 70] of the ADA prohibits public entities from discriminating against persons with disabilities or excluding such individuals from services, programs and activities. This section extends the non-discrimination policy of section 504 of the Rehabilitation Act to state and local entities regardless of whether they receive federal funds. Many of these entities were already covered under section 504, in which case they are now covered under both Acts. [No. 71] The scope of title II of the ADA "is comparable to coverage of Federal Executive agencies under . . . section 504 [which applies] to all programs and activities "conducted by" Federal Executive Agencies, in that title II applies to anything a public entity does." [No. 72] Taken together, section 504 and title II reach programs and activities of federal, state, and local government entities. Title II incorporates those provisions of title I and title III that are not inconsistent with the regulations implementing section 504. [No. 73]

The term "public entity" is narrowly defined as "a state or local government" or one of its departments or agencies. [No. 74] "The sole fact that a private entity receives financial assistance from the federal government is not enough to render it a public entity." [No. 75] Private entities that receive Federal financial assistance are covered under title III.

Title II facilities must be readily accessible to persons with disabilities, as is required by section 504 of the Rehabilitation Act, unless this would impose an undue burden on the public entity. While this standard does not necessarily require removal of architectural barriers (required by title III, see below), the readily accessible standard was intended to be significantly higher than the "readily achievable" standard in title III. Note that existing buildings leased by a public entity are not required to meet the accessibility standards simply by virtue of being leased. The ADA Title II Technical Assistance Manual states: "Public entities are encouraged, but not required, to lease accessible space." [No. 76] Thus, whether an existing building leased from the DoD must be accessible may depend on whether the Barriers Act covers DoD buildings leased to civilian tenants.

2. Enforcement of Title II of the ADA

Enforcement of title II invokes the same remedy available under section 504 of the Rehabilitation Act and the applicable standards "shall be consistent" with the guidelines promulgated by the Access Board. [No. 77] Public entities must choose a design standard -- either UFAS or ADAAG -- and must follow a single standard completely for any given facility. [No. 78] The DoD's policy on accessibility generally reflects the policy stated in title II of the ADA.

Title II is primarily enforced by the Department of Justice. [No. 79] An individual may file a complaint with a designated federal agency (not including the DoD), [No. 80] a funding agency (e.g., the DoD) or the Department of Justice. There is, however, a private right of action under section 504 and title II; plaintiffs need not exhaust administrative remedies before seeking judicial review. Where the title II entity is covered under section 504, the funding agency may apply title II requirements if they exceed those under section 504. [No. 81] If an individual files a complaint with an agency that does not have jurisdiction over that claim, the claim will be referred to the appropriate agency. [No. 82] If the public entity does not comply voluntarily, the matter is referred to the Department of Justice. [No. 83]

B. Title III of the ADA: Public Accommodations

1. Definition and Coverage of Title III Entities

Title III of the ADA prohibits discrimination by private entities against persons with disabilities in places of public accommodation. Under title III, a place of public accommodation is defined as a facility, operated by a private entity, whose operations

affect commerce and fall within one of the twelve listed categories. [No. 84] "Public Accommodation" is defined as a "private entity that owns, leases (or leases to), or operates a place of public accommodation." [No. 85]

Title III reaches private entities whether or not they receive Federal financial assistance. The regulations state: "The receipt of government assistance by a private entity does not by itself preclude a facility from being a place of public accommodation." [No. 86] Public accommodations that receive Federal financial assistance are subject to the requirements of section 504, as well as the requirements of the ADA. [No. 87] Where no assistance is received, a tenant is liable under the ADA.

Title III specifically prohibits certain forms of discrimination. Among these are: a) failure to modify policies in order to accommodate persons with disabilities; b) failure to provide "auxiliary aids and services," such as braille writing or telecommunication devices for the hearing impaired, unless such action would result in an undue burden; and c) failure to remove architectural and communications barriers, where such removal is readily achievable. [No. 88] The ADA requires that newly constructed and altered facilities be "readily accessible" to persons with disabilities, unless it is structurally impracticable to meet these requirements. [No. 89] Thus, the readily achievable standard applies to existing facilities and the readily accessible standard applies to new and altered facilities.

2. Enforcement of Title III of the ADA

Title III is enforced by private suits and by the Attorney General. [No. 90] Title III violations are investigated by the Attorney General; an individual may request that the Attorney General institute an investigation. [No. 91] Private parties are entitled to injunctive relief; this means that the title III entity would be required to make facilities readily accessible and may be required to provide an auxiliary aid or to modify a policy that results in discrimination. Where the Attorney General commences a civil action to enforce the Act, monetary damages, not including punitive damages, may be available in addition to injunctive relief. [No. 92] Title III entities may also be required to pay a civil penalty for violation of the Act. [No. 93]

II. Allocation of responsibilities between Landlord and Tenant

Since both the federal lessor and the tenant -- whether private or public -- each have a duty to comply with accessibility standards, the relevant inquiry focuses on how those duties will be allocated between lessor and lessee. The ADA regulations do not specifically address the government's liability when it leases to a public accommodation; but consistency of section 504 and title II implies that the relationship between title II and title III would be analogous to the relationship between section 504 and title III. The following analysis assumes that federal lessors could be liable under section 504 and under the Barriers Act. The following analysis should be helpful in understanding the lessor and lessee relationship under the ADA.

The ADA fails to clearly allocate responsibility between the landlord and the tenant for complying with accessibility requirements. [No. 94] Title III, for example, requires that architectural barriers to access be removed where "readily achievable," but does not indicate whether the landlord or the tenant should remove the architectural barrier where each party could be liable for failure to do so.

The ADA regulations for title III state that the responsibilities of landlord and tenant should be allocated by contract or lease:

Both the landlord who owns the building that houses the public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations and subject to this part. As between the parties, allocation of the responsibility for complying with the obligations of this part may be determined by lease or other contract. [No. 95]

The adopted rule varied from the proposed rule that would have required landlords to be responsible for common areas and tenants to be responsible for their own space. [No. 96] The proposed rule reflected the duties of landlord and tenant under common law. Where liability has not been allocated by lease or contract the common law may determine each party's responsibilities:

The landlord would generally be held responsible for making readily achievable changes and providing auxiliary aids and services in common areas and for modifying policies,

practices, or procedures applicable to all tenants, and the tenant would generally be responsible for readily achievable changes, provision of auxiliary aids, and modification of policies within its own place of public accommodation. [No. 97]

Where each party is liable for non-compliance, there is a natural incentive to make sure the other party is in compliance. Parties that do allocate responsibilities in the lease can indemnify the other party for noncompliance. [No. 98]

Each party's responsibilities for compliance with accessibility standards depends on the title (or statute) that governs the party, as well as whether the party is a landlord or a tenant. For example, airports operated by public entities are covered by title II, while places of accommodation located within airports such as restaurants, shops or conference centers are covered under title III. [No. 99] Additionally, the title III party might have to meet section 504 standards if it receives federal financial assistance.

Even where both landlord and tenant are covered under the same title, each party's responsibilities may vary. For example, since "readily achievable" represents a factual assessment based on the cost of the needed action and the financial resources of the covered entity, its meaning necessarily depends on whether one is assessing the landlord or the tenant. [No. 100] Although the ADA applies to even short term leases, the length of the lease could influence whether a change is readily achievable, i.e. whether the expense of the change is disproportionate in light of the tenant's total rent. [No. 101] Similarly, in leases that pre-dated the ADA, clauses that require that the tenant comply with all laws could inadvertently place a great new burden on that tenant. Leases made after passage of the ADA, however, can be carefully designed to allocate responsibilities in a manner consistent with the parties' intentions. [No. 102]

In the instant situation, the federal lessor would not be covered under the ADA, but could be liable under the Barriers Act or the Rehabilitation Act. Hence, allocation of responsibility would also take into account whether one party was required to meet a higher standard (e.g. "readily accessible" vs. "readily achievable"). A plaintiff would want to pursue her claim under the law that provided the greatest coverage. Thus, definition and allocation of each party's respective responsibilities under federal law involves a careful analysis and comparison of applicable standards.

It seems unlikely that a federal lessor could delegate its own responsibilities for complying with accessibility standards to a private lessor where that lessor was not required to meet section 504 standards. In Rose, however, the court noted that Congress intended that alterations necessary to meet accessibility standards of the Barriers Act be done by the private lessor as a condition of doing business with the Postal Service, the public lessee. At the time Rose was decided, the private lessor had no statutory duty to provide accessible space, but Congress intended that the lessor assume this duty. A similar situation could be created here by requiring private tenants to assume greater responsibility in complying with ADA requirements. In constructing leases, the DoD could also take advantage of relevant business tax incentives for barrier removal. [No. 103] Thus, a greater proportion of private funds could be used to ensure that property leased from the government is accessible. In any case, both parties must comply with accessibility standards and would be wise to define and allocate their responsibilities before accessibility problems arise.

CONCLUSION

The ADA, the Rehabilitation Act and the Barriers Act form a web of overlapping accessibility requirements. These statutes must be viewed in light of their cumulative effect and purpose. Congress has continually broadened the scope of protections for persons with disabilities. Congress and the courts have made clear that nondiscrimination policies should not be undermined by loopholes or inconsistencies in legislation; rather, to permit the vindication of disabled persons' civil rights, these remedial statutes must be applied broadly and consistently.

The Department of Defense, in regulations and memoranda, have clearly acceded to this goal of accessibility. Nonetheless, their liability is not clearly delineated in every instance. As discussed in this memorandum, the following questions may be helpful for determining whether the federal lessor is liable:

- (1) Under the Barriers Act:
 - a) Is the property leased a "building" under the Act, or is it subject to the military exception?
 - b) Does the act of "leasing out" DoD facilities trigger the military's duty to comply with the

Barriers Act?

(2) Under the Rehabilitation Act:
a) Is leasing a federally conducted program or activity under the Act?
b) In determining whether the Rehabilitation Act applies to the tenant: Is the tenant a recipient of Federal financial assistance from the DoD?

(3) Finally, does the federal lessor have responsibilities to comply with accessibility standards under its leasing agreement with the tenant, or based on common law principles?

Most likely, the federal lessor is responsible for meeting accessibility standards under both the Barriers Act and the Rehabilitation Act. Federal lessees would also be covered under these Acts. Finally, civilian tenants are probably covered under the ADA, and many may be covered under the Rehabilitation Act as well.

As previously stated, section 504 of the Rehabilitation Act implies a private right of action allowing for money damages as well as injunctive relief. The 1978 amended version of the Act added the availability remedies under Title VI of the Civil Rights Act of 1964. (Book p.109)

Most importantly, the Architectural Barriers Act has been interpreted to allow an aggrieved individual to enforce the government's duty to comply with UFAS standards. In Rose, the plaintiff sued to (1) enjoin the United States Postal Service from leasing buildings inaccessible to the disabled, and (2) require the Postal Service to make the currently leased facilities accessible. The issue in Rose was whether the act of leasing or merely the alteration of the building triggered the government's duty to comply with the accessibility standards in the Act. The court held that the lease, not the act of alteration, triggered the government's duty of compliance. After Rose, the government had a duty to comply as owner and as lessee; logically, the government would have the same duty to comply as owner/lessor.

The ADA Technical Assistance Guidelines allow "public entities" to choose to follow either the UFAS or the ADAAG design standards for new construction and alterations. The public entity must follow one standard completely. Concluding that the federal lessor and a civilian tenant each have a duty to make facilities and buildings accessible, the relevant inquiry focuses on how those duties will be allocated between lessor and lessee.

How the Military has dealt with Accessibility complaints:

The DoD approach to the problem of accessibility to the handicapped, for any applicable facility, has been in accordance with 28 CFR 35.151. (Internal memorandum from Commanding Officer, Naval Station Pearl Harbor to Commander, Naval Base, Pearl Harbor dated June 1992.) The Purpose of 28 CFR 35.101-175 is to effectuate subtitle A of title II of the American with Disabilities Act of 1990 (42 U.S.C. 12131), which prohibits discrimination on the basis of disability by public entities. Section 35.151 covers New Construction and Alterations and requires that construction or building alterations commenced after January 26, 1992 be readily accessible to persons with disabilities in compliance with either the UFAS or the ADAAG.

Section 35.170 enables an individual subjected to discrimination on the basis of disability by a public entity may file a complaint under this part. In response to an informal complaint alleging that a restaurant on Naval base property failed to comply with federal accessibility standards, the Navy Chief of Staff requested review of the restaurant and accessibility standards to ensure compliance. This request indicated that (a) the Navy follows the guideline standards for public entities (2) requires restaurant facilities on Navy property to comply as well.

The Rehabilitation Act provides private litigants only equitable relief. Act p.534. In Consolidated Rail Corporation v. Darrone, the Supreme Court held that section 504 permitted a private damage action could be maintained against an employer receiving Federal financial assistance, regardless of the role of that assistance. 462 U.S. 624 (1984) The Court did not define "program or activity" under section 504. The scope of application of section 504 is left open. For the issue at hand, however, this Act is less relevant than facility related duties imposed under the Architectural Barriers Act.

NOTES

[No. 1] 42 U.S.C.A. secs. 12101-12213 (West 1994).

[No. 2] 42 U.S.C.A. secs. 4151-4157 (West 1994).

[No. 3] 29 U.S.C.A. secs. 701-796 (West 1994).
[No. 4] 42 U.S.C.A. sec. 12131(A) defines a public entity as "any state or local government."
[No. 5] In California, the Fair Employment and Housing Act prohibits discrimination to persons with physical and mental disabilities in employment and housing. Cal. Gov't Code sec. 12900 et seq. Specifically, section 12926(k) covers physical disability; section 12926(i) covers mental disability. Compliance with these state regulations, which are also coordinated with the ADA, is beyond the scope of this paper, which focuses on accessibility to buildings generally, not specifically for purposes of employment or housing.
[No. 6] 42 U.S.C.A. sec. 12102(5)(B)(i).
[No. 7] 42 U.S.C.A. sec. 12131(1).
[No. 8] 42 U.S.C.A. sec. 12134(c).
[No. 9] An internal DoD memo notes that "a check with federal agencies around [the District of Columbia] indicates that none of them considers the Act applicable; Other [sic] Handicap Access Regs which are applicable to federal projects serve the same/similar purpose." Memo from Paul Fisher to Rebecca Hommon, June 19, 1992.
[No. 10] 29 U.S.C.A. sec. 794, note: "Obligations by the United States Postal Service to maintain accessible postal facilities were established under the Architectural Barriers Act of 1968, section 4151 et seq. of Title 42, not by this section which prohibits discrimination against qualified handicapped individuals under any program or activity conducted by the Postal Service, since federal government's duties to make buildings accessible are governed by specific provisions of said Act, not general ones of this chapter." *Rose v. U.S. Postal Service*, D.C.Cal. 1983, 774 F.2d 1355 (1984).
[No. 11] 42 U.S.C.A. sec. 4151.
[No. 12] 42 U.S.C.A. sec. 4154.
[No. 13] 42 U.S.C.A. sec. 4156.
[No. 14] The Architectural and Transportation Barriers Compliance Board was established under section 792 of the Rehabilitation Act; its role is to enforce the Barriers Act.
[No. 15] 42 U.S.C.A. sec. 4157.
[No. 16] Mitchell S. Eisenberg, "The Rights of People with Disabilities to a Barrier-Free Environment: U.S. Compliance with International Law," 20 N.Y.U.J. Int'l L. & Pol. 929, 950 (1988), citing Raffa, "Removing Architectural Barriers: The Architectural Barriers Act of 1968," 9 Men. Phy. Dis. L. Rep. 304, 306 (1985): "[the Barriers Act] does not require that if the bathroom is altered, a ramp must be put on the outside of the building, unless the steps are also being altered."
[No. 17] 42 U.S.C.A. sec. 4156.
[No. 18] 42 U.S.C.A. sec. 4154 (author's emphasis).
[No. 19] Military Handbook 1190, Section E "Provisions for Physically Handicapped Persons" (1987).
[No. 20] Id.
[No. 21] NAVFAC DM 1.01, "Basic Architectural Requirements & Design Considerations," section 5.8, "Provisions for the Physically Handicapped" (1986) (Author's emphasis).
[No. 22] See *Rose v. United States Postal Service*, 774 F.2d 1355 (9th Cir, 1984).
[No. 23] 42 U.S.C.A. sec. 4154.
[No. 24] The new chapter and standards were effective immediately upon issuance of the memorandum. Memorandum from the Federal Affirmative Action Programs to Heads of Federal Agencies, etc, dated October 2, 1985.
[No. 25] Memorandum from Secretary of Defense Les Aspin to Secretaries of the Military Department, et al., dated October 20, 1993.
[No. 26] U.S. Architectural and Transportation Barriers Compliance Board, Resolution, dated January 15, 1993.
[No. 27] 29 U.S.C.A. sec. 792.
[No. 28] 29 U.S.C.A. sec. 792(a)(1)(A).
[No. 29] Charles D. Goldman, "Architectural Barriers: A Perspective on Progress," 5 W. New Eng. L. Rev. 465, 474 (1983).
[No. 30] 36 C.F.R. sec. 1150.41(a) (1988).
[No. 31] 36 C.F.R. sec. 1150.41(g)-(i) (1988).
[No. 32] *Eastern Paralyzed Veterans Association of Pennsylvania v. Sykes*, 697 F.Supp. 845, 847 (D.C.E.D. Pa. 1988) citing H. Conf. Rep. No. 1780, 95th Cong., 2nd Sess. 90, 91 reprinted in 1978 U.S.Code Cong. & Admin. News, 7401.
[No. 33] 36 C.F.R. sec. 1150.13 (1988).
[No. 34] 36 C.F.R. sec. 1150.104 (1988). Apparently few complaints have reached the judicial review stage. Eisenberg, supra note 16, at 951. "Research as of February 28, 1989, indicated that only sixteen cases have been brought in the federal courts involving the ABA since its passage in 1968."
[No. 35] 36 C.F.R. sec. 1150.105 (1988).
[No. 36] 29 U.S.C.A. sec. 792(d)(1).
[No. 37] *Eastern Paralyzed Veterans Association of Pennsylvania v.*

Sykes, 697 F.Supp. 845, 847 (D.C.E.D. PA 1988).
[No. 38] 774 F.2d at 1356 (1984).
[No. 39] Id.
[No. 40] Id.
[No. 41] 774 F.2d at 1360, n.14.
[No. 42] Id.
[No. 43] 774 F.2d at 1361, citing to Public Buildings Cooperative Use: Hearings on HR 15134 Before the Subcommittee on Public Buildings and Grounds of the House Committee on Public Works and Transportation, 94th Cong., 2d Sess. 147-148 (1976).
[No. 44] 774 F.2d at 1357. "A court should go beyond the literal language of the a statute if reliance on that language would defeat the plain purpose of the statute." (Citing Bob Jones University v. United States, 461 U.S. 574, 584 (1983).
[No. 45] Public Law 93-112 section 504, "Rehabilitation Act of 1973" September 26, 1973 (29 U.S.C. 794).
[No. 46] See Lloyd v. Regional Transp. Authority, 548 F.2d 1277 (C.A.Ill. 1977).
[No. 47] 29 U.S.C.A. sec. 794.
[No. 48] In Rose, the court states: "Section 504 requires structural changes to provide access to federal programs if no less costly solution is possible. . . . To meet the requirements of the Rehabilitation Act, the same structural modifications that are mandated under the Barriers might be necessary under the Rehabilitation Act." 774 F.2d at 1363.
In Disabled in Action of Pennsylvania v. Pierce, the court held that the availability of a remedy under the Barriers Act did not preempt an action brought under the Rehabilitation Act. The court stated: "the legislative history of the Rehabilitation Act reveals that one of its primary intentions was the elimination of architectural barriers" The Barriers Act does not contain any thing that the Rehabilitation Act does not. "[I]t appears that section 504 was intended by Congress to be an independent weapon in its barrier-free arsenal." 606 F.Supp. 310, 313-314 (E.D.Pa. 1985). However, plaintiff may be limited to the Barriers Act if she was not excluded from a federal or federally funded program or activity.
[No. 49] If tenants are recipients of federal financial assistance, they could be liable under both the ADA and the Rehabilitation Act.
[No. 50] Section 504 states: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, . . . be subjected to discrimination"
[No. 51] 10 U.S.C.A. sec. 2687 (West 1994).
[No. 52] 29 U.S.C.A. 794(a) (author's emphasis). "Program or Activity" is defined under section 794(b): For the purposes of this section, "program or activity" means all the operations of --
(1)(A) a department, agency, special purpose district or other instrumentality of a State or local government; or
(3)(A) an entire corporation, partnership or other private organization . . . --
(i) if assistance is extended to such . . . private organization . . . as a whole; or
(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks, or recreation;
any part of which is extended Federal financial assistance.
[No. 53] 32 C.F.R. sec. 56.7 (a)(2) (1992).
[No. 54] See 10 U.S.C.A sec. 2687 Historical Notes (#7): "The Federal Government may best contribute to such reutilization and redevelopment by making available real and personal property to be closed to communities affected by such closures on a timely basis, and, if appropriate, at less than fair market value." "Making available" is not defined in this section; it could mean sale and/or lease.
[No. 55] 32 C.F.R. sec. 56.3(b) (1992).
[No. 56] 32 C.F.R. sec. 56.3(a) (1992).
[No. 57] 32 C.F.R. 56.3(g) (1992).
[No. 58] United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597, 607 (1986).
[No. 59] Id.
[No. 60] 840 F.Supp. 1328 (1993).
[No. 61] Id. at 1343.
[No. 62] Timothy M. Cook, "The Scope of the Right to Meaningful Access and the Defense of Undue Burdens under disability civil rights laws," 20 Loy.L.A.L.Rev. 1471, 1523-1525 (1987). "Congress desired that the costs of compliance with section 504 would not outweigh the right to meaningful access to federal and federally assisted programs."
[No. 63] 32 C.F.R. part 56 (1992).
[No. 64] 32 C.F.R. sec. 56.5(b) (1992).

[No. 65] 32 C.F.R. 56.10(c) (1982). Note that section 56.10(a) calls for supplementary guidelines relating to enforcement against the DoD itself. Rule 59.10(e) states that the Assistant Secretary in enforcing section 504 against DoD Components shall proceed as described in sections 56.9(n) through 59.9(v).

[No. 66] 37 C.F.R. sec. 56.9(p) (1992).

[No. 67] 32 C.F.R. sec. 56.9(q) (1992).

[No. 68] 32 C.F.R. sec. 56.9(s) (1992).

[No. 69] 32 C.F.R. sec. 56.9(n)(2) (1992).

[No. 70] 42 U.S.C.A. sec. 12132.

[No. 71] 36 C.F.R. Part 1191 (1994).

[No. 72] 28 C.F.R. App. A sec. 35.102 (1991).

[No. 73] 28 C.F.R. sec. 36.103 (1991).

[No. 74] 28 C.F.R. sec. 35.104 (1991).

[No. 75] Gabrielle P. Whelan, "The 'Public Access' provisions of Title III of the Americans with Disabilities Act: A Guide for Commercial Landlords and Tenants," 34 Santa Clara L. Rev. 215, 238 (1993).

[No. 76] 28 C.F.R. sec. 35.151 (1991). Thus, although the federal government must lease accessible facilities under the Barriers Act (as held in Rose), title II public entities must not.

Quotation from ADA Title II Technical Assistance Manual, section II-6.4000 (1992).

[No. 77] 42 U.S.C.A. sec. 12134(c).

[No. 78] ADA Title II Technical Assistance Manual section II-6.2000 and II-6.2100 (1992), Choice of design standard: UFAS or ADAAG: "Because of the many differences, one standard is not stricter than the other."

[No. 79] 28 C.F.R. App. A Subpart F (1991).

[No. 80] 28 C.F.R. sec. 35.190(b) (1991). These agencies are the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, Interior, Justice, Labor and Transportation.

[No. 81] 28 C.F.R. App. A Subpart F (1991).

[No. 82] 28 C.F.R. sec. 35.171 (1991).

[No. 83] 28 C.F.R. sec. 35.174 (1991).

[No. 84] 28 C.F.R. sec. 36.104 (1991). The twelve categories are: 1) places of lodging, 2) establishments serving food or drink, 3) places of exhibition or entertainment, 4) places of public gathering, 5) sales or rental establishments, 6) service establishments, 7) stations used for public transportation, 8) places of public display or collection, 9) places of recreation, 10) places of education, 11) social service center establishments, 12) places of exercise or recreation.

[No. 85] Id.

[No. 86] 28 C.F.R. sec. 36.104 (1991).

[No. 87] A public accommodation that is covered under both section 504 and the Rehabilitation Act is still required to meet the "program accessibility" standard in order to comply with section 504, but would not be in violation of the ADA unless it failed to make "readily achievable" modifications. On the other hand, an entity covered by the ADA is required to make "readily achievable" modifications, even if the program can be made accessible without any architectural modifications. Thus, an entity covered by both section 504 and title III of the ADA must meet both the "program accessibility" requirement and the "readily achievable" requirement. 28 C.F.R. part 36 (1991).

[No. 88] 42 U.S.C.A. sec. 12182(b)(2)(A)(ii)-(iv).

[No. 89] 28 C.F.R. sec. 36.401 (1991), New Construction: The "readily accessible" standard has been used in the Barriers Act and section 504 of the Rehabilitation Act, and current accessibility standards; it means that a facility can be approached, entered and used by persons with disabilities easily and conveniently.

28 C.F.R. sec. 36.402 (1991), Alterations: "To the maximum extent feasible, the altered portions of the facility [must be] readily accessible."

[No. 90] 28 C.F.R. secs. 36.501 and 36.503 (1991).

[No. 91] 28 C.F.R. sec. 36.502 (1991).

[No. 92] 42 U.S.C.A. sec. 12188.

[No. 93] 28 C.F.R. sec. 36.504 (1991).

[No. 94] Karen E. Field, "The Americans with Disabilities Act 'Readily Achievable' Requirement for Barrier Removal: A Proposal for the Allocation of Responsibility Between Landlord and Tenant," 15 Cardozo L.Rev. 569, 571 (1993).

[No. 95] 28 C.F.R. sec. 36.201(b) (1991).

[No. 96] Whelan, supra note 75, at 238.

[No. 97] 28 C.F.R. App. B sec. 36.201(b) (1991).

[No. 98] Field, supra note 94, at 585.

[No. 99] 28 C.F.R. sec. 36.104 (1991).

[No. 100] The "readily achievable" standard is clearly lower than the "undue burden" standard, i.e. "significant difficulty or expense," that applies to auxiliary aids requirement and the "undue hardship" standard used in Title I. 28 C.F.R. App. B sec. 36.304 (1991).

that both the "readily achievable" and the "undue hardship" standards are based on the same four factors; it is unclear exactly how each standard is met. The four factors are: 1) the nature and cost of the action needed to comply; 2) overall financial resources of the facility; 3) overall financial resources of the covered entity; 4) the type of operation of the entity. 42 U.S.C.A. secs. 12111(10) [undue hardship] and 12181(9) [readily achievable]. [No. 101] Field, supra note 94, at 588. [No. 102] Id. [No. 103] Field, supra note 93, at 592. There are two types of tax incentives: 1) a \$5000 tax credit for eligible small businesses, and 2) a \$15,000 tax deduction for businesses of any size for the removal of architectural barriers.