

Notice of Interpretation: Discrimination on the Basis of Disability in Federally Assisted Programs and Activities

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DEPARTMENT OF EDUCATION

Office for Civil Rights

34 CFR Part 104

Discrimination on the Basis of Disability in Federally Assisted Programs and Activities

AGENCY: Office for Civil Rights, Department of Education

ACTION: Policy interpretation.

SUMMARY: The Department of Education (Department or Education) provides notice of its interpretation of Section 504 of the Rehabilitation Act of 1973 and the Department's implementing regulations, which prohibit discrimination on the basis of disability in federally assisted programs and activities (Education's Section 504 regulations). Among other things, Education's Section 504 regulations address the accessibility and usability of a recipient's facilities by persons with disabilities. This document explains that for new construction and alterations commenced on or after September 15, 2010, we will permit recipients of Federal financial assistance from the Department to use an additional alternative accessibility standard in lieu of the Uniform Federal Accessibility Standards (UFAS) for the purpose of complying with Section 504. Specifically, we will permit the use of the U. S. Department of Justice's 2010 ADA Standards for Accessible Design as defined in the Americans with Disabilities Act (ADA) Title II regulation (referred to in this notice as the 2010 Title II ADA Standards) except that Exception (1) to Section 206.2.3 does not apply. Use of the 2010 Title II ADA Standards will not be required as a means of compliance with Section 504, however, until the Department revises its Section 504 regulations to formally adopt the 2010 Title II ADA Standards in lieu of UFAS.

EFFECTIVE DATE: March 14, 2012

FOR FURTHER INFORMATION CONTACT: Arthur Goldman, U.S. Department of Education, 400 Maryland Avenue SW., Washington, DC 20202-1100. Telephone: (800) 421-3481, or by email at: OCR@ed.gov.

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[OCR-00063]

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SUPPLEMENTARY INFORMATION:

Background

Section 504

Education implements the requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504),¹ which prohibits discrimination on the basis of disability² in federally assisted programs or activities, through regulations in 34 CFR part 104. Education's Section 504 regulations apply to recipients to which the Department extends Federal financial assistance. Among other things, Education's Section 504 regulations prohibit denial of the benefits of, exclusion from participation in, or other discrimination against qualified individuals with disabilities in programs or activities because a recipient's facilities are inaccessible to or unusable by persons with disabilities.³

Education's Section 504 regulations require that if construction of a recipient's facility commenced after the effective date of the regulations (June 3, 1977)⁴ the facility must be designed and constructed so that it is readily accessible to and usable by persons with disabilities.⁵ These regulations also require that facility alterations commenced after June 3, 1977, that affect or may affect the facility's usability must be accomplished so that, to the maximum extent feasible, the altered portion of the facility is readily accessible and usable by persons with disabilities.⁶

¹ 29 U.S.C. 794.

² In this notice, we use the term "disability," the term that is currently used by Congress in legislation, in place of the term "handicap," which was used in the 1973 statute and our 1977 regulations. There is no substantive difference.

³ 34 CFR 104.21.

⁴ The former Department of Health, Education, and Welfare issued section 504 regulations, including this provision, with an effective date of June 3, 1977. *See* 45 CFR part 84 (1978). Upon the establishment of the Department of Education, 20 U.S.C. 3401 *et seq.*, we adopted those regulations without substantive change.

⁵ 34 CFR 104.23(a) provides: *Design and construction*. Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by * * * persons [with disabilities], if the construction was commenced after the effective date of this part.

⁶ 34 CFR 104.23(b) provides: *Alteration*. Each facility, or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by * * * persons [with disabilities].

For facilities subject to the new construction and alterations requirements, 34 CFR 104.23(c) has always incorporated by reference an accessibility design standard, such that construction or alterations in conformance with that standard would be deemed compliance with Education's Section 504 regulations.⁷ Under the current regulations, at 34 CFR 104.23(c), new construction or alterations made in conformance with the Uniform Federal Accessibility Standards (UFAS) are deemed to be in compliance with Education's Section 504 regulations, although a recipient may depart from UFAS when other methods provide equivalent or greater access to and usability of the facility.⁸

The adoption of UFAS as an accessibility design standard in Education's Section 504 regulations occurred in 1991 as part of a joint rulemaking with other Federal agencies, led by the Department of Justice (DOJ) pursuant to its coordinating authority for Section 504 under Executive Order 12250. We and the other participating agencies adopted UFAS (effective January 18, 1991) to diminish the possibility that some recipients of Federal financial assistance would face conflicting enforcement standards either between Section 504 and the Architectural Barriers Act of 1968,⁹ or among the Section 504 regulations of different Federal agencies.¹⁰ In addition, after DOJ adopted the 1991 ADA Accessibility Standards for compliance with Title II of the ADA, Education permitted entities subject to our Section 504 regulation and the ADA to use the 1991 Standards, except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) does not apply.¹¹

⁷ 34 CFR 104.23(c). This section, in its entirety, provides: *Conformance with Uniform Federal Accessibility Standards*.

(1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR subpart 101-19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For the purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical [disabilities].

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

⁸ 34 CFR 104.23(c)(1).

⁹ The Architectural Barriers Act of 1968 (ABA), 42 U.S.C. 4151-4157, directed four agencies, the General Services Administration, the Department of Housing and Urban Development, the Department of Defense, and the United States Postal Service, to establish accessibility standards for the design, construction, and alteration of certain Federal and federally funded buildings. The four agencies adopted UFAS as the ABA standard in 1984.

¹⁰ 55 FR 52136-37 (1990).

¹¹ See "Major Differences Between the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities and the Uniform Federal Accessibility Standards," Office for Civil Rights (OCR),

Title II Regulations

Title II of the ADA prohibits discrimination on the basis of disability by public entities. Public educational institutions that are subject to Education's Section 504 regulations because they receive Federal financial assistance from us are also subject to the Title II regulations because they are public entities (e.g., school districts, State educational agencies, public institutions of vocational education, and public colleges and universities). Pursuant to a delegation by the Attorney General of the United States, Education shares in the enforcement of Title II by virtue of being the designated agency to investigate complaints and seek voluntary compliance under Title II for certain types of public educational entities.¹² Thus, for those entities, Education enforces both Section 504 and Title II, as well as the implementing regulations of both statutes.¹³

Definitions of Standards Referenced in This Notice

In this notice, we explain our interpretation of 34 CFR 104.23 as it relates to new construction and alterations commenced on or after September 15, 2010. As described more fully later in this notice, our purpose is to inform all interested parties that for new construction and alterations commenced after that date, we are interpreting Education's current Section 504 regulations to permit use of accessibility standards that are consistent with DOJ's Title II regulations until Education's Section 504 regulations are revised.¹⁴ DOJ first issued the Title II regulations in 1991,¹⁵ and published revisions to the regulations on September 15, 2010. These revised regulations included modifications to the Title II ADA nondiscrimination requirements and they adopt revised ADA accessibility standards (the 2010 Title II ADA Standards). Before discussing Education's decision to deem the 2010 Title II ADA Standards as an acceptable alternative to UFAS, we first introduce and define the various accessibility standards referenced

U.S. Department of Education, September 1993, at 4. This technical assistance handout was distributed as an attachment to a September 17, 1993, memorandum from Norma V. Cantu, Assistant Secretary for Civil Rights, to OCR Senior Staff, with instructions that it was designed to accompany technical-assistance presentations on the issue of accessibility and that OCR staff should disseminate copies to interested persons.

¹² Education is the designated agency for public elementary and secondary education systems and institutions, institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools), and libraries. 28 CFR 35.190(b)(2).

¹³ DOJ enforces Title III of the ADA and has advised Education that private educational institutions that are subject to Education's Section 504 regulations are in almost all cases also subject to Title III.

¹⁴ 34 CFR 104.23(c). 42 U.S.C. 12131 *et seq.*; 28 CFR part 35. The Title II regulations and supplementary information were published in the Federal Register on September 15, 2010 (75 FR 56164-56236). DOJ's ADA Web site contains links to HTML and PDF versions at www.ada.gov/regs2010/ADAREgs2010.htm.

¹⁵ 28 CFR part 35 (1992). DOJ also issued regulations in 1991 under Title III of the ADA, 42 U.S.C. 12181 *et seq.*, 28 CFR part 36 (1992), that prohibit discrimination on the basis of disability by, among other entities, private educational institutions. As previously noted, DOJ enforces Title III of the ADA.

in the Title II regulations or Education’s Section 504 regulations that are used for designing, constructing, or altering a facility:

UFAS means the Uniform Federal Accessibility Standards. Education’s Section 504 regulations reference sections 3 through 8 of UFAS.¹⁶

1991 Standards means the requirements in the ADA Standards for Accessible Design originally published as Appendix A to 28 CFR part 36 on July 26, 1991, and republished as Appendix D to 28 CFR part 36 on September 15, 2010.¹⁷

2010 Standards as defined in the Title II regulation, means the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in 28 CFR 35.151.¹⁸ In this notice, these standards are referred to as the “2010 Title II ADA Standards.”

2004 ADAAG means the requirements set forth in appendices B and D to 36 CFR part 1191 (2009).¹⁹

Accessibility Standards in Title II Regulations Issued by DOJ

DOJ’s Title II regulations prohibit exclusion from participation in or the denial of the benefits of services, programs, or activities, or other discrimination because a public entity’s facilities are inaccessible to or unusable by individuals with disabilities. The Title II regulations provide that design, construction, and alterations of facilities commenced after January 26, 1992, must be done in such a manner that the facility or part of the facility being built or altered is readily accessible to and usable by individuals with disabilities.²⁰

The Title II regulations issued in 1991 (which have been revised in relevant part, as discussed later in this section) incorporated by reference two sets of standards for new construction and alterations: UFAS and the 1991 Standards²¹ without the “elevator exemption.”²² The 1991 Title

¹⁶ 34 CFR 104.23(c).

¹⁷ 28 CFR 35.104. These standards were based on the ADA Accessibility Guidelines (ADAAG) published by the Access Board (Architectural and Transportation Barriers Compliance Board) in 1991 (1991 ADAAG). DOJ’s ADA Web site contains links to HTML and PDF versions of the 1991 Standards at www.ada.gov/stdspdf.htm.

¹⁸ 28 CFR 35.104. DOJ provides an online compilation of the revised ADA regulations that includes the 2010 Standards, guidance about the 2010 Standards, and the Title II and Title III regulations and the interpretive guidance accompanying the regulations, at www.ada.gov/2010ADASTandards_index.htm. There are links to HTML, PDF screen, and PDF print versions of the 2010 Standards and the regulations. (The online version also includes the 2010 Title III ADA Standards for the purposes of the Title III regulations, i.e., 28 CFR part 36, subpart D, and 2004 ADAAG.)

¹⁹ 28 CFR 35.104.

²⁰ 28 CFR 35.151(a) (new construction); 28 CFR 35.151(b) (alterations).

²¹ See definition of *1991 Standards* in the *Definitions of Standards Referenced in this Notice* section of this notice.

²² The 1991 Title II regulations provided that design, construction, or alterations of facilities in conformance with UFAS or the 1991 Standards shall be deemed compliant with the relevant

II regulations also permitted departures from the particular requirements of either standard by the use of other methods when it was clearly evident that equivalent access to the facility or part of the facility is thereby provided.²³

On September 15, 2010, DOJ published revisions to the Title II regulations.²⁴ The revised regulations became effective March 15, 2011. Among other things, they provide that new construction and alterations that commence on or after March 15, 2012, must comply with the 2010 Title II ADA Standards.²⁵

The revised Title II regulations permit covered entities to use the 2010 Title II ADA Standards as an alternative to the 1991 Standards without the elevator exemption or to UFAS for new construction and alterations that commenced on or after September 15, 2010, but before March 15, 2012.²⁶ This approach provides flexibility for covered entities that comply with building codes that have many of the same requirements as the 2010 Title II ADA Standards.

As emphasized by the revised Title II regulatory language as well as the interpretive guidance published with it, covered entities engaged in physical construction or alterations during this period may select only one standard from among the three options. They may not rely on some of the requirements contained in one standard and some of the requirements contained in the other standards.²⁷

Education's Enforcement of DOJ's Title II Regulations

Public entities that receive Federal financial assistance are subject to both Title II and Section 504, and, as described previously, Education shares enforcement responsibilities with DOJ for Title II because it is the designated agency for investigation of complaints and voluntary compliance under Title II. For new construction and alterations commenced on or after March

requirements, except that if the public entity chose the 1991 Standards, the elevator exemption set forth at section 4.1.3(5) and section 4.1.6(1)(k) of those standards did not apply. All references in this notice to the "elevator exemption" in connection with the 1991 Standards refer to the exemption from these specific sections of the 1991 Standards. The elevator exemption, applicable to certain private buildings under the 1991 Standards pursuant to the 1991 Title III ADA regulations, provided that, with some exceptions, elevators were not required in facilities that have less than three stories or have less than 3,000 square feet per story. Consequently, although the 1991 Standards contained an elevator exemption, the Title II regulations prohibited public entities that chose to use the 1991 Standards for new construction or alterations from applying the elevator exemption. 28 CFR 35.151(c).

²³ 28 CFR 35.151(c).

²⁴ That same day, DOJ also published revisions to the Title III regulations (75 FR 56236).

²⁵ See definition of the *2010 Standards* (2010 Title II ADA Standards) in the *Definitions of Standards Referenced in this Notice* section in this notice.

²⁶ 28 CFR 35.151(c)(2).

²⁷ 75 FR 56164, 56213 (Sep. 15, 2010).

15, 2012, the 2010 Title II ADA Standards will be used by Education in its enforcement of the Title II regulations.²⁸

Education's Intent To Revise its Section 504 Regulations To Adopt the 2010 Title II ADA Standards

In the preamble to the final Title II regulation, DOJ stated that Federal agencies that extend Federal financial assistance should revise their Section 504 regulations to adopt the 2010 Standards as Section 504 standards for new construction and alterations.²⁹ Following issuance of the final rule, DOJ reiterated its intent to work with Federal agencies "to revise their Section 504 regulations in the near future to adopt the 2010 Standards as the appropriate accessibility standard for their recipients."³⁰ The 2010 Standards were adopted through formal rulemaking and were subject to substantial scrutiny and deliberation, including consideration of costs and benefits; we intend to harmonize the corresponding requirements of Education's Section 504 regulations with the Title II requirements. For these reasons, in coordination with DOJ, we are planning to initiate rulemaking to address the relevant standards of Education's Section 504 regulations for new construction and alterations commencing on or after March 15, 2012, by proposing an amendment to adopt the 2010 Title II ADA Standards, in lieu of UFAS, except that Exception (1) to Section 206.2.3 would not apply.³¹

²⁸ 28 CFR 35.151(c)(3). In other words, for the purposes of Title II compliance, a public entity must comply with the 2010 Title II ADA Standards as of March 15, 2012, even if UFAS remains an option under the Section 504 regulations for some period after this date. In addition, DOJ, which enforces Title III of the ADA, has advised Education that as of March 15, 2012, entities subject to Title III must use the 2010 Title III ADA Standards for the purposes of Title III ADA compliance.

²⁹ 75 FR 56164, 56213 (Sep. 15, 2010) (Because "construction in accordance with UFAS would no longer satisfy ADA requirements[,] * * * the Department [of Justice] would coordinate a government wide effort to revise Federal agencies' section 504 regulations to adopt the [2010 Title II ADA Standards] as the Standard for new construction and alterations.").

³⁰ Memorandum dated March 29, 2011, from Thomas E. Perez, Assistant Attorney General, Division of Civil Rights, U.S. DOJ, to Federal Agency Civil Rights Directors and General Counsels, titled "Permitting Entities Covered by the Federally Assisted Provisions of Section 504 of the Rehabilitation Act to Use the 2010 ADA Standards for Accessible Design as an Alternative Accessibility Standard for New Construction and Alterations" (March 29, 2011 DOJ memorandum.) This memorandum is available on DOJ's ADA Web site at http://www.ada.gov/504_memo_standards.htm.

³¹ Section 206.2.3 of the 2010 Title II ADA Standards requires that an accessible route connect each story and mezzanine in multi-story facilities, which means that an elevator is required unless there is an applicable exception. Exception (1) to Section 206.2.3 exempts from this requirement certain private facilities that are less than three stories or that have less than 3000 square feet per story. Because Education's Section 504 regulations for new construction and alterations impose the same obligation on recipients whether they are public or private entities, the Department is announcing that it will not permit recipients that are private entities to avail themselves of Exception (1).

Applicable Standards Under the Department of Education's Section 504 Regulation

Because the only standard specifically incorporated by reference in Education's Section 504 regulations at this time is UFAS, we have received questions both about whether, for new construction and alterations commenced on or after September 15, 2010, but before March 15, 2012, we will interpret Education's Section 504 regulations to deem conformance with the 2010 Title II ADA Standards or the 1991 Standards without the elevator exemption as compliance with these requirements, and about which standards will be permissible on or after March 15, 2012. DOJ, exercising its Section 504 coordinating authority, has advised all affected Federal agencies that, until the agencies revise their Section 504 regulations, they may issue guidance to recipients that permits, but does not require, recipients to use the 2010 Title II ADA Standards as an acceptable alternative to UFAS for the purposes of compliance with Section 504.³²

Standards Applicable Prior to March 15, 2012

We announce, through this notice, that we will permit, but not require, recipients to use the 2010 Standards as adopted in the Title II regulations, except that Exception (1) in Section 206.2.3 does not apply, as an acceptable alternative accessibility standard for new construction and alterations commencing on or after September 15, 2010, but before March 15, 2012. In addition, based on our longstanding policy, we will also continue to interpret 34 CFR 104.23(c), which addresses UFAS and departures from UFAS, to permit, but not require, recipients to use the 1991 Standards without the elevator exemption as an acceptable alternative accessibility standard for new construction and alterations that commence before March 15, 2012. This is also consistent with the corresponding provision in the Title II regulations, 28 CFR 35.151(c), which provides:

If physical construction or alterations commence on or after September 15, 2010 and before March 15, 2012, then new construction and alterations subject to this section may comply with one of the following: The 2010 Standards, UFAS, or the 1991 Standards except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of the 1991 Standards shall not apply. Departures from particular requirements of either standard by use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.³³

Thus, for the period spanning September 15, 2010, to March 14, 2012, we are deeming compliance with any of the following three accessibility standards as compliance with 34 CFR 104.23: (1) The 1991 Standards without the elevator exemption, (2) the 2010 Title II ADA Standards except that Exception (1) to Section 206.2.3 does not apply, or (3) UFAS. We note,

³² March 29, 2011 DOJ memorandum.

³³ 28 CFR 35.151(c)(2).

however, that a recipient may select only one standard from among these options for purposes of complying with 34 CFR 104.23.

Because under Education’s Section 504 regulations we apply the same accessibility standards for new construction and alterations to private and public recipients, this notice applies to recipients of Federal financial assistance from the Department regardless of whether they are public or private entities. That is, under the interpretation announced in this notice, both private and public recipients may make the same choice of a standard for the purposes of compliance with Education’s Section 504 regulations. Education wishes to emphasize that private entities that are covered both by our Section 504 regulation and by Title III of the ADA and that choose the 2010 Standards may not rely on the elevator exception found at Exception (1) to section 206.2.3 of the 2010 Standards.

Standards Applicable Under Section 504 as of March 15, 2012

In addition, effective March 15, 2012, because the 1991 Standards will no longer be an applicable standard under the ADA for any new construction and alterations, we are announcing that for Section 504, recipients will have the choice of the 2010 Title II ADA Standards (except that Exception (1) to Section 206.2.3 does not apply) or UFAS until Education has revised its Section 504 regulation to adopt the 2010 Title II ADA Standards. Please refer to the following table of dates and accessibility standards for a quick reference to standards for complying with 34 CFR 104.23.

Table of Applicable Standards for Complying with 34 CFR 104.23

Date construction or alternation commenced	Applicable standards for complying with 34 CFR 104.23
Between 6/3/77 and 1/17/91	ANSI A117.1-1961 (R1971). ³⁴
Between 1/18/91 and 1/25/92	UFAS.
Between 1/26/92 and 9/14/10	UFAS or 1991 Standards without the elevator exception.
Between 9/15/10 and 3/14/12	UFAS, 1991 Standards without the elevator exception, or 2010 Title II ADA Standards except that Exception (1) to Section 206.2.3 does not apply.
On or after 3/15/2012 (until the regulations are revised)	UFAS or 2010 Title II ADA Standards except that Exception (1) to Section 206.2.3 does not apply.

³⁴ This is the “American National Standards Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped,” published by the American National Standards Institute, Inc.

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This notice is also available on OCR's Web site at: <http://www.ed.gov/ocr>.

Authority: 29 U.S.C. 794.

Dated: March 8, 2012.

Arne Duncan,
Secretary of Education.