

Higher Education: Twelve New Steps for ADA Compliance (2010 Regulations)

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The Americans with Disabilities Act of 1990

Broad ban on
discrimination

- **Title II (public entities)** –
state and local colleges
and universities
- **Title III (private entities)**
– private colleges and
universities
– regardless of federal
funding



The ADA, almost 23: Change is here

- Growing and diverse population
- ADA Amendments Act
- DOJ's 2010 regulations in effect
- Pending rulemaking
- Increased enforcement
- Technology
- Complexity
- Fewer resources, more demands

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DOJ's revised ADA regulations

- Issued July 26, 2010
- Updates to 1991/1994 regulations under titles II (28 C.F.R. part 35) and III (28 C.F.R. part 36)
- Two parts
 - Policy changes
 - New accessibility standards
- Regulations and guidance are at www.ada.gov

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2010 revisions: effective date

- March 15, 2011
 - Policies to be compliant
 - Applies to service animals, mobility devices, etc.
- For hotel reservation policies (including campus conference centers), an extra 12 months

| MARCH 2011 | | | | | | |
|------------|-----|------|-----|-------|-----|-----|
| SUN | MON | TUES | WED | THURS | FRI | SAT |
| | | 1 | 2 | 3 | 4 | 5 |
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| 13 | 14 | 15 | 16 | 17 | 18 | 19 |
| 20 | 21 | 22 | 23 | 24 | 25 | 26 |
| 27 | 28 | 29 | 30 | 31 | | |

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2010 revisions: compliance date

March 15, 2012

- New construction and alterations
MUST comply with the Standards
- Existing facilities to be compliant
with barrier removal and program
accessibility requirements (using new
Standards as measure)

| March 2012 | | | | | | |
|------------|------|-----|------|-----|-----|-----|
| Mon | Tues | Wed | Thur | Fri | Sat | Sun |
| | | | 1 | 2 | 3 | 4 |
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| 12 | 13 | 14 | 15 | 16 | 17 | 18 |
| 19 | 20 | 21 | 22 | 23 | 24 | 25 |
| 26 | 27 | 28 | 29 | 30 | 31 | |

NOTE:

On March 15, 2012, DOJ modified compliance date for existing swimming pools: January 31, 2013.

Section 35.151(c), 36.304(d).

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2010 changes: Twelve Tips (1)

1. Update policies on service animals.
2. Alert staff to new provisions on miniature horses.
3. Develop clear policies about OPDMD's.



Twelve Tips (2)

4. If you use VRI, be sure it works and meets DOJ's standards.
5. Check your phone systems for effective real-time communication.
6. Don't drop the call (TTY or TRS).
7. Don't rely on companions for communication.



Twelve Tips (3)

8. Study the provisions about exams and courses.
9. Align your event ticketing policies with the 2010 provisions.
10. For any facilities with overnight guests (conference centers, hotels), update your reservation systems for 2010 compliance.



Twelve Tips (4)

11. Follow the 2010 Standards for new construction/alterations.
12. Complete barrier removal and program accessibility changes.



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1. SERVICE ANIMALS

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1. Update policies on service animals.



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Service animal: definition

A dog that does work or performs tasks for the benefit of an individual with a disability (including psychiatric, cognitive, mental)



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Examples of tasks (1)



- Assist during seizure
- Retrieve medicine or other items
- Help individual with dissociative identity disorder to remain grounded



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Examples of tasks (2)

- Prevent/interrupt impulsive or destructive behavior
- Assist with balance, stability
- Provide non-violent protection or rescue work



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Emotional support/comfort?

If this is the only function, not considered a service animal



Dilip Vishwanat/Getty Images, for The New York Times



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Can ask only two questions

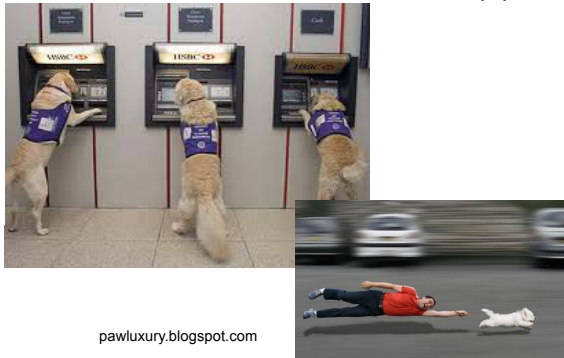
- Is this service animal required because of a disability?
- What work or tasks is the animal trained to perform?

Can't ask about disability.



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Service animals under control(s)?



Other issues

- An entity can exclude a service animal if --
 - it is not controlled or
 - it is not housebroken.
- Entity is not responsible for care or supervision.
- No "service animal" license or documentation required.

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2. MINIATURE HORSES

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2. Alert staff to new provisions on miniature horses.

NEW

- Make reasonable modifications to permit if appropriate
- Allowed if
 - Reasonable
 - Individually trained



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Use assessment factors

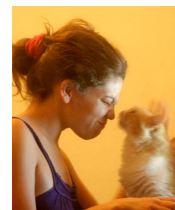
- Type, size, weight (whether facility can accommodate)
- Handler's control
- Whether housebroken
- Legitimate safety requirements of specific facility



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Other laws

- Other laws or codes may call for admission of animals --
 - Other than dogs
 - That provide emotional support or comfort
- Higher education and housing: FHAA and section 504 go "beyond" ADA
 - Allow emotional support animals
 - Allow more intrusive questions



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FHAA basics

Waive “no pets” rules for use of assistance animals in housing --

- upon request,
- if needed because of disability, and
- if “reasonable.”



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HUD v. UNK (1)

- Lawsuit filed November 2011
- Alleges
 - U of Nebraska at Kearney violated FHAct
 - Barred student with therapy dog from university-owned apartment
 - 4-pound miniature pinscher to cope with depression and anxiety
 - Asked too many details about treatment, limitations, and medications

<http://www.justice.gov/opa/pr/2011/November/11-crt-1532.html>

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HUD v. UNK (2)

First decision, April 19, 2013

- Housing unit is apartment-style living for families and single students above the age of 21.
- UNK’s student housing facilities are “dwellings” and are covered by FHAct.
- Court rejects defendants’ contentions that --
 - Students are “transient” visitors
 - Student housing is like a jail – not a “dwelling”
 - Purpose is educational one, not housing
 - Definition is “residence” by HUD is ambiguous
- Case will proceed unless decision is appealed and overturned.

Decision: http://www.ada.gov/kearney_order.pdf

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New HUD guidance

- “Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs,” notice of April 25, 2013
- Addresses FHAct, section 504, ADA
- Where laws apply simultaneously, university must meet all requirements
- http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf

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Policies about animals: Think it through

- Examine all applicable laws and codes.
 - You can go “beyond” them.
- Tailor policies to your entity.
- Determine policy as to miniature horses in advance, by facility, with assessment factors.
- Consider published policies plus internal directives.
- Designate a “go-to” person or team.
- Train staff, including front-line staff.

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Sample (not necessarily model) policies

- Kennedy Center
http://www.kennedy-center.org/accessibility/TipSheet_Service_Animals_and_the_Revised_ADA_Regulations.pdf
- University of Illinois
<http://www.disability.illinois.edu/applying-services/service-animals-campus>
- Idaho State University
<http://www.isu.edu/disabilityservices/animals/>

3. OPDMDs

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3. Develop clear policies about OPDMDs.



Wheelchairs and OPDMDs Two tiers of devices, two approaches

Wheelchairs and manually powered mobility aids

- Wheelchairs, walkers, crutches, canes, braces:
Permitted in any area open to pedestrian use

Other power-driven mobility devices

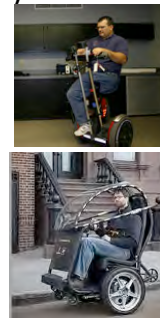
- Devices not necessarily designed for use by
people with disabilities: **Make reasonable
modifications to permit use by people with
disabilities**



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Other Power-Driven Mobility Device (OPDMD)

"[A]ny mobility device
powered by batteries,
fuel, or other engines—
whether or not designed
primarily for use by
individuals with mobility
disabilities—that is used
by individuals with
mobility disabilities for
the purpose of
locomotion."



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Use of OPDMDs

- Burden is on entity to demonstrate
use is not reasonable: that
the class of OPDMD cannot
be operated in accordance
with legitimate safety
requirements adopted by
the entity.



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OPDMD Assessment Factors

1. Device: type, size, weight,
dimensions, and speed
2. Facility's volume of pedestrian
traffic
3. Facility's design and operational
characteristics
4. Substantial risk of serious harm
to environment, resources
5. Conflict with Federal land
management laws and
regulations.



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OPDMD Policies: DOJ guidance

- Develop policy
 - Clearly state circumstances under which permitted (follow assessment factors)
 - Specific rule
 - Procedure for assessment
 - Consider grouping by type
 - Example: GSA policy (see p. 56200 of Federal Register notice)
- Give advance notice of policy

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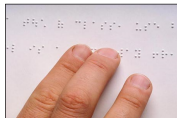
OPDMDs: Limits on inquiries

- Can request a “credible assurance” that an OPDMD is required because of the person’s disability.
 - Give examples in policy: placard, I.D.
- May not ask about nature and extent of disability.

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EFFECTIVE COMMUNICATION

- Communications with individuals with disabilities must be “as effective” as communications with others.
- Provide appropriate auxiliary aids and services “where necessary.”



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4. VIDEO REMOTE INTERPRETING

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4. If you use VRI, be sure it works and meets DOJ’s standards.

Performance standards

- Quality of video and audio
- Dedicated high-speed connection
- Picture:
 - Clear, sufficiently large, and sharply delineated
 - Heads, arms, fingers
- Voices: clear and easily understood transmission
- Quick set-up: training of users



5. PHONE SYSTEMS

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5. Check your phone systems for effective real-time communication.



- Automated voice mail, interactive voice response systems
- If provided, must ensure effective communication in real time with individuals using auxiliary aids and services (TTY's, TRS).

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6. TTYS AND RELAY CALLS

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6. Don't drop the call (TTY or TRS).

- Entity must answer telecommunications relay calls in same manner as it answers others.



- See Wells Fargo settlement.
http://www.ada.gov/wells_fargo/wells_fargo_settle.htm

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7. COMPANIONS

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7. Don't rely on companions.

- Companions
 - Covered entities must communicate effectively with companions, as appropriate
 - Family members, friends, associates
- Can't require person to bring own interpreter
- Can't rely on companions to interpret except in emergency or by request

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8. EXAMS AND COURSES

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8. Study the provisions about exams and courses.

- Title III: entity that offers exams or courses re: licensing, credentialing... shall offer them in a place and manner accessible to people with disabilities.
- Generally, exam must ensure that results accurately reflect aptitude, achievement level, etc. rather than reflecting impaired sensory, manual, or speaking skills.

Documentation



Any request for documentation should be narrowly tailored to ascertain the individual's need for the requested modification or auxiliary aid.



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Principles

- Focus on need for accommodation
- Give weight to accommodation history
- Give deference to treating professionals
- Give deference to clinical and professional narrative

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9. EVENT TICKETING

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9. Align your event ticketing policies with the 2010 provisions.

Application of equal opportunity concept:

A covered entity may not, on the basis of disability ... provide a qualified individual with a disability an opportunity that is not equal to that afforded others.

28 CFR 35.130(b)(1)(i-iii), 36.202(b).

Event ticketing



- Distribution outlets
- Clear seating charts
- Ticket transfers
- "Sell outs" and accessible seats
- Equivalent pricing and access limitations
- Verification

See DOJ technical assistance piece.



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10. RESERVATION SYSTEMS

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10. For any facilities with overnight guests, update reservation systems for compliance.

Individuals with disabilities must be able to make reservations for accessible guest rooms during the same hours and in the same manner as other guests.



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All aspects

- Access to reservations systems
- Information about features
- Hold back accessible rooms
- Block accessible rooms
- Guarantee of holding specific accessible room that is reserved
- Ensure that third parties act consistently with rule
 - Reasonable efforts
 - Information provided

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11. NEW ACCESSIBILITY STANDARDS

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11. Follow the 2010 Standards for new construction/alterations.

- a. DOJ adopts 2004 ADAAG, based on model codes and ANSI (sections 35.151(c), (d); 36.406)
- b. Certain areas are included in the Standards (and 2004 ADAAG) for the first time, for example –
 - Swimming pools
 - Golf courses
 - Playgrounds
 - Exercise facilities



...The Basics: 2010 Standards

- c. DOJ adds specific provisions (see sections 35.151(a),(b),(c)(5),(d)-(k); 35.152; 36.406(b)-(g))
 - **Path of travel in title II**
 - Places of lodging
 - **Assembly areas**
 - Medical care facilities
 - Social service centers
 - **Housing at a place of higher education**
 - Detentions and corrections

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"Path of travel"/20% rule

- Rule now applies to all public entities under title II
- If you alter a "primary function area," you have to comply with alterations standards for that space, **plus** spend up to 20% on path of travel accessibility (route to space, restrooms, drinking fountains, phones)
- BUDGET for it.



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Assembly areas (1)

ADAAG 221

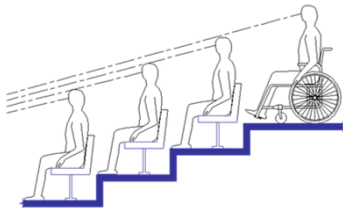
- Fewer wheelchair spaces for assembly areas with more than 500 seats
 - 501 – 5,000 seats: 1 space/ every 150 seats (instead of 1%)
 - > 5,000: 0.5%
- Accessible route to lawn seating



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Assembly areas (2)

Lines of sight over seated/standing spectators



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Campus housing (1)



- New definition of housing at a place of education in 35.104, 36.104 includes dormitories, suites, apartments, etc.
- Two categories
 - Residence halls and similar: comply with transient lodging requirements, 224 and 806
 - Apartments or townhouses leased year-round to graduate students or faculty (if no areas for educational programming): comply with residential facility standards, 233 and 809

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Campus housing (2)

- Transient
 - Usually smaller number of accessible rooms
 - But more accessibility for people with hearing impairments
 - Some roll-in showers
 - Elevators to all levels
- Residential
 - Usually elevator not required
 - No roll-in showers required
 - Adaptable features allowed
 - 5% of units accessible

NOTE: DOJ adds provisions to ADAAG: Sections 36.406(e), 35.151(f)

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New construction and alterations

- Be sure planners, designers, contractors know the applicable standards
- Attach standards to contracts
- Check for compliance

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12. EXISTING FACILITIES

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12. Complete barrier removal and program accessibility changes.

Basic requirements stay

- Title II program accessibility:
Each service, program, and activity must be accessible when viewed in its entirety (section 35.150(a)).
- Title III barrier removal:
Remove barriers building-by-building to extent “readily achievable” (section 36.304).
- Use the Standards as a measure of accessibility.

Safe harbor (Title II and Title III)

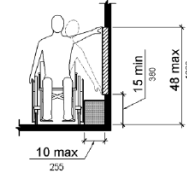


Existing elements that comply with current requirements (UFAS or 1991 ADA Standards) are “safe” from further changes just for the sake of program accessibility or barrier removal.

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Safe harbor example: side reach range (308.3)

- 1991 Standards –
54” max to 9” min
- 2010 Standards –
See diagram



New Maximum
Side Reach Range –
48”

New Minimum
Side Reach Range –
15”

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Example

- 1991 Standards: Controls can’t exceed 54” for side reach.
- 2010 Standards: Controls can’t exceed 48” for side or front reach.
- Your controls are all at 50” for side reach.
- If you don’t alter them after March 2012, controls can stay where they are.

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Using the safe harbors

- If an element already complies with UFAS or the 1991 ADA Standards (and you don’t alter it), it’s still ok until you alter it.
- Safe harbor doesn’t apply to:
 - An element that is altered (except path of travel safe harbor)
 - Elements not covered by earlier Standards.

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NOT protected by safe harbor (1)

- Swimming pools, wading pools, spas

NOTE: DOJ extended the compliance date for 28 CFR 35.150(b)(1) and (b)(2)(ii), as to existing POOLS, to January 31, 2013.



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NOT protected by safe harbor (2)

- Exercise machines and equipment
- Golf and miniature golf facilities
- Play areas
- Recreational boating facilities
- Fishing piers and platforms
- Residential facilities dwelling units
- Miscellaneous: team or player seating, accessible route to bowling lanes, accessible route in court sports facilities



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"Maintenance"



New "maintenance" of accessible features provision:

- If the Standards reduce the technical or scoping requirements for an element below what the 1991 Standards required, the technical or scoping standards may be reduced per 2010 Standards.
- Example: 1991 Standards require 4% of seats to have ALDs in an assembly area (classroom, auditorium). 2010 Standards require only 2%. You can reduce existing number to 2%.

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Off to a good start

- First, learn the facts
- Be sure those affected know the applicable standards:
 - Planners, facilities, residential life, athletics, IT, academic affairs, others
 - Contractors: Attach the standards to contracts
- Check for compliance
- Some basic training?



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Barrier removal

- No "plan" required by regulation
- DOJ urges "procedures for an ongoing assessment" and consultation with organizations representing people with disabilities
- DOJ encourages development of an implementation plan
- Ongoing obligation

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Existing facilities

- Document existing conditions in compliance with 1991 Standards (per 2010 preamble)
- If you didn't do everything by March 15, 2012, be sure you
 - Have a plan
 - Implement it

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Moving forward

- You will have to use 2010 Standards when making changes now.
- Document existing conditions in compliance with 1991 Standards (per 2010 preamble)
- Develop an approach to changes
- Implement the changes!

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KEEP UP WITH YOUR HOMEWORK

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Future rulemaking

- Four areas in which DOJ may propose rulemaking, per notices of July 26, 2010
 - Accessibility of web information and services
 - Movie captioning and video description
 - Next generation 9-1-1
 - Equipment and furniture
- All are at DOJ's ADA website
<http://www.ada.gov/anprm2010.htm>

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How much do you need to know?

- Basics: DOJ fact sheets
- Compilation of related materials from DOJ
 - Regulation language (integrated rule)
 - Preamble explanation
 - Appendix B: Analysis of Standards
- Regulatory Impact Analysis
- ADAAG technical assistance from Access Board
- New Small Business Guide
- Other technical assistance from DOJ
- Alert articles through AHEAD

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Resources

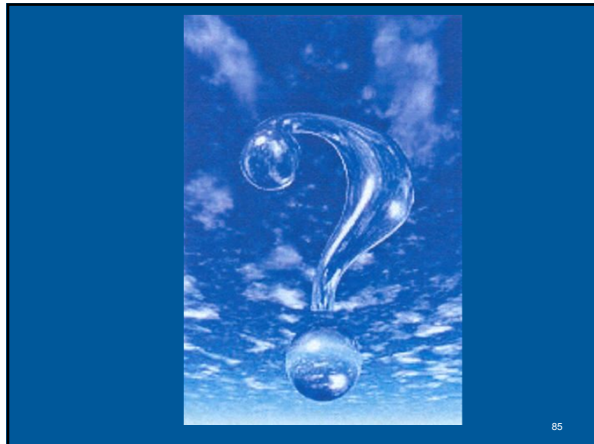
DOJ web site: www.ada.gov
DOJ information line: 800 - 514 - 0301 (voice)
800 - 514 - 0383 (TTY)
ADA TA Centers: 800-949-4232 (Voice/TTY)
Access Board: www.access-board.gov
ADA One: Resources: Physical Accessibility in
Higher Education
<http://ada-one.com/articles-tips/access-higher-ed/>

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Resources

- DOJ ADA Requirements: Service Animals
 - http://www.ada.gov/service_animals_2010.htm
 - http://www.ada.gov/service_animals_2010.pdf
- ADA One, LLC -- Two articles from AHEAD's newsletter
 - The Ides of March are upon us: Are you complying with DOJ's new regulations about service animals?
<http://ada-one.com/articles-tips/ahead-of-the-ada-access-curve-part-5/>
 - A Case of a Different Animal: DOJ's lawsuit against the University of Nebraska about emotional assistance animals
<http://ada-one.com/articles-tips/ahead-of-the-ada-access-curve-part-8/>
- Guidance from AHEAD President, May 2013
<http://www.ahead.org/uploads/docs/Staying%20out%20of%20the%20Dog%20House%20Revisited%20-%20Lissner%20AHEAD.doc>

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