

The Civil Rights Division’s Comments on the “ADA Education and Reform Act of 2017” (H.R. 620)

The Civil Rights Division, which administers and enforces the Americans with Disabilities Act, has various concerns regarding H.R. 620.

As further outlined below, the bill would direct the Department to take actions that are already a part of its mandate under the Americans with Disabilities Act (ADA). In addition, the proposed notice and cure provisions substantially change the balance Congress struck for private enforcement actions pursuant to title III of the ADA, and the Department already funds an innovative mediation program administered by the Division that is designed to promote access without resort to litigation. Moreover, the 30-day enactment period is not workable given the need for additional regulatory activity by the Department to effectuate some of the provisions of the bill.

- I. The Civil Rights Division currently engages in robust technical assistance** (Sec. 2). As described below, the Division’s Disability Rights Section (DRS) currently operates a robust technical assistance program for entities covered by titles II and III of the ADA. As a result, the requirements of this Section of the proposed bill are largely duplicative of the work already being done.
 - The Division’s ADA Technical Assistance Unit already carries out the ADA’s statutory charge (42 U.S.C. 12206) that the Department provide technical assistance to the more than seven million public accommodations and public entities that have responsibilities under titles II and III of the ADA.
 - Specific activities include the creation and dissemination of a vast array of technical assistance materials; operation of the nationwide toll-free ADA Information Line; operation of the Department’s ADA Website (www.ada.gov); educational efforts that include presentations and training sessions to covered entities and individuals with disabilities; and outreach initiatives targeted to specific audiences, including businesses, state and local governments, people with disabilities, and under- and unrepresented minority groups and geographic locations.
 - In FY 2016 and YTD FY 2017, the Department answered 97,000 calls to the ADA Information Line by ADA Specialists who assisted callers in applying the ADA to their own unique situations. A significant number of these calls came from places of public accommodation seeking guidance on barrier removal issues.
 - The Department’s ADA information website, www.ADA.gov, provides a central location for all of the Department’s technical assistance materials on ADA compliance issues, including a large number of publications on barrier removal issues such as: a guide to [Managing Accessible Features in Retail Establishments](#), an [ADA Guide for Small Businesses](#), and a guide on [Common ADA Errors and Omissions in New Construction](#)

[and Alterations](#). ADA.gov, which is operated by the Disability Rights Section and its staff, is a highly trafficked website. For example, in FY 2016 and YTD FY 2017, it had more than 30 million hits.

- The Department routinely conducts training and outreach activities throughout the country on important issues under the ADA like the ADA’s barrier removal requirements, and also provides extensive training to state and local government entities.
 - The Department’s training efforts include routinely partnering with the ADA National Network to support its training and outreach efforts. Funded by the National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR) of the Department of Health and Human Services, the network consists of ten regional “ADA Centers” located throughout the United States and an “ADA Knowledge Translation Center.” Each regional ADA Center provides information, guidance, and training on how to implement the ADA that focuses on its region’s unique needs. This regional focus is critical to ensuring that ADA National Network services meet the needs of diverse populations and stakeholders throughout the country.
 - Both the Department’s outreach and training efforts, and the ADA National Network, serve all sectors of society, including businesses, employers, state and local governments, architects, disability organizations and individuals with disabilities.
- The Division also funds and provides support for a comprehensive and innovative ADA Mediation Program, as discussed further below in Part III. The Mediation Program is a way for public accommodations and individuals with disabilities to resolve their ADA-based disputes without resort to investigation or litigation by the Department.

II. The notice and cure provisions of this proposed bill change the landscape of enforcement under the ADA for matters involving the barrier removal requirements.

- Public accommodations have been subject to the ADA’s barrier removal requirements for more than 27 years ago. The ADA’s barrier removal provisions, contained at 42 U.S.C. 12182(b)(2)(A)(iv), (v) and 28 C.F.R. 36.304-36.305, reflect the measured determination by Congress that for existing places of public accommodation, only those architectural barriers that are “readily achievable,” i.e, easily accomplishable without significant difficulty or expense, must be removed to avoid discrimination on the basis of disability. The “readily achievable” defense is available to all public accommodations that are subject to barrier removal actions.
 - The notification provisions do not allow public accommodations to avail themselves of the ADA’s defenses. Instead, the notification provisions require a “form over substance” process that at the very least delays access to the ADA’s defenses, or overrides the existence of these defenses altogether, requiring persons

with disabilities and public accommodations to proceed down a path of procedure and for those public accommodations to potentially make changes to their facilities that would not be required under the ADA.

- The proposed notice and cure process would also unnecessarily limit individuals' abilities to obtain much-needed barrier removal in a timely manner by imposing additional requirements that may not result in the collaborative process that the proposed bill intends, but may instead result in additional areas of litigation.
 - Both the notice requirements for the person with a disability and the response requirements from the public accommodation involve a series of steps that may not be clear. Either regulatory action by the Department or judicial intervention may be required to define these terms and concepts.
 - Moreover, the addition of the notice and cure procedures may prevent individuals with disabilities from availing themselves of the ADA's statutory right not to engage in a "futile gesture" before asserting their rights under the law. Specifically, the notice requirements to set out "circumstances under which an individual was actually denied access;" and the requirement that a "request for assistance in removing an architectural barrier" be made seem to be the specific sorts of "futile gestures" that the ADA does not require.
 - The proposed notice and cure procedures also include requests for information by a person with a disability that may not be known and ultimately, do not matter. For example, the ADA regulations already provide that temporary interruptions to access due to maintenance and repairs are not considered to be architectural barriers to access. *See* 28 CFR 36.211.
 - The notice and cure provisions may prevent an individual with a disability from obtaining rapid relief. Section 3 gives public accommodations up to 180 days (60 days to respond to an initial notice and another 120 days to actually make any progress toward removing the barrier). For individuals with disabilities who live in small towns or remote areas of the country and have limited access to alternative places of public accommodation that may be more accessible, like hospitals, doctors offices, funeral homes, and grocery stores, this additional time could be a significant problem.
- Because the notice and cure section is to be placed in the general enforcement provisions of the ADA, and because it applies to civil actions under sections 302 and 303 based on the failure to remove architectural barriers, it appears to apply to the Department of Justice. Notice and cure obligations for the Department of Justice are unnecessary because the Department already has the obligation to use alternative means of resolution when possible to resolve disputes under the ADA. 42 U.S.C. 12212. In addition, the Department is required to comply with Executive Order 12988 that requires the Department to attempt to settle disputes and provide notice before filing suit under civil rights laws.

III. The Department of Justice already funds a comprehensive and innovative ADA Mediation Program (Sec. 5). While the proposed bill requires that the Judicial Conference of the United States develop a model mediation program for barrier removal, in fact, the Department has funded and supported such a program under the ADA for many years.

- Since 1994, the ADA Mediation Program has helped the Department to more quickly resolve ADA complaints effectively, efficiently, equitably, and voluntarily using an alternative dispute resolution approach, as encouraged by Title V of the ADA.
- The ADA Mediation Program is a partnership between the Federal government and the private sector. About half of all referred complaints allege discrimination in the area of barrier removal, and others address program access, effective communication, and modifications of policies, practices, and procedures.
- The ADA Mediation Program has achieved remarkable results, providing a convenient alternative to litigation that resolves issues between public accommodations and local community members with disabilities that meets everyone's needs and preserves, rather than severs, the relationship between the parties.
 - Mediation is voluntary for both the person with a disability and the public accommodation, and places responsibility on the shoulders of both parties, who themselves control both the process and the outcome of the mediation.
 - More than 6,000 complaints filed with the Department alleging ADA violations have been referred to the program for mediation. Ninety percent of these have involved public accommodations under title III, and about half have involved barrier removal issues
 - Seventy-seven percent of complaints mediated have been successfully resolved.