LEGAL OPINION
U.S. DEPARTMENT OF TRANSPORTATION
OFFICE of GENERAL COUNSEL
49 CFR 37.43(a)

May 2016

Background:

New York City Transit (NYCT) has altered, is in the process of altering, or plans to alter numerous stations on its rapid rail (subway) lines. NYCT typically seeks funding from the Federal Transit Administration (FTA) for these projects. NYCT asserts that any time alterations to the path of travel are contemplated, cost is a factor, and if the cost of making the path of travel accessible is disproportionate, then NYCT is not required to make the path of travel accessible. Thus, NYCT asserts it is not required to install an elevator when it replaces staircases with new staircases.

The U.S. Department of Transportation's (DOT) Americans with Disabilities Act (ADA) regulation at 49 CFR § 37.43(a)(1), provides that when a public entity "alters an existing facility or a part of an existing facility used in providing designated public transportation services in a way that affects or could affect the usability of the facility or part of the facility, the entity shall make the alterations (or ensure that the alterations are made) in such a manner, and to the maximum extent feasible, that the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations."

Section 37.43(a)(2) provides that when a public entity "undertakes an alteration that affects or could affect the usability of or access to an area of a facility containing a primary function, the entity shall make the alteration in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of the alterations. Provided, that alterations to the path of travel, drinking fountains, telephones and bathrooms are not required to be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, if the cost and scope of doing so would be disproportionate."

Importantly, as described here and supported by the legal analysis below, there is a distinction between these two provisions. Section 37.43(a)(1) applies to alterations of existing facilities that could affect the usability of the facility—what we have labeled for purposes of this opinion, "general alterations." As explained further below, when making general alterations under section 37.43(a)(1), cost is not a factor. On the other hand,

section 37.43(a)(2) specifically applies only to those situations in which an entity is altering a primary function area, and requires that in such a case, the entity also alters the path of travel, provided the cost of doing so is not disproportionate. Thus, where an element of a path of travel (such as a sidewalk, pedestrian ramp, passageway between platforms, staircase, escalator, etc.) in an existing facility is itself the subject of alteration—that is, not in connection with an alteration to a primary function area—and is therefore subject to 49 CFR § 37.43(a)(1), the public entity is required to make the altered portion (i.e., the element of the path of travel) readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, without regard to cost or cost disproportionality, to the maximum extent feasible.

Questions presented:

I. Is the replacement of a staircase at an existing public transportation facility an "alteration" that affects or could affect the usability of a facility for purposes of the ADA and the DOT implementing regulations?

II. Under the ADA and DOT's regulations, when is a public entity permitted to consider costs and cost-disproportionality in determining whether to make an altered path of travel in a facility readily accessible to individuals with disabilities, including individuals who use wheelchairs?

Brief Answers

I. Yes, the replacement of a staircase is an alteration under the ADA and DOT's implementing regulations because a staircase replacement is tantamount to the renovation, rehabilitation, or reconstruction of an existing facility, as opposed to normal maintenance. Moreover, in a situation where a staircase is being replaced due to concrete deterioration or to make the staircase easier or safer to use, such a staircase replacement qualifies as an alteration that affects or could affect the usability of the facility or part of the facility.

II. The plain language of the ADA and DOT's implementing regulations, federal appellate case law, and the Department of Justice's (DOJ) interpretation of the ADA's legislative history each dictate that costs and cost-disproportionality may be considered by a public entity ***only*** under circumstances where a public entity is undertaking an alteration to a primary function area of the facility (e.g., train or bus platforms) and where the public entity must, therefore, ensure that "the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area are readily accessible" as well.

Analysis

I. Staircase Replacements Are Alterations That Affect or Could Affect Usability

Replacing a staircase at a public transportation facility (A) is an alteration for purposes of the ADA and DOT's implementing regulations and (B) affects or could affect the usability of a facility or part of the facility. See 42 U.S.C. § 12147(a); 49 CFR §§ 37.3, 37.43(a); see also, Disabled in Action of Pa. v. Se. Pa. Transp. Auth. (*hereinafter* "SEPTA II"), 635 F.3d 87, 93–94 (3d Cir. 2011).

(A) Staircase replacements are alterations.

Pursuant to Title II of the ADA (Pub. L. No. 101-336, Title II) and DOT's implementing regulations (49 CFR part 37), when a public entity alters an existing public transportation facility or a part thereof, "in a way that affects or could affect the usability of the facility or part" thereof,

> the entity shall make the alterations (or ensure that the alterations are made) in such a manner, to the maximum extent feasible, that the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations.

49 CFR § 37.43(a)(1); see also 42 U.S.C. § 12147(a); 42 U.S.C. § 12162(e)(2)(B)(i). "Alteration" is defined by DOT regulations as:

> [A] change to an existing facility, including, but not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical or electrical systems are not alterations unless they affect the usability of the building or facility.

49 CFR § 37.3. The regulatory definition differentiates between "normal maintenance" and more substantial modifications, such as "remodeling, renovation, rehabilitation, [or] reconstruction," when giving examples of what constitutes an alteration for purposes of the ADA and DOT's regulations. See 49 CFR §§ 37.3, 37.43(a); 42 U.S.C. § 12147(a);

see also SEPTA II (stating that complete replacement of a stairway should be considered "'remodeling, renovation, rehabilitation [or] reconstruction' in the ordinary sense of those words") (quoting 49 CFR § 37.3). Replacing a staircase is an alteration here because staircases that are demolished, under construction, or otherwise in disrepair in public transportation facilities directly impact usability.

(B) Staircase replacements are alterations that affect or could affect the usability of a public transportation facility or part thereof.

NYCT, in its comments to the docket for FTA's proposed ADA circular, asserted that an alteration to an existing facility must be done "in a way that affects or could affect the usability of the facility" in order to trigger the accessibility requirements under the ADA and 49 CFR § 37.43. However, in Disabled in Action of Pa. v. Se. Pa. Transp. Auth. (*hereinafter* "SEPTA I"), 655 F. Supp. 2d 553, 562 (E.D. Pa. 2009), *aff'd*, SEPTA II, 635 F.3d 87, 93–94 (3d Cir. 2011), the staircase at issue was replaced due to deterioration of the concrete, and the court noted that the original stairway and the replacement stairway brought an ambulatory person from street level to the *same* point within the station courtyard. SEPTA I, 655 F. Supp. 2d at 557. The Federal District Court, later affirmed by the Third Circuit, found it "inescapable as a conclusion that replacing a stairway that is *unsafe* and an escalator that is inoperable with a safe stairway and an operating escalator unequivocally enhances the usability of the stairway and escalator portions of the SEPTA facilities." SEPTA I, 655 F. Supp. 2d at 562 (emphasis added).

NYCT argues that the "usability" determination in SEPTA II hinges on the fact that the Third Circuit considered the staircase to be "unusable" when it was replaced (or, in NYCT's words, "no longer usable" and "non-functional"). See SEPTA II, 635 F.3d at 90, 93 (describing the staircase as having become "unusable"); but see SEPTA I, 655 F. Supp. 2d at 557, 562 (deciding that a staircase replacement affected "usability" without describing the original staircase as being "unusable," but rather "unsafe" or "in disrepair"). While the court in SEPTA II found that the staircase was unusable because it was no longer safe or operable, these are not the only circumstances that meet the "usability" standard. For example, the Third Circuit in Kinney held that resurfacing street pavement affects the street's "usability" because it makes streets "easier and safer" to use. Kinney v. Yerusalim, 9 F.3d 1067, 1073–74 (3d Cir. 1993) (citing the District Court opinion). "When that surface is improved, the street becomes more usable in a fundamental way." Id. at 1074. Neither the District Court nor the Third Circuit indicated that the street was unsafe when it was resurfaced. Rather, the Third Circuit's holding rested solely on the fact that resurfacing the street made the street "easier and safer" for pedestrians and vehicles to use. Id. at 1073–74. The Third Circuit, citing the legislative

history of the ADA, underscored that the term "usability" should be broadly defined and has an expansive, remedial construction. Id. at 1073 (citing H. Rep. No. 485, 101st Cong., 2d Sess., Pt. 3, at 64 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 487). By asserting that an altered portion of a facility must be "no longer usable" or "non-functional" (in NYCT's words), or not "in-use" (in SEPTA's words), in order to qualify as an alteration that "affects or could affect the usability of a facility or part of the facility," NYCT and SEPTA attemptto add a substantive element that does not exist in 42 U.S.C. § 12147(a) or 49 CFR § 37.43(a); indeed, adding such an element would be inconsistent with Third Circuit case law. See Kinney, 9 F.3d at 1073–74.

In conclusion, a staircase replacement at an existing facility would qualify as an alteration, given DOT's examples of alterations under 49 CFR § 37.3 (e.g., "remodeling, renovation, rehabilitation, reconstruction," etc.), and Third Circuit case law that held that a staircase replacement is in fact an alteration for purposes of the ADA. SEPTA II, 635 F.3d at 93–94. Moreover, where the staircase is replaced due to concrete deterioration or to make the staircase easier or safer to use, such a staircase replacement would qualify as an alteration that "affects or could affect the usability of the facility or part of the facility" under federal appellate case law, regardless of whether the staircase was "in use" at that time. See Kinney, 9 F.3d at 1073–74; SEPTA I, 655 F. Supp. 2d at 562, *aff'd*, SEPTA II, 635 F.3d at 93–94; see also 42 U.S.C. § 12147(a); 49 CFR § 37.43(a)(1).

(C) NYCT's interpretation of the ADA and DOT's implementing regulations is too narrow.

To address another argument presented by NYCT,[1] the ADA Accessibility Guidelines (ADAAG) do not, as NYCT contends, limit the requirement that "a means of accessible vertical access" be provided in connection with staircase or escalator alterations or additions to only those circumstances where a staircase or elevator did not exist previously and where major structural modifications were necessary for the installation.[2] A similar argument was presented by SEPTA in SEPTA II, and the Third Circuit expressly held that "[a]lthough ADAAG § 4.1.6(1)(f) addresses one scenario in which an

[1] This argument was raised by NYCT in its letter dated December 15, 2014 to FTA Region 2 regarding the Middletown Road Station, on page 2.

[2] Note that NYCT quotes § 4.1.6(1)(f) (Accessible Buildings: Alterations) from the 2002 version of the ADAAG in its letter dated December 15, 2014, which provides that "[i]f an escalator or stair is planned or installed where none existed previously and major structural modifications are necessary for such installation, then a means of accessible vertical access shall be provided that complies with the applicable provisions of 4.7, 4.8, 4.10, or 4.11." See ADAAG § 4.1.6(1)(f), available at http://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/background/adaag#4.9. However, FTA adopted the revised ADAAG issued by the Access Board on July 23, 2004, which was codified in Appendices B and D to 36 CFR Part 1191 and which contains the language "an accessible route," rather than "a means of accessible vertical access." See 49 CFR § 37.9(a); Appendix A to 49 CFR Part 37; Appendix B to 36 CFR Part 1191 at § 206.2.3.1.

accessible means of vertical access must be provided, it does not clearly indicate that this is the *only* scenario in which such access must be provided [. . . and] SEPTA's reading is at odds with the otherwise broad accessibility mandate of 42 U.S.C. § 12147(a) and 49 CFR § 37.43." SEPTA II, 635 F.3d at 94 (emphasis in original). In fact, 49 CFR § 37.9(a) requires public entities to comply with both the requirements of 49 CFR Part 37 *and* the ADAAG requirements set forth in Appendices B and D to 36 CFR Part 1191, not just the ADAAG requirements.

The relevant ADAAG requirement cited by NYCT, as set forth in § 206.2.3.1 of Appendix B to 36 CFR Part 1191, merely lays out one situation in which a public entity must provide an accessible route between the levels served by the staircase or escalator—i.e., a situation where the staircase or escalator did not exist previously and major structural modifications were necessary for the installation. Notwithstanding this non-exhaustive ADAAG requirement, because a staircase replacement at an existing facility qualifies as an "alteration" that "affects or could affect the usability of the facility or part of the facility," for the reasons set forth above, DOT's regulations (specifically, 49 CFR § 37.43(a)(1)) expressly require that the public entity shall make the alteration "in such a manner, to the maximum extent feasible, that the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations." See 49 CFR § 37.43(a)(1); SEPTA II, 635 F.3d at 93–98.

II. Cost-disproportionality Is Only a Factor Under Certain Circumstances

A public entity is permitted to consider cost-disproportionality in determining whether to make an altered path of travel readily accessible to individuals with disabilities (including individuals who use wheelchairs) *only* if the path of travel is being altered *not* as a general alteration, but rather as an additional alteration that is required where the path of travel to the altered area must be made readily accessible because the public entity is altering a primary function area (such as a bus or train platform) of a facility. See 42 U.S.C. § 12147(a); 49 CFR § 37.43(a), (c); DOJ Final Rule Implementing Title III of the ADA, 56 Fed. Reg. 35544, 35581 (July 26, 1991) (Title II of the ADA regarding public services and public transportation is identical in pertinent language to Title III of the ADA) ("Costs are to be considered only when an alteration to an area containing a primary function triggers an additional requirement to make the path of travel to the altered area accessible"); see also SEPTA II, 635 F.3d at 95; Roberts v. Royal Atlantic Corp., 542 F.3d 363, 371–72 (2d Cir. 2008).

The plain language of the ADA and DOT's implementing regulations dictate that consideration of cost-disproportionality is permissible only in the scenario where alteration of a primary function area triggers the additional requirement to make the path

of travel to the altered area readily accessible and usable by individuals with disabilities, including individuals who use wheelchairs, to the maximum extent feasible. See, e.g., 42 U.S.C. § 12147(a); 49 CFR § 37.43(a)(1)–(2); SEPTA II, 635 F.3d at 95. For example, 42 U.S.C. § 12147(a) does not provide that cost is a consideration in the sentence explaining the rule for general alterations, whereas the statute does state expressly, in the following sentence, that a path of travel must be altered if a primary function area is altered, where such alterations to the path of travel are "not disproportionate to the overall alterations in terms of cost and scope." See 42 U.S.C. § 12147(a) (governing alterations to public transportation facilities). Similarly, but even more clearly than in separate sentences, 42 U.S.C. § 12162(e)(2)(B) differentiates between the requirements for general alterations (not containing cost-disproportionality as a factor) and the requirements for alterations to primary function areas (listing cost-disproportionality as a factor) by setting out the rule for each in separate paragraphs (i.e., (B)(i) and (B)(ii)). See 42 U.S.C. § 12162(e)(2)(B) (governing alterations to intercity and rail commuter stations). DOT's implementing regulations likewise separate out the distinguishable rules in different paragraphs (i.e., (a)(1) and (a)(2)). See 49 CFR § 37.43(a)(1)–(2). Moreover, the Third Circuit has recognized that:

> [B]oth 42 U.S.C. § 12147(a) and 49 C.F.R. § 37.43 do contain provisions for the consideration of cost in making public transit facilities accessible, but only in *different* sections establishing requirements for certain additional changes (e.g., to the bathrooms and drinking fountains [and paths of travel]) that must be made 'to the maximum extent feasible' if an area that serves a "primary function" is altered. The costs for those additional changes should not be 'disproportionate.' See 42 U.S.C. § 12147(a); 49 C.F.R. § 37.43(a)(2). The sections addressing 'alterations' in general contain no such language.

SEPTA II, 635 F.3d at 95. Consistent with DOT's interpretation and Third Circuit case law, DOJ has also taken the position—based on the legislative history of the ADA—that "[c]osts are to be considered only when an alteration to an area containing a primary function triggers an additional requirement to make the path of travel to the altered area accessible." DOJ Final Rule Implementing Title III of the ADA, 56 Fed. Reg. 35544, 35581 (July 26, 1991) (emphasis added) (Title II of the ADA regarding public services and public transportation is identical in pertinent language to Title III of the ADA).

Consequently, where a path of travel (such as a staircase or escalator) in an existing facility is itself the subject of alteration—i.e., not in connection with an alteration to a primary function area—the public entity is required to make the altered portion readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) without regard to costs or cost-disproportionality. See 56 Fed. Reg. at

35581; SEPTA II, 635 F.3d at 95; see also 42 U.S.C. § 12147(a); 49 CFR § 37.43(a). For general alterations to paths of travel, the qualifier set forth in 49 CFR § 37.43(a) that alterations must be readily accessible "to the maximum extent feasible" refers to technical feasibility. See 56 Fed. Reg. at 35581 ("Any features of the facility that are being altered shall be made accessible unless it is technically infeasible to do so"). The Third Circuit recognized that while there might be, in practice, a correlation or overlap between technical feasibility and "particularly excessive costs," the "omission of any reference to costs" in the statutory and regulatory rules for general alterations, when cost-disproportionality is "mentioned in closely-related sections, indicates that the ADA and the DOT regulations define feasibility primarily with respect to technical, not purely economic concerns." See SEPTA II, 635 F.3d at 94–95, n.10 (emphasis added). As such, the court held that SEPTA may not refuse to install elevators at a facility, where it had just undertaken a complete staircase replacement, "solely because to do so would, allegedly, force SEPTA to incur significant costs." SEPTA II, 635 F.3d at 96.

Importantly, 49 CFR § 37.43(b), itself, explicitly provides that "the phrase to the maximum extent feasible applies to the *occasional case where the nature of an existing facility makes it impossible* to comply fully with applicable accessibility standards through a planned alteration." 49 CFR § 37.43(b) (emphasis added). Additionally, Appendix D clarifies that "'to the maximum extent feasible' means that all changes that are possible must be made." App. D to 49 CFR part 37 (explaining, for example, that "to the maximum extent feasible" would not require entities "to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member unless the load-bearing structural member is otherwise being removed or altered as part of the alteration"); see also SEPTA II, 635 F.3d at 95–96.

Conclusion

There is a clear distinction between 49 CFR § 37.43(a)(1) and (a)(2). Section 37.43(a)(1) applies to general alterations of existing facilities that could affect the usability of the facility, and for general alterations, cost is not a factor. Where an element of a path of travel (such as a sidewalk, pedestrian ramp, passageway between platforms, staircase, escalator, etc.) in an existing facility is itself the subject of alteration and is therefore subject to 49 CFR § 37.43(a)(1), the public entity is required to make the altered portion (i.e., the element of the path of travel) readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, without regard to cost or cost disproportionality, to the maximum extent feasible.