

2010

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Recommended Citation

Pendo, Elizabeth (2010) "Taking It to the Streets: A Public Right-of-Way Project for Disability Law," *Saint Louis University Law Journal*: Vol. 54 : No. 3 , Article 14.

Available at: <https://scholarship.law.slu.edu/lj/vol54/iss3/14>

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TAKING IT TO THE STREETS: A PUBLIC RIGHT-OF-WAY PROJECT FOR DISABILITY LAW

ELIZABETH PENDO*

INTRODUCTION

I teach a course in Disability Discrimination Law, which is designed as a civil rights course focused on the Americans with Disabilities Act (ADA).¹ When the ADA was passed in 1990, it was celebrated by many as one of the most significant civil-rights victories of this century.² The ADA was enacted to “provide clear, strong, consistent, [and] enforceable standards [for] addressing discrimination against individuals with disabilities”³ and prohibits discrimination in employment, public services and transportation, privately-owned places of public accommodations, and telecommunications. Although the ADA is not the first federal law addressing disability,⁴ its passage made

* ©2009–2010. Professor of Law, Saint Louis University School of Law. Thank you to the students in my Disability Discrimination Law course in Fall 2008, and to Kara Kezios, (J.D., class of 2010) for her excellent research assistance and documentation of this project in her paper “Teaching Access Through Advocacy: PROW Public Service Project” (Apr. 23, 2009) (copy on file with author).

1. Pub. L. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 U.S.C. (2006)). Like many, I focus on the ADA, although that approach is not the only way to teach such a course. For a history of teaching disability law and suggested approaches to the subject, see Laura F. Rothstein, *Teaching Disability Law*, 48 J. LEGAL EDUC. 297 (1998).

2. See, e.g., President George Bush, Remarks of President George Bush at the Signing of the Americans with Disabilities Act (July 21, 1990), <http://www.eeoc.gov/ada/bushspeech.html> (last visited March 20, 2010) (“This historic act is the world’s first comprehensive declaration of equality for people with disabilities—the first. Its passage has made the United States the international leader on this human rights issue.”); NAT’L COUNCIL ON DISABILITY, THE AMERICANS WITH DISABILITIES ACT POLICY BRIEF SERIES: RIGHTING THE ADA 2 (2002), available at <http://www.ncd.gov/newsroom/publications/pdf/rightingtheada.pdf> (last visited March 20, 2010) (“The Americans with Disabilities Act of 1990 (ADA) has been the most significant civil rights advancement for people with disabilities to date.”); Marca Bristo & Gerben DeJong, *Foreword* to JONATHAN M. YOUNG, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT, at xi (1997) (“Future historians will come to view the Americans with Disabilities Act (ADA) of 1990 as one of the most formative pieces of American social policy legislation in the 20th century.”).

3. 42 U.S.C. § 12101(b)(2) (Supp. V 1994).

4. See, e.g., Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C. (2000); Air Carrier Access Act of 1986, 49 U.S.C. § 41705

clear that the continued exclusion of people with disabilities from full participation in all aspects of public life is a civil rights issue.

As the subject of a freestanding course, Disability Discrimination Law is a relative newcomer to the field of civil rights, with most courses devoted to disability law appearing after the enactment of the ADA in 1990.⁵ Disability law has aspects in common with other civil rights courses, but also some important differences. The employment provisions of Title I,⁶ for example, are modeled in part after Title VII of the Civil Rights Act of 1964,⁷ which prohibits discrimination in employment on the basis of race, national origin, sex, and religion, but face distinctive challenges, including the definition of “disability,” the requirement of reasonable accommodation, and the issue of cost.⁸ Although Title I has received the most attention,⁹ similar issues are

(1994) (codified as amended at 49 U.S.C. § 41705 (2000)) (prohibiting any carrier, including a foreign carrier from discriminating against an otherwise qualified individual with a mental or physical handicap); Individuals with Disabilities Education Act (IDEA), Pub. L. 91-230, 84 Stat. 175–188 (codified as amended in scattered sections of 20 U.S.C. (2000)) (guaranteeing that each child with disabilities will have an “individualized education program” so that he or she can receive a “free appropriate public education”); Fair Housing Act Amendments of 1988 (FHAA), Pub. L. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3631 (1994 & Supp. III 1997)) (prohibiting discrimination on the basis of handicap in the sale or rental of housing, in residential real estate related transactions and in the provision of brokerage services); Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub. L. 106-402, 114 Stat. 1677 (codified as amended in scattered sections of 42 U.S.C. (2000)) (guaranteeing that individuals with developmental disabilities and their families “participate in the design of and have access to needed community services, individualized supports, and other forms of assistance”); Help America Vote Act of 2002 (HAVA), Pub. L. 107-252, 115 Stat. 1666 (codified as amended in scattered sections of 36 U.S.C. and 42 U.S.C. (2006)) (enacting election reform statute that implements a new set of minimum voting standards that each state and territory must follow, including grants to protection and advocacy systems to “ensure full participation in the electoral process for individuals with disabilities, including registering to vote, casting a vote and accessing polling places.”); Voting Accessibility for the Elderly and Handicapped Act of 1984, Pub. L. 98-435, 98 Stat. 1678 (codified as amended at 42 U.S.C. §§ 1973ee–ee-6 (Supp. II 1984)) (improving access for handicapped and elderly individuals to registration facilities and polling places for federal elections).

5. See Rothstein, *supra* note 1, at 297.

6. Pub. L. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12102–12117 (2006)).

7. Pub. L. 88-352, Title VII, 78 Stat. 253 (codified as subchapter VI of chapter 21 of 42 U.S.C. § 2000e (1964)).

8. Unlike Title VII, which protects everyone on the basis of race, color, religion, sex, or national origin, the ADA protects only individuals who meet the statutory definition of “disabled.” See 42 U.S.C. § 12112(a) (2006). The ADA defines “disability” to mean (1) “a physical or mental impairment that substantially limits one or more of the major life activities of such individual;” (2) “a record of such an impairment;” or (3) “being regarded as having such an impairment.” ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3553 (codified as amended at 42 U.S.C. §§ 12102(2)(A)–(C) (2009)). See also Elizabeth A. Pendo, *Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation*, 35 U.C. DAVIS L. REV. 1175 (2002) (discussing the lack of a consistent understanding of the

presented by Title II, which prohibits discrimination by public entities,¹⁰ and Title III, which prohibits discrimination by places of public accommodation.¹¹

People with disabilities face a wide range of discrimination, including the thoughtlessness and indifference of non-disabled people. Often, issues critical to the lives of people with disabilities go unnoticed, and therefore unaddressed, by others. Although there are many reasons for this, one key reason is the failure of people without disabilities to identify with the experiences of people with disabilities—a lack of “experiential accessibility” to borrow a phrase from philosopher Anita Silvers.¹²

I wanted to design a project that would introduce students to significant issues of doctrine, theory, and policy under the ADA. I also wanted to equip them with the practical skills to employ that knowledge on behalf of clients and in their own communities. Finally, I hoped to provide a meaningful context for exploring issues and tensions underlying disability law and the disability rights movement, and to notice and address an issue of importance to people with disabilities in the community. A service-learning project seemed especially appropriate in meeting these ends, and in keeping with the movement towards integrating *pro bono* and public service opportunities into doctrinal courses.¹³ It also resonates with the mission of the School of Law to educate “legal professionals who use their knowledge to serve others.”¹⁴ This Article describes the public right-of-way project that I designed with these goals in mind.

reasonable accommodation requirement of Title I). The issue is determined on a case by case basis, and is likely to remain a controversial issue even after the ADA Amendments Act.

9. Most recently, the ADA Amendments Act of 2008 primarily addressed the definition of disability in a number of Supreme Court decisions in the employment context. *See* ADA Amendments Act of 2008, ch. 325, sec. 2(b), 122 Stat. 3553, 3554.

10. Pub. L. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12131–12161 (2006)).

11. *Id.* (codified at 42 U.S.C. §§ 12181–12213 (2006)).

12. Anita Silvers, *Reconciling Equality to Difference: Caring (F)or People with Disabilities*, in *FEMINIST ETHICS AND SOCIAL POLICY* 23, 29 (Patrice DiQuinzio & Iris Marion Young eds., 1997). I have discussed this concept in other writings, most recently, Elizabeth Pendo, *Disability, Equipment Barriers, and Women’s Health: Using the ADA to Provide Meaningful Access*, 2 ST. LOUIS U. J. HEALTH L. & POL’Y 15 (2008).

13. For example, the Association of American Law Schools recently featured a day-long workshop on “Pro Bono and Public Service” at its 2010 Annual Meeting, including a panel on “faculty who have made pro bono a central part of their curriculum in doctrinal courses, seminars and workshops, going beyond the traditional model of pro bono through clinical and externships only.” The program is available at the AALS webpage, <http://www.aals.org/am2010/brochure1.pdf> at 4–5, and descriptions of selected *pro bono* and public service projects are available at https://memberaccess.aals.org/eWeb/DynamicPage.aspx?webcode=SesDetails&ses_key=60744e4c-7d10-440b-9289-0777f04e1fd.

14. *See* Saint Louis University School of Law, *The Mission*, http://law.slu.edu/admissions/about_us/mission.html (last visited Mar. 20, 2010).

I. PUBLIC RIGHTS-OF-WAY

The text and history of the ADA demonstrate Congressional concern with architectural barriers and inaccessible public spaces. As the House Report noted, “[L]ocal and state governments are required to provide curb cuts on public streets. The employment, transportation, and public accommodation sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between streets.”¹⁵ Accessible public rights-of-way remain a critical issue today. Andrew Lackey, a community advocate and student at Saint Louis University School of Law, explains:

People with mobility disabilities, unlike others in the population, are totally dependent on the nexus between public transit and pedestrian access because most cannot drive independently. We use pedestrian rights of way as contact points with other forms of transportation to participate in the community economically and socially. If you remove the pathway, you make it impossible for us to live independently and make positive contributions to society.¹⁶

The need for safe and accessible public rights-of-way affects millions of people across the nation. According to recent Census data, 13.5 million Americans use a wheelchair, cane, crutches, or walker.¹⁷ In addition, 7.8 million people have visual impairments, including 1.8 million people who are completely unable to see.¹⁸ The number and percentage of people with these and other disabilities are expected to rise as the population ages.¹⁹

Safe, usable streets and sidewalks are also a critical local issue. Here in Saint Louis, in November 2004, city resident and wheelchair user Elizabeth “Lisi” Bansen was struck by a vehicle as she traveled the three-block route from a nearby corner store to her home.²⁰ She was forced to travel in the street because the sidewalk was broken and overgrown with weeds, and there was no curb ramp at the intersection where she was struck. Her story was reported in the press at the time of her death a few days after the accident, and again in December of 2007, when a jury held the City of Saint Louis liable for her

15. H.R. REP. NO. 101-485(II), pt. 2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367.

16. Interview by Kara Kezios with Andrew Lackey, Saint Louis University School of Law student and community advocate in St. Louis, Mo. (April 7, 2009), *quoted in* Kara Kezios, Teaching Access Through Advocacy: PROW Public Service Project 3 (Apr. 23, 2009) (copy on file with author).

17. MATTHEW W. BRAULT, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, AMERICANS WITH DISABILITIES: 2005 HOUSEHOLD ECONOMIC STUDIES 6 (2008), *available at* <http://www.census.gov/prod/2008pubs/p70-117.pdf>.

18. *Id.*

19. *Id.*

20. Jeremy Kohler, *When a Woman in a Wheelchair Was Struck and Killed by an SUV: Path of Resistance*, ST. LOUIS POST-DISPATCH, Nov. 10, 2005, at A1.

death due to its failure to maintain safe and usable sidewalks.²¹ According to a local source, the sidewalk was not reconstructed until November 2009, and there are still similarly inaccessible sidewalks and curbs within blocks of the site.²²

Even closer to home, at the time of our project, the block-and-one-half of city street between Saint Louis University School of Law and its legal clinic was inaccessible because it included, among other things, two uncut curbs. The pathway is heavily traveled—law school students, faculty, and visitors use the right-of-way daily to travel to and from the legal clinic. Individuals using public transportation and the nearby bus stop use the right-of-way to reach the legal clinic, the Contemporary Art Museum, and other destinations. In addition, residents of and visitors to the historic Coronado apartment building (which occupies the block in between the Law School and the legal clinic) and its retail establishments also use this right-of-way. A project that focused on this pathway seemed to be the perfect opportunity to learn more about accessibility requirements and the removal of architectural barriers and to address a problem in our community.

Since the time of the project, public rights-of-way have received some additional attention in the national news and in the courts.²³ In January 2010, a landmark settlement was reached in a class-action lawsuit challenging inaccessible public rights-of-way brought by Californians for Disability Rights, the California Council of the Blind, and two individuals with disabilities against the California Department of Transportation (“Caltrans”). The action, *CDR v. Caltrans*, alleged a lack of access for people with mobility and visual disabilities on roads controlled or maintained by Caltrans, including Ashby and San Pablo Avenues in Berkeley and the Pacific Coast Highway in Long Beach.²⁴ According to the plaintiffs,

21. Kelly Wiese, *Verdicts and Settlements: January 14, 2008: Family Wins Verdict for Death of Woman Hit by Car*, MO. LAWYERS WKLY., Jan. 14, 2008, available at <http://find.galegroup.com/gtx/infomark.do?&contentSet=IAC-Documents&type=retrieve&tabID=T004&prodId=AONE&docId=A173409254&source=gale&sreprod=AONE&userGroupName=sain44199&version=1.0>.

22. Steve Patterson followed the Lisi Bansen story on his Urban Review STL Blog, “a look at public policy, urban planning and related politics in the St. Louis region,” available at <http://www.urbanreviewstl.com/> (last visited March 20, 2010) (“One pedestrian route complete, more needed,” Nov. 25, 2009), and identified similar problems nearby (“Sidewalks on Dr. Martin Luther King Drive are for show, not actual pedestrians,” Jan. 18, 2010) (last visited March 20, 2010).

23. See Chris Joyner, *Sidewalks Become Battlegrounds*, USA TODAY, Oct. 26, 2009, at 3A.

24. Settlement Agreement, *CDR v. Caltrans* (No. C-06 5125 SBA, N.D. Cal. Dec. 22, 2009), available at http://www.dot.ca.gov/Documents/Master_Stipulation_and_Settlement_Agreement.pdf. See also Joyner, *supra* note 23, at 3A.

[M]iles of sidewalk are impassible for people with [disabilities and] thousands of required wheelchair ramps along state routes are either missing, do not comply with federal law or lack warning such as bumps that the blind can feel underfoot. The conditions . . . are dangerous and can force wheelchair users, for example, to detour onto streets.²⁵

One of the named plaintiffs, Dmitri Belser, has a vision impairment and said he decided to file the lawsuit after nearly being struck by a car at an intersection without detectable warnings to signal the edge of the curb. He reported, “I was standing where I thought was safe—for blind people we like to know when the edge of the curb is a yellow truncated dome . . . I thought I was standing on the curb, but I was actually standing on the gutter. A car sped by and knocked my cane out of my hand.”²⁶

Pursuant to a settlement, Caltrans agreed to a range of remedial measures, and it pledged to spend \$1.1 billion over the next thirty years to improve accessibility to public sidewalks, crosswalks, intersections, pedestrian under and overpasses, and park-and-ride facilities throughout California.²⁷ It was reported as the largest single settlement reached on the issue of architectural access for persons with disabilities nationwide, and advocates hope that the agreement will become a model for resolving disputes between people with disabilities and state and local governments nationwide.²⁸

II. LEARNING THE LAW

Once I identified the subject matter and the site, it was time for the students to learn the law. Title II of the ADA prohibits discrimination by public entities in programs, services, and activities,²⁹ providing that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”³⁰ Public entities include state or local governments, such as

25. Dan Weikel, *Caltrans Settles Disability Suit*, L.A. TIMES, Dec. 23, 2009, at A3.

26. Riya Bhattacharjee, *Caltrans Settles Class Action Disability-Access Lawsuit*, THE BERKELEY DAILY PLANET, Jan. 7, 2010, at 1, 22.

27. Settlement Agreement, *CDR v. Caltrans* (No. C-06 5125 SBA, N.D. Cal. Dec. 22, 2009, available at http://www.dot.ca.gov/Documents/Master_Stipulation_and_Settlement_Agreement.pdf).

28. Weikel, *supra* note 25, at A3.

29. This is an extension of the nondiscrimination requirement of the Rehabilitation Act of 1973, which prohibits entities that receive federal funding for programs or activities from discriminating against people with disabilities. 29 U.S.C. § 701(a)(1) (1994). See 42 U.S.C. §§ 12131–12134 (2006); DEP’T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT: TITLE II TECHNICAL ASSISTANCE MANUAL § II-1.2000 (1993) (“Public Entity”), available at <http://www.ada.gov/taman2.html> (last visited March 20, 2010).

30. 42 U.S.C. § 12132 (2006).

the City of Saint Louis, and extend to situations where the city's services are provided through a third party.³¹

According to the regulations, public entities have an obligation to operate each service, program, or activity so that “[it] is readily accessible to and usable by individuals with disabilities.”³² In order to satisfy this obligation, a public entity may need to make reasonable modifications, implement policies, practices, and procedures, remove architectural barriers, and provide auxiliary aids unless the public entity demonstrates that doing so would be a fundamental alteration.³³

Title II requires that buildings, facilities, and rights-of-way be accessible and usable by people with disabilities. Detailed standards for buildings and facilities subject to Title II and Title III are contained in the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG).³⁴ The ADAAG's requirements generally apply to fixed features of buildings and structures, such as entryways, doorways, stairs, elevators, floor surfaces, restrooms, parking areas, and curbs.³⁵ The standards apply differently to new, existing, and altered buildings and facilities. New construction must be fully accessible and in compliance with the ADAAG.³⁶ Existing facilities must remove

31. 42 U.S.C. § 12131(1)(A)–(B) (1994) (providing that “‘public entity’ means . . . any State or local government . . . [or] any department, agency, special purpose district, or other instrumentality of a State or States or local government”); 28 C.F.R. § 35.130(b)(1) (2009) (Title II also applies where a public entity provides any “aid, benefit, or service” through a contractual agreement).

32. 28 C.F.R. § 35.150(a). This obligation is met where the “opportunity to participate in or benefit from the aid, benefit, or service . . . [is] equal to that afforded others.” 28 C.F.R. § 35.130(b)(1)(ii).

33. 28 C.F.R. § 35.130(b)(7).

34. For the full text of the 1991 ADAAG (as amended through 2002), see Americans with Disabilities Act (ADA): Accessibility Guidelines for Buildings and Facilities, 36 C.F.R. pt. 1191, app. A (2004), available at <http://www.access-board.gov/adaag/html/adaag.htm> (last visited March 20, 2010) [hereinafter 1991–2002 ADAAG]. Once adopted by the Department of Justice, the ADAAG became the standards for accessible design under Title III. See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. pt. 36 (2009) (containing requirements for existing facilities in Subpart C, covering new construction and alterations in Subpart D, and incorporating ADAAG as Appendix A); Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. pt. 35 (2009) (containing requirements for existing facilities and new construction and alterations in Subpart D). The ADAAG was revised in 2004, but that version has not yet been adopted by the Department of Justice. For the full text of the 2004 ADAAG, see Americans with Disabilities Act (ADA): Accessibility Guidelines for Buildings and Facilities, 36 C.F.R. pt. 1191, app. A (2004), available at www.access-board.gov/adaag/ADAAG.pdf (last visited March 20, 2010) [hereinafter ADAAG].

35. See generally ADAAG, *supra* note 34.

36. See 42 U.S.C. § 12183. “New” means constructed after January 26, 1992. See 28 C.F.R. § 35.151(a).

architectural barriers if “readily achievable,”³⁷ and use alternative methods to ensure accessibility where removal is not readily achievable.³⁸ Alterations to existing facilities trigger an intermediate standard and must be made accessible to “the maximum extent feasible.”³⁹

As noted above, public streets, curbs, and sidewalks are often necessary to access programs or services, and many public entities have responsibility for streets and sidewalks as a program or activity.⁴⁰ There are specific standards for public rights-of-way such as sidewalks, street crossings, and curbs, contained in the draft Public Rights-of-Way Accessibility Guidelines (PROWAG),⁴¹ and the Department of Justice publications provide guidance on how these standards apply to new, existing, and altered public rights-of-way.⁴² In addition, public entities were required to develop a transition plan for

37. 42 U.S.C. § 12182(b)(2)(A)(iv) (2006).

38. *Id.* § 12182(b)(2)(A)(v).

39. *Id.* § 12147(a). An “alteration” is a change “that affects or could affect access to or usability of [a] facility or part of [a] facility.” *See* 28 C.F.R. § 35.151(b) (2009).

40. *See* 28 C.F.R. §§ 35.149–35.151; H.R. REP. NO. 101-485(II), pt. 2, at 84–85 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367 (“Title II of the legislation has two purposes. The first purpose is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto, regardless of whether or not such entities receive Federal financial assistance . . . under this title, local and state governments are required to provide curb cuts on public streets.”). *See also* *Frame v. City of Arlington*, 575 F.3d 432, 436 (5th Cir. 2009) (explaining that curbs, streets, sidewalks, and public parking areas are services within the meaning of Title II); *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002) (finding that public sidewalks are a “normal function of a city,” and a city has an obligation to ensure sidewalk accessibility free of obstacles).

41. ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD, AMERICANS WITH DISABILITIES ACT (ADA) GUIDELINES FOR BUILDINGS AND FACILITIES; ARCHITECTURAL BARRIERS ACT (ABA) ACCESSIBILITY GUIDELINES; PUBLIC RIGHTS-OF-WAY: NOTICE OF AVAILABILITY OF DRAFT GUIDELINES (November 23, 2005) [hereinafter PROWAG], *available at* <http://www.access-board.gov/prowac/draft.htm> (last visited March 20, 2010). Once adopted by the Department of Justice, the PROWAG will become the new minimum design standards under the ADA for both new construction and alterations of public rights-of-way. 42 U.S.C. § 12204(a) (Supp. III 1992). In the meantime, the Department of Transportation has recognized the PROWAG as “the current best practice in accessible pedestrian design under the Federal Highway Administration’s Federal-aid (504) regulation.” PUBLIC RIGHTS-OF-WAY ADVISORY COMMITTEE, SPECIAL REPORT: ACCESSIBLE PUBLIC RIGHT-OF-WAY: PLANNING AND DESIGNING ALTERATIONS 3 (July 2007), *available at* <http://www.access-board.gov/prowac/alterations/guide.pdf> (last visited March 20, 2010) [hereinafter PROWAAC].

42. *See* ADAAG, *supra* note 34, §4; Dep’t of Justice, *ADA Best Practices Tool Kit for State and Local Governments*, ch. 6, *available at* <http://www.ada.gov/pcatoolkit/chap6toolkit.htm> [hereinafter ADA Tool Kit] (last visited March 20, 2010).

structural changes to existing facilities, including a schedule for providing curb cuts and sloped areas for city-maintained streets and sidewalks.⁴³

In addition to the sources above, I asked students to review testimony in the legislative history of Title II so they could appreciate the necessary role public streets, curbs, and sidewalks play to provide disabled individuals access to public programs or services. We also studied the landmark cases that found public entities responsible for ensuring accessible streets and sidewalks as a result of alterations⁴⁴ or as a program or activity.⁴⁵ Our review of the ADAAG and PROWAG provided an opportunity to discuss how guidelines are generated, the process of adoption as standards by the Department of Justice and other federal agencies, and the current status of different proposed guidelines in the rule-making process.⁴⁶ Finally, I had hoped also to refer to the transition plan for the City of Saint Louis, but I learned that the city was still in the process of creating an updated transition plan.⁴⁷

III. SURVEYING THE SITE

After we familiarized ourselves with the law, the class surveyed the site for compliance with the requirements of the statute, regulations, and PROWAG. We used the Department of Justice's "The ADA Best Practices Tool Kit for State and Local Governments," hereinafter "ADA Tool Kit," a technical assistance document designed to teach state and local government officials how to identify and fix problems that prevent equal access to programs,

43. 28 C.F.R. § 35.150(d) (2009). The transition plan requires that any structural modifications to existing facilities intended to bring them into compliance should have been completed by January 26, 1992.

44. *Kinney v. Yerusalim*, 9 F.3d 1067 (3rd Cir.1993).

45. *Barden*, 292 F.3d 1073. I also assigned a newer case finding that a city's curbs, sidewalks and certain parking lots to be a program or activity, *Frame*, 575 F.3d 432, and will consider including the recently-settled *CDR v. Caltrans* in the future. See Settlement Agreement, *supra* note 24.

46. For example, currently Title II entities may choose either ADAAG or the Uniform Federal Accessibility Standards. The Department of Justice was considering revising its regulations to adopt the 2004 ADAAG for both Title II and Title III entities, but that rulemaking process was suspended by the Obama administration on January 21, 2009. See Nondiscrimination on the Basis of Disability in State and Local Government Services; Correction, 73 Fed. Reg. 36,964 (June 30, 2008) (to be codified at 28 C.F.R. pt. 35); see also Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities; Correction, 73 Fed. Reg. 37,009 (June 30, 2008) (to be codified at 28 C.F.R. pt. 36); Department of Justice, Proposed ADA Regulations Withdrawn from OMB Review, Jan. 26 2009, available at <http://www.ada.gov/ADAREgswithdraw09.htm>.

47. Many transition plans are available online. A compilation of Transition Plan and Grievance Procedure information for thirty-one cities is collected at Abraham Robles, Jr., Intern, City of San Antonio, Public Works Dept., Disability Access Office, "ADA Compliance Measures: USA Cities," (Mar 2010) (unpublished report, on file with author).

services, and activities.⁴⁸ It includes a section on curb ramps at intersections,⁴⁹ instructions with illustrations showing how and where to take measurements, and the “ADA Curb Ramp Survey Form” to record findings.⁵⁰ We were able to enlist an architect with expertise in the design of accessible public spaces to provide guidance on the technical requirements and the use of the surveying tools. We conducted the survey as a class, during class time. I also put the surveying tools on reserve in the library so students could go back and take more measurements on their own if they wished.

The class identified several accessibility problems in the course of surveying the sidewalks, curbs, and crosswalks between the entrance to the Law School and the legal clinic, including curb ramps with overly steep running and cross slopes, curb ramps without detectable warnings to signal the edge of the cut and curb, and uneven or obstructed sidewalks. The most significant finding was the lack of curb ramps on either side of the intersection closest to the legal clinic. There was a driveway ramp and loading dock ramp several feet away, but neither provided an acceptable alternative, as their running slopes were over 15%, far above the 8.33% maximum permitted, and they forced travelers to cross outside the crosswalk in the middle of the block.

IV. TAKING ACTION

Once the students documented the facts and evaluated them against the legal standards, they were ready to take action. The class discussed and evaluated the available remedies for resolving problems with ADA compliance. An individual can file an administrative complaint with the Department of Justice, or directly with the Civil Rights Division.⁵¹ An individual can also file a private lawsuit in federal court,⁵² although public right-of-way issues are not often litigated.⁵³ The paucity of private actions is unfortunate, but not surprising. As other scholars and myself have written elsewhere, the ADA is underenforced, in significant part due to various limitations on private actions.⁵⁴

48. See generally ADA Tool Kit, *supra* note 42.

49. *Id.* at 13.

50. *Id.* at 11 (referring to Appendices 1 and 2, respectively).

51. Department of Justice, ADA Enforcement, at <http://www.ada.gov/enforce.htm> (last visited March 20, 2010).

52. *Id.*

53. See *infra* note 54 and accompanying text. But see Settlement Agreement, CDR v. Caltrans (No. C-06 5125 SBA, N.D. Cal. Dec. 22, 2009), available at http://www.dot.ca.gov/Documents/Master_Stipulation_and_Settlement_Agreement.pdf.

54. See, e.g., Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1, 30 (2006) (“The limited remedies have led to massive underenforcement of the ADA’s public accommodations title, and they have left serial litigation as one of the only ways to achieve anything approaching meaningful compliance

An individual can also request that the Department of Justice consider his or her city or town for Project Civic Access (PCA), “a wide-ranging effort to ensure that counties, cities, towns, and villages comply with the ADA by eliminating physical and communication barriers that prevent people with disabilities from participating fully in community life.”⁵⁵ Under PCA, the Disability Rights Section of the Department’s Civil Rights Division conducts reviews of local and state governments and develops technical assistance materials so that communities can comply with Title II.⁵⁶ Settlement agreements from prior PCA reviews are available at the Department of Justice webpage and typically include sidewalk and curb-cut issues.⁵⁷

Another option is to use the local administrative process for resolving problems with ADA compliance. The ADA mandates that a public entity employing fifty or more persons shall designate at least one employee to coordinate its efforts to comply with its Title II requirements, including the investigation of complaints.⁵⁸ Each public entity should make available the name and contact information of the designated employee⁵⁹ as well as the procedures by which complaints may be submitted and resolved.⁶⁰ The Commissioner on the Disabled for the City of Saint Louis, David Newberger, Esq., was kind enough to visit our class after our survey to speak about his office and to answer questions about the process to request that a public-right-of-way be made accessible.

Shortly thereafter the class drafted a formal request to the Commissioner respectfully requesting that the curb ramps on the two corners at issue be reconstructed in accordance with the applicable standards under Title II. By that time, the semester was nearly over, so I agreed to edit the letter and send it to the Commissioner while they prepared for finals. I sent the letter in late December, along with a copy of the completed survey and photographs of the two curbs.

with the statute.”); Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKLEY J. EMPL. & LAB. L. 377, 379–80 *passim* (2000) (discussing the trend of underenforcement of ADA’s public accommodations provisions); Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 458 (2007) (“There has been a notable lack of systemic and class action litigation under the ADA, particularly with regard to the law’s employment provisions.”); Pendo, *supra* note 12, at 37.

55. Department of Justice, Project Civic Access, <http://www.ada.gov/civicac.htm> (last visited March 20, 2010).

56. Department of Justice, Project Civic Access Fact Sheet, <http://www.ada.gov/civicfac.htm> (last visited March 20, 2010).

57. Department of Justice, Project Civic Access, <http://www.ada.gov/civicac.htm>. (last visited March 20, 2010).

58. 28 C.F.R. § 35.107(a) (2009).

59. *Id.* § 35.107(b).

60. DEP’T OF JUSTICE, *supra* note 29, § II-8.5000 (designation of responsible employee and development of grievance procedures).

Our request was granted, and the city broke ground on the curbs about a month later. Several of us went out to see the work being done, and noticed that the edge of the ramps ended several inches above the street. A student volunteered to follow up with City and learned that the curbs were cut leaving a clearance of several inches, apparently in anticipation of possible street resurfacing that would raise the street level to the edge of the ramps. She requested an alteration to make the ramps usable in the meantime, which was granted within a few days. When the work was finally done, I organized a class photograph on site with nearly everyone in attendance.

V. EVALUATION

The project ended on a successful note with the reconstruction of the curbs and exceeded my expectations on other levels, as well. It was very effective in bringing together multiple sources of law applicable to the requirements of physical access and barrier removal under the ADA and provided an opportunity to apply the law in a specific and meaningful context. Students also had a chance to exercise a variety of practical skills as they worked through each step of the project. One student later wrote that the project “taught me more than just the law of Title II. It taught me how to become an advocate for people living with disabilities in St. Louis.”⁶¹

As I had hoped, the project provided a rich context in which to explore issues and tensions underlying disability law and the disability rights movement. What does it mean to have a disability? Why don't more cities have working transition plans to ensure safe, accessible rights-of-way? Does the law require too little to benefit those who need access or accommodation? Or does it require too much of the city, particularly in competing priorities and limited resources? How should these interests be weighed against each other? I explore these types of questions in my work and enjoyed talking about them with my class.⁶²

The project generated tremendous enthusiasm among the students throughout and after the semester. I notified the class when the city began work on the curbs and received responses such as: “This is fantastic news. It really shows you that time and energy can make significant changes!”⁶³ and

61. Kara Kezios, *supra* note 16, at 8 (Apr. 23, 2009) (copy on file with author).

62. If you are interested in reading more about this project from an access to health care perspective and in connection with my research, see Elizabeth Pendo, *A Service Learning Project: Disability, Access and Health Care*, 38 J.L. MED. & ETHICS 154 (2010).

63. E-mail from Stessie Bill, student in Disability Discrimination Law, Saint Louis University School of Law, Fall 2008, to Professor Elizabeth Pendo (Feb. 2, 2009) (on file with author).

“Great to hear our advocacy produced some meaningful results!”⁶⁴ Another student spoke to the personal and professional benefits of the project: “Thank you for bringing Disability Discrimination Law to life for me. Outside the clinic courses I have taken, your class is the only ‘lecture’ course that was alive. If more courses integrated such real-life experiences allowing students to touch the world, I believe we would see a more conscious crop of attorneys being produced.”⁶⁵ Over the next semester, one student drafted a wonderful resource on public right-of-way projects⁶⁶ and highlighted the project in a short piece for our alumni magazine,⁶⁷ while another spoke of the project when she received a statewide award her commitment to public service.⁶⁸ I experienced many of these benefits along with my students and now participate in the lively discussion on public policy, urban planning, and related politics in Saint Louis with other disability advocates, city officials, architects, and academics.⁶⁹

CONCLUSION

Although Title II of the ADA requires that public rights-of-way be accessible, safe, and usable, streets and sidewalks remain a critical issue for people with disabilities. I chose to implement this service-learning project to introduce students to the complex and detailed requirements of ADA public accessibility law and to help them understand why such requirements are important. I wanted to create an opportunity to *use* the law instead of simply *covering* it. Thanks to the enthusiasm of my students and the support of several people in the community, the project exceeded my expectations on almost every level.

Of course, this is just one project that focused on access to public rights-of-way for people with certain types of physical disabilities. Many other projects

64. E-mail from Nicholas Brescia, student in Disability Discrimination Law, Saint Louis University School of Law, Fall 2008, to Professor Elizabeth Pendo (Feb. 13, 2009) (on file with author).

65. E-mail from Jittuan Dill, student in Disability Discrimination Law, Saint Louis University School of Law, Fall 2008, to Professor Elizabeth Pendo (Feb. 2, 2009) (on file with author).

66. Kara Kezios, *supra* note 16.

67. Kara Kezios, *School of Law Students Advocate for People with Disabilities*, ST. LOUIS BRIEF (2009), at 7.

68. Program, Profile of Anne Marie Harkins, 2009 Women’s Justice Awards, sponsored by *Missouri Lawyers Weekly* and the *Saint Louis Daily Record* (April 2009).

69. For example, I spoke at a seminar on ADA Transition Plans, “ADA Transition Plan: Do You Have One?,” (speaking on legal requirements for accessible programs, activities and services under Title II of the ADA), sponsored by the American Institute of Architects, Saint Louis Chapter, and the City of Saint Louis Office on the Disabled, Oct. 20, 2009, Saint Louis, MO, and started following the Urban Review STL Blog, “a look at public policy, urban planning and related politics in the St. Louis region,” available at <http://www.urbanreviewstl.com/> (last visited March 20, 2010).

are possible. This, too, tells students something important about the nature of the disability rights movement and its diversity of membership, interest, and projects, as well as the work that remains to be done.

APPENDIX: SELECTED RESOURCES

A wonderful resource for this project is the paper written by my student, Kara Kezios (J.D., class of 2010), "Teaching Access through Advocacy: PROW Public Service Project" (Apr. 23, 2009) (copy on file with author).

There is also a comprehensive list of resources at the back of the print version of Public Rights-of-Way Access Advisory Committee (PROWACC), Subcommittee on Technical Assistance, SPECIAL REPORT: ACCESSIBLE PUBLIC RIGHTS-OF-WAY PLANNING AND DESIGN FOR ALTERATIONS 93-107 (2007).

Good sources for future PROW project locations can be found in the applicable public entity's transition plan or by contacting the local Center for Independent Living and speaking to advocates and organizers in the community. Paraquad, Saint Louis's Center for Independent Living, and its Community Advocates Program have been invaluable sources of support for this project. To find your local Center for Independent Living, see searchable index at <http://www.ilru.org/html/publications/directory/index.html>.

Professor Ruth Colker's casebook, THE LAW OF DISABILITY DISCRIMINATION 482-501 (7th ed. 2009), includes an accessibility evaluation project for public accommodations under Title III and a practice problem involving a university auditorium.

