IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
(TAMPA DIVISION)

CASE NO. 8:01 CV-00787-EAJ
CLASS ACTION

MICHAEL YELAPI, KATHY DYER and SHERRI BASTRESS, individuals,

Plaintiffs

vs.

ST. PETERSBURG SURGERY CENTER, LTD., et al.,

Defendants.

AMENDED REPORT AND RECOMMENDATION OF THE SPECIAL MASTER ON THE PARTIES' FINAL 84 ACCESSIBILITY COMPLIANCE REPORTS

This matter was referred to the Special Master by the Court in its Orders dated February 1, 2006 (**D.E. 102**) and September 18, 2008 (**D.E. 115**). The Orders direct the Special Master to review the Accessibility Compliance Reports ("ACRs") jointly submitted by the parties, and to issue a report and recommendation to the Court regarding the removal of architectural barriers identified in the ACRs.

I. INTRODUCTION

This case concerns the obligations that Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.* (the "ADA"), imposes upon those who construct and operate public accommodations such as hospitals and healthcare facilities. The foundation of Title III is 42 U.S.C. § 12182(a), which mandates that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges,

advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."

Plaintiffs are a class of similarly situated individuals with disabilities who allege they have been discriminated against by Defendants based on their disabilities. This discrimination, Plaintiffs allege, is, in part, a result of being denied equal access to Defendants' facilities due to the existence of architectural barriers in violation of the ADA and its regulations (codified at 28 C.F.R. part 36), which incorporate the ADA Accessibility Guidelines ("ADAAG"), Appendix A to 28 C.F.R. part 36. Defendants are wholly-owned subsidiaries or affiliates of HealthSouth Corporation. Defendants provide healthcare services and, at this time, own or operate 105 medical care buildings and facilities located throughout the United States.

On December 29, 2005, the Court approved the parties' Procedural Settlement Agreement and Consent Decree (**D.E. 95) (**the "Consent Decree"). The Consent Decree provided for a process by which the then 138 facilities comprising the holdings of HealthSouth, and which were subject to this action, would be inspected and modified in order to comply with the ADA and the Rehabilitation Act of 1973 (the "Rehabilitation Act").

The parties raised the issue of the need for acceptable deviations in constructed dimensions and slopes and/or equivalent facilitation during a December 17, 2005 Status Conference. On March 8, 2006, Defendants filed their Unopposed Motion for Partial Summary Judgment (**D.E. 105**, the "MSJ") requesting the Court enter an order holding that, as a matter of law, certain deviations from the ADAAG's requirements, and/or certain equivalent facilitation, do not constitute violations of the ADA or the Rehabilitation Act. By Order dated September 28, 2006 (**D.E. 112**), the Court adopted the Special Master's Amended Report and Recommendation

(**D.E. 111**), granting the MSJ in part, thus finding the following design elements raised in the MSJ do not constitute violations of the ADA or the Rehabilitation Act: width and slope of accessible parking spaces and access aisles; slope of accessible parking spaces and access aisles; accessible parking signage height; water closets and toilet stalls; height of grab bars in accessible toilet stalls; knee clearance under lavatories; height of lavatory mirrors; urinal rim height; height and location of toilet paper dispensers; water fountains; location of strobe alarms; height for wall-mounted strobe alarms; and interior signage height.

On May 5, 2010, the parties filed a corrected third amended and restated first batch of twenty-one ACRs ("First Batch of ACRs") for approval by the Court (**D.E. 136**). The Special Master reviewed the First Batch of ACRs and on June 7, 2010 submitted to the Court his report recommendations (**D.E. 137**). On August 28, 2012, the Court approved fourteen ACRs. (**D.E. 47**). On April 14, 2014, the Parties filed the remaining 84 ACRs with the Court (**D.E. 152**). This report and recommendation responds to this most recent filing.

II. Requirements of the ADA and the Rehabilitation Act

"[I]n its attempt to equalize physical access to public buildings, Congress imposed reasonable architectural standards for new construction and allowed for less costly measures for older facilities. See 28 C.F.R. § 35.151; 28 C.F.R. § 35.150(b)(1)." *Association for Disabled Americans, Inc. v. Florida Intern. University*, 405 F. 3d 954, 959 (11th Cir. 2005). The ADA mandates that places of public accommodation and commercial facilities shall be accessible to persons with disabilities. *Access Now, Inc. v. Ambulatory Surgery Center Group, Ltd.*, 146 F. Supp. 2d 1334, 1336 (S.D. Fla. 2001). Places of public accommodation and commercial facilities newly constructed for first occupancy after January 26, 1993, must be accessible to persons with disabilities, and places of public accommodation and commercial facilities that are

altered after January 26, 1992, must be made accessible to the maximum extent feasible (these dates are referred to herein as the "Effective Date," as applicable). 28 C.F.R. §§ 36.401(a)(1) and 36.402(ba)(1). "Accessible" is generally defined as being in compliance with the ADAAG standards. *Independent Living Resources v. Oregon Arena Corp.,* 982 F. Supp. 698, 746 (D. Or. 1997).[1] The ADA further requires that all places of public accommodation, including, but not limited, to those that predate the effect date of the ADA remove architectural barriers and communication barriers that are structural in nature, when it is readily achievable to do so. 42 U.S.C. §12182(b)(2)(A)(iv); *see also Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F. 3d 1269, 1273 (11th Cir. 2006).

The Rehabilitation Act prohibits any entity that receives federal financial assistance from discriminating against any disabled individual in any service it offers. 29 U.S.C. § 794. The Rehabilitation Act's implementing regulations adopt the Uniform Federal Accessibility Standards ("UFAS"), 28 C.F.R. § 42.522(b), found in 41 C.F.R. subpart 101-19.6. Section 42.522(b) provides that, "[e]ffective as of March 7, 1988, … construction[ ] or alteration of buildings" shall comply with the UFAS. While entities covered by the Rehabilitation Act are not required to remove all barriers, they are required to remove barriers where such removal is necessary to make a program accessible. *Putnam v. Oakland Sch. Dist.,* 1995 WL 873734 *9-10 (N.D. Cal. 1995).

B. Applicable Standards

Title III's provisions are implemented through regulations promulgated by the Department of Justice, which include guidelines for new construction and alterations. *See* 28

[1] The 2010 ADA Standards, *infra*, defines "accessible" as "a site, building, facility, or portion thereof that complies with [the 2010 ADA Standards].

C.F.R. Part 36 and Appendix A. The original guidelines, the ADAAG (1991 edition), were drafted and proposed by the U.S. Architectural and Transportation Barriers Compliance Board ("Access Board"). *Ambulatory Surgery Center*, 146 F. Supp. 2d at 1336. The ADAAG set forth standards for new construction and alterations. 28 C.F.R. § 36.406. On September 15, 2010, the Department of Justice adopted an updated set of regulations and architectural standards. The updated standards are comprised of the 2004 edition of the ADAAG combined with certain sections of the 2010 regulations and are referred to as the 2010 ADA Standards for Accessible Design, or more commonly, the 2010 ADA Standards. The 2010 ADA Standards had an effective date of March 15, 2012. Buildings and facilities that were newly constructed or altered (with the new construction or alteration commencing) after March 15, 2012 must comply with the 2010 ADA Standards (for alterations, those portions of the building being altered). Elements of existing facilities that were in compliance with the corresponding element in the ADAAG on March 15, 2010, are not require to be modified to comply with the 2010 ADA Standards unless and until that element undergoes an alteration. 28 C.F.R. § 36.406 (2010).

In addition to the requirements for new construction and alterations, Title III requires places of accommodation and commercial facilities to remove architectural barriers when it is readily achievable to do so, i.e., easily accomplishable and able to be carried out without much difficulty or expense. 28 C.F.R. § 36.304. The Supreme Court has held that this exception for "difficulty" is not limited to the cost of requested modifications; rather, Title III directs that the "readily achievable" determination take into account "'the impact . . . upon the operation of the facility'." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 135; 125 S. Ct. 2169, 2177 (2005) (quoting 42 U.S.C. §12181(9)(B)).

Applied to existing facilities, this "readily achievable" standard imposes a less rigorous degree of accessibility than for new construction or alterations. 28 C.F.R. part 36, App. B §36.304. The ADAAG (as well as the 2010 ADA Standards) further incorporate the concept of construction tolerances in its provision that "[a]ll dimensions are subject to conventional building industry tolerances for field conditions." ADAAG 3.2; 2010 ADA Standards § 104.1.1. In addition to permitting these construction tolerances, ADAAG §2.2 (and 2010 ADA Standards § 103) permit(s) the use of alternative designs or technologies that meet or exceed the ADAAG (or the 2010 ADA Standards):

> Departures from particular technical and scoping requirements of this guideline by the use of the designs and technologies are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility.

This court has previously recognized the applicability of tolerances and equivalent facilitation. (**D.E. 112**, at pp. 5-6.) Accordingly, if Defendants make the modifications contemplated by the Consent Decree within the tolerances or equivalent facilitation approved below (or if existing facilities' conditions are within these tolerances or provide equal facilitation), they will be in compliance with the ADA and/or the Rehabilitation Act.

C. Effect of 2010 Title III Regulations Amendment and 2010 ADA Standards on the Consent Decree and the Parties

As discussed above, the Title III regulations were amended, and the 2010 ADA Standards were adopted on September 15, 2010, with the 2010 ADA Standards taking effect on March 15, 2012. The Consent Decree was approved and entered by the Court on December 28, 2005. (**D.E. 95**). In regard to the post-Consent Decree amendment of the Title III regulations and adoption of the 2010 ADA Standards, the Consent Decree provides as follows:

> Nothing contained in this Consent Decree shall be interpreted as requiring that any accessibility modification required by this Consent Decree exceed the standards set forth in the ADA, the Rehab Act, or the ADAAG. Notwithstanding the foregoing, nothing in this Consent Decree shall limit the right of Defendants to undertake accessibility modifications, or to build or alter any facility that exceeds the requirements of this Consent Decree, the ADA, the Rehab Act, or the ADAAG.

Consent Decree at ¶ 13.

> Should the ADAAG be amended or revised at any time after the Effective Date of this Consent Decree, and if such amendments or revisions result in an accessibility standard that is more stringent than that which is provided for in this Consent Decree, from the Effective Date of the amendment or revision forward, Defendant [*sic*.] shall be required only to meet the requirements of this Consent Decree and the ADAAG in existence as of the effective date.

Consent Decree at ¶ 14.[2]

Accordingly, the review of the ACRs by the Special Master was based on the requirements set forth in the ADAAG (1994 Rev.).

Many permitting jurisdictions in this country adopted the requirements set forth in ADAAG after it took effect as part of their respective building codes or accessibility codes.[3] Subsequent to the 2010 ADA Standards talking effect, many of these jurisdictions likewise adopted the updated standards, sometimes adding some provisions that exceeded the federal requirements. The 2012 Florida Accessibility Code is one example of this. The Florida legislature adopted the 2010 ADA Standards as the foundation of Florida's accessibility code and then added a small number of enhancements making it possible for building officials to

---

[2] Although the United States Access Board issued a final rule adopting an updated version of the ADAAG in 2004 (commonly referred to as the "2004 ADAAG"), the Consent Decree defines ADAAG as Appendix A to 28 C.F.R. Part 36 (July 1, 1994 Rev.).

[3] Building officials are agents of their respective states and jurisdictions and typically do not have the jurisdiction to enforce the ADAAG, 2010 ADA Standards or other federal civil rights laws. Therefore, states and other permitting jurisdictions that wished to enforce the provisions of the ADAAG or 2010 ADA Standards enacted their own accessibility codes that effectively mirrored the requirements of the ADAAG or 2010 ADA Standards, or adopted their requirements by reference.

enforce the accessibility requirements of the 2010 Standards in the same manner they enforce the Florida Building Code. §§ 553.501-553.513, Fla. Stat. (2011). While the Parties to this consent decree (in this case it is Defendants who are most affected) are bound to each other, and the Court, to comply with the requirements of the ADAAG, state and local permitting jurisdictions are not a party to this Consent Decree. Accordingly, while the performance undertaken by Defendants cannot go below the level of performance mandated by the ADAAG and the ACRs, the level of performance in some of Defendants' facilities in certain jurisdiction may be held to the higher standard of the 2010 ADA Standards by state and local permitting jurisdictions if their laws and codes so provide.

Because the parties are aware of the possibility of being required to comply, in some cases, with the corresponding requirements of the 2010 ADA Standards (for reasons outside of the Consent Decree), in order for the parties to be aware of their "potential" obligations, they requested that the Special Master, and his consultant, provide on the ACRs the corresponding citations to the 2010 ADA Standards for the required modifications set forth in the ACRs.[4] Accordingly, the ACRs that were reviewed and are now being discussed with the Court have had the corresponding citations to the 2010 ADA Standards added to the ACRs (except for a small number that already contained citations to the 2010 ADA Standards).

[4] With the consent of the Parties, the Special Master retained the services of Bill Hecker, AIA, to assist in the review of the ACRs. Mr. Hecker has extensive experience consulting on the requirements of various accessibility codes and laws including but not limited to the ADAAG and 2010 ADA Standards. Mr. Hecker has been retained by the Department of Justice on numerous occasions to be its consultant and expert witness in ADA-related matters. Mr. Hecker's *curriculum vitae* will be provided to the Court as Exhibit 086 to this report and Recommendation.

D. Evaluation of Individual ACRs[5]

The ACRs were evaluated in the context of whether the respective facilities were designed and constructed for first occupancy, or altered, prior to, or after, the effective date of the ADA's design and construct regulations and standards. *See* 28 C.F.R. 36.401-36.402. If the ACR states a year-built date of 1992 or earlier, in the absence of additional information, it is assumed that the facility was constructed prior to the effective date. If the ACR states a year built date of 1993 or later, it is assumed that the facility was constructed after the effective date.

While the Court previously approved certain tolerances and equivalent facilitations that would be considered to hold for all applicable facilities within this litigation, other tolerances or equivalences were raised in the ACRs. These were evaluated in the particular context in which they occurred. Generally, if an ACR proposed an equivalent facilitation, it was considered in the context of whether it complied with the American National Standard Institute: *Accessible and Usable Buildings and Facilities* A117.1, 1998 and 2003 editions (cited herein as "ICC/ANSI A117.1-1998" and, "ICC/ANSI A117.1-2003"), the U.S. Access Board's 2004 ADAAG Final Rule, or the 2010 ADA Standards, and if not, whether evidence had been presented to indicate that the particular item clearly provided equal or greater accessibility and usability to the particular ADAAG standard that the *equivalence* was substituting for. If the equivalence complied with either ANSI standard, the 2004 ADAAG Final Rule or the 2010 ADA Standards, it

[5] Pursuant to Section 5.h of the Consent Decree, once an ACR has been approved by the Court, it embodies the only modifications that Defendants will be required to make in order for such facility to be in compliance with the ADA and/or the Rehab Act. Thus, each approved ACR is, for all practical purposes, a settlement as to the facility subject to the ACR, thereby triggering the notice requirements of Federal Rule of Civil Procedure 23(e)1. As directed by the Court in its Order dated February 18, 2010 (**D.E. 130**), the parties jointly submitted their proposal to provide class notice to the ACRs, and to hear objections thereto.

generally was approved without specific mention. However, any equivalence seeking approval without being based on such existing authorities was not of issue in the current batch of ACRs.

During the review of the ACRs for this Report and Recommendation, certain items were noted that were not addressed at the time the Court entertained the issue of acceptable tolerances and equivalent facilitations. Because the resulting solutions proposed by the Parties result in conditions that are not inconsistent with the requirements of the ADAAG they should not require approval by the Court. Three such items repeated themselves on numerous occasions and so are noted here as opposed to in a discussion of each ACR in which one or more of these conditions exist:

- Regardless of whether an ACR says a non-compliant ramp (due to slope, insufficient landings, or lack of handrails) will be modified to be ADAAG-compliant, such ramp may always be replaced with a sloped path whose slope does exceed 1:20 with a cross-slope not exceeding 1/48.
- Where toilet and bathing room mirrors are noted as being higher than allowed and the agreed solution is to provide a full-length mirror, replacing the existing non-compliant mirror with a compliant mirror suffices in lieu of providing the full-length mirror.
- In toilet and bathing rooms, the general rule is that doors may not swing into the clear floor space of any fixture. However, when the toilet or bathing room is for single-person use only, the exceptions found in ANSI A117.1-1998 and ANSI A117.1-2003, the 2004 ADAAG Final Rule, and the 2010 ADA Standards, all at section 603.2.3, may be utilized. This exception allows the door to swing into the required clear floor space for fixtures so long as there is sufficient room for a

person in a wheelchair to enter the room and let the door close behind him/her. Once the door is in the closed position, it creates no hindrance to accessibility or usability of the fixtures.

The ACRs were evaluated based upon the following criteria:

1. If a facility was noted in the ACR as having been constructed or altered after the Effective Date, then the elements of the facility that have corresponding standards in the ADAAG should comply with the ADAAG, provide an equivalent facilitation, or fall within conventional building industry tolerances for field conditions. If a condition described in the ACR did not comply with these criteria, then the "Agreed Accessibility Modifications" were reviewed to see that the solution would bring that condition to within the required criteria.

2. If a facility was noted as having been constructed prior to the Effective Date, then each condition was reviewed to see whether, or how close, it complied with the alterations standards in the ADAAG as an accessibility benchmark. *See* 28 C.F.R. § 36.304(g). The Agreed Accessibility Modifications were then evaluated to see if they brought that condition into compliance with alterations standards in the ADAAG, and if not, whether they do so to the extent readily achievable. Note that even if an item had a fairly low construction cost, if the modification necessary to bring the condition into compliance with the corresponding alterations standard had a significant impact on the facilities operations (for example, while it might be relatively inexpensive to remove a wall and combine two undersized patient rooms into one, such a solution would cause the facility to lose the revenue of one room for as long as the facility continues to operate), then the Agreed Accessibility

Modification was evaluated to see if it achieved the greatest accessibility that is readily achievable (even if not achieving the level of accessibility that would be attained by complying with the alterations standards).

3. If a condition was noted whose remediation was structurally impracticable (for example, limited by severe slope or terrain conditions), *see* 28 C.F.R. § 36.401(c), the Agreed Accessibility Modifications was evaluated based upon whether it provides the greatest accessibility possible to the extent not structurally impracticable.

4. If a condition was noted whose remediation was technically infeasible, then the agreed modification was evaluated based upon whether the modification provides accessibility to the maximum extent feasible. *See* 28 C.F.R. § 36.402(a)(c).

The ACRs were evaluated based upon the criteria set forth in **D.E. 102** and **D.E. 112** and as described in this Report and Recommendation. Where the Special Master had concerns or questions, he met (by conference call) with the Parties to discuss the issues which were resolved without requiring modifications to the ACRs with the exception of supplementing the ACRs with the citations to the corresponding provisions of the 2010 ADA Standards. It should be noted that for the purpose of the Consent Decree, the addition of these supplemental citations are for informational purposes and to assist the Parties. The supplemental citations are not intended to modify Defendants' obligations under the Consent Decree.[6] Defendants need only comply with the requirements of the ACRs as they were cited to the ADAAG, in order to comply with their obligations to the class, and the Court. Because the Parties, and in particular the Defendants, appear to have taken the Special Masters comments and suggested corrections for the earlier

[6] The ACRs that are the subject of this Report and Recommendation are attached as Exhibits 2 - 86.

submitted ACRs to heart as they prepared the current batch of ACRs for submittal, the resulting ACRs are, in the Special Master's opinion, consistent with requirements of the Consent Decree and therefore should be approved.

CONCLUSION

Subject to the comments regarding the ACRs discussed above, the Special Master finds that the Agreed Accessibility Modification required of Defendants as set forth in these ACRs represent appropriate compliance with the requirements of the Consent Decree, and that they are "fair, adequate and reasonable…" *See Bennett v. Behring Corp.*, 737 F. 2d 982, 986 (11th Cir. 1984).

Dated September 10, 2015

Respectfully submitted,

/s/ Robert S. Fine .

ROBERT S. FINE, ESQ.
Florida Bar No. 0155586
Greenberg Traurig, P.A.
1221 Brickell Ave.
Miami, FL 33131
Telephone: (305) 579-0826
Facsimile: (305) 579-0717
Email: finer@gtlaw.com
Special Master

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 10, 2015, I electronically filed the foregoing Report and Recommendation with the Clerk of the Court using CM/ECF. I also certify that it is being served this day on all counsel of record or pro se parties identified below, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing

M. Jefferson Starling, III, Esq.
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, AL 35203
Telephone: (205) 226-3406

Christopher L. Griffin, Esq.
Florida Bar No. 0273147
FOLEY & LARDNER LLP
100 N. Tampa Street, Suite 2700
P.O. Box 3391
Tampa, FL 33601
Telephone: 813-229-2300

Attorneys for Defendants

Kip Roth, Esq.
Kip Roth, P.A.
601 N. Ashley Drive
Suite 210
Tampa, FL 33602
Telephone: (801) 870-7777

Attorney for Plaintiffs

/s/ Robert S. Fine
ROBERT S. FINE