



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

June 7, 2016
(**UPDATED with new sign-ons**)

Hon. Trent Franks
Chair, Subcommittee Constitution and Civil Justice
House Judiciary Committee
2435 Rayburn House Office Building
Washington, DC 20515

Hon. Steve Cohen
Ranking Member, Subcommittee Constitution and Civil Justice
House Judiciary Committee
2404 Rayburn House Office Building
Washington, DC 20515

***Re: Comments for Record of May 19, 2016 Hearing, Examining Legislation to
Promote the Effective Enforcement of the ADA's Public Accommodation
Provisions***

Dear Chairman Franks and Ranking Member Cohen:

The undersigned members of the Consortium for Citizens with Disabilities (CCD) submit these comments for the record of this hearing. CCD is a coalition of national disability organizations working for national public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

We strongly oppose the three bills that were the subject of this hearing: the ADA Education and Reform Act of 2015, H.R. 3765, the ACCESS ADA Compliance for Customer Entry to Stores and Services Act of 2015, H.R. 241, and the COMPLI Act, H.R. 4719. These bills are designed to limit the ability of people with disabilities to enforce their rights under the Americans with Disabilities Act (ADA) to access places of public accommodation in the same manner as all other citizens. Twenty-six years after the ADA was enacted, businesses should be expected to know and comply with their obligations under the law. Permitting the continued exclusion of people with disabilities from the mainstream of society unless and until *they themselves* demonstrate to businesses that those businesses are violating the law is absurd and unacceptable.

The ADA Notification Bills Would Eliminate Any Reason for Businesses to Comply with the Law Before Receiving Notification

These bills would remove all incentive for businesses, social service establishments, and other places of public accommodation to comply with the ADA's accessibility requirements unless and until an individual with a disability recognizes that the place of public accommodation is out of compliance with the ADA's requirements and provides the entity with written notice in precisely the right manner. Businesses could employ a "wait and see" approach, continuing to violate the law with impunity and excluding countless people with disabilities from their goods, services, facilities, and accommodations until a person with a disability determined that the business was out of compliance with the ADA and provided the business with the proper notification. Even then, the business would face no penalty or consequence for having violated the law for months, years, or decades, if the business then took advantage of the months-long period to remedy the violation before a lawsuit was permitted.

In short, the premise of these bills is that *businesses* should not be responsible for knowing their obligations to comply with a law that has been in effect for 26 years,¹ but *people with disabilities* should be responsible not only for knowing the accessibility requirements of that law, but also for determining when a business is not in compliance (including when that determination depends on information available to the business but not to the public), and for knowing the precise requirements of the notice that they must provide.

One of the bills – H.R. 3765 – would even subject people with disabilities to *criminal penalties* for failure to provide precisely the information called for by its notification provisions. It is beyond ironic for legislation that presumes it is too burdensome for businesses to know and comply with longstanding access requirements to criminalize people with disabilities for lacking the knowledge or information to be included in the required notification.

The message of these bills—that people with disabilities should be treated as second-class citizens—could hardly be clearer.

These Bills Are Not Necessary and Will Not Achieve Their Asserted Purpose

In addition to having a flawed premise, these bills are unnecessary and, if passed, would not achieve their purported purpose. One of the primary justifications for these bills is to protect businesses from large monetary awards from courts or in settlement agreements. *Such awards, however, have nothing to do with the ADA.* Title III of the ADA does not authorize damages; only injunctive relief is available for violations of public accommodation accessibility requirements.

¹ As the ADA was signed into law on July 26, 1990, businesses have had ample opportunity to learn of its existence and bring themselves into compliance with its accessibility rules. Nor are the ADA's accessibility regulations new; they have been in effect since 1991, and were updated in 2010.

All of the lawsuits highlighted in the May 19th hearing involved monetary damages authorized under *state* law. Indeed, the small number of “serial” ADA litigants filing numerous Title III cases have been based in states with accessibility laws that authorize damages—such as California, Florida, and others. The proposed modifications to the ADA *would do nothing* to eliminate the prospect of monetary damages for violations of these state law accessibility requirements.

Moreover, there are already existing legal mechanisms to address the filing of legal claims in bad faith or on fraudulent bases. Rule 11 of the Federal Rules of Civil Procedure authorizes courts to sanction attorneys and unrepresented parties for filing frivolous complaints. The Rule provides that by signing a pleading to the court, an attorney or unrepresented party is certifying that the pleading is not being filed for an improper purpose and is supported by the law and the facts. Courts may impose monetary sanctions where a pleading violates the rule. Second, while prevailing defendants generally do not recover fees from plaintiffs, if a lawsuit is frivolous or without foundation, the defendant may not only avoid paying the plaintiff’s attorney’s fees but recover its own attorney’s fees from the plaintiff. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). State bars are also well-equipped to deal with members who file abusive litigation.

In addition, Article III of the Constitution, which limits federal courts to hearing “cases or controversies,” requires plaintiffs seeking injunctive relief to demonstrate that they are likely to be injured in the future (in the case of ADA Title III claims, that they are likely to be denied access to the covered entity in the future). *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Absent a showing that the plaintiff has “standing” to sue, Title III claims would be dismissed.

Furthermore, any attorneys’ fees incurred by a business sued for violations of Title III would be minimal if the business was already in compliance or took immediate steps to bring itself into compliance. If, as the proponents of these bills claim, the violations in question are minor, “technical” violations, such violations are easily fixable with minimal effort and cost. And if a business that was sued for violations of the ADA’s accessibility requirements fixes those violations while the lawsuit is pending, the plaintiff is limited in the ability to seek his or her attorneys’ fees from the business. *See Buckhannon Board & Care Home, Inc. v. West Virginia Dep’t of Health & Human Resources*, 532 U.S. 598, 600 (2001).

“..."

Compliance with the ADA Should Be Treated No Differently than Compliance with Other Laws

Establishing and running a business involves compliance with numerous laws, including tax laws, property laws, health and safety laws, environmental laws, civil rights laws, and many others. Compliance with these legal obligations is part of the cost of doing business. It is unthinkable that we would eliminate any consequences for small businesses that failed to pay taxes or failed to meet health and safety codes unless and until they had received a notice that they were in violation of the law and failed to fix the problems after being given months to do so. Violating the rights of people with disabilities—and denying them the access to places of public accommodation that we all take for granted as American citizens—should be treated no differently.

Title III of the ADA already reflects a compromise that takes into account the needs of businesses—by ensuring that accommodations must be reasonable, by placing limits on the amount of retrofitting required for facilities built before the ADA, and by limiting remedies to injunctive relief. The restrictions on enforcement contained in these bills go far beyond that compromise and would make the ADA’s promise of equal access a hollow one.

People with Disabilities Should Not Be Forced to Wait for Months to Enforce the ADA

The imposition of a months-long “waiting period”² during which a business may continue to violate the law and deny access to people with disabilities once it has received a notice that it is violating the ADA is unreasonable. Permitting the continued unlawful denial of access by people with disabilities to stores, health care establishments, social service establishments, theaters, schools, transportation terminals, gas stations, day care centers, senior centers, and other places of public accommodation for months or years until someone with a disability discerns that the business is violating the law and provides the requisite notification—and then disallowing any enforcement for an *additional* period of months once that occurs—conveys that people with disabilities are simply not welcome as full members of society. Moreover, forcing individuals to wait for months to enforce their rights would leave people with disabilities without recourse for particularly grievous harms, such as the inability to receive needed surgery at a specialty hospital that is inaccessible, or the inability to continue attending a private school after a student has developed a disability.

Stopping Individuals From Enforcing Rights Against Multiple Businesses Regardless of the Merits of Enforcement Actions Would Reduce Access and Blame Individuals with Disabilities For Widespread Discrimination

The message of these bills that individuals should be stopped from enforcing their rights against multiple businesses is misplaced. Indeed, H.R. 4719 would require an Attorney General report concerning individuals who have filed multiple lawsuits, including recommendations on whether a cap on recoverable attorneys’ fees would reduce the number of Title III actions brought by individual plaintiffs. The premise of these provisions is that individuals should not enforce the ADA against multiple businesses, regardless of the merit of their claims or of how widespread accessibility violations are.

Many businesses violate the ADA’s accessibility requirements, creating many challenges and unequal opportunities for people with disabilities. It is perplexing that individuals who enforce their rights against multiple businesses would necessarily be viewed as the problem, and businesses sued for violating a law that has been in effect for many years as victims. It would be unthinkable to limit fees in other contexts in order to limit enforcement of civil rights—for example, to limit fees under the Civil Rights Act of 1964 to reduce the number of lawsuits brought by African Americans challenging discrimination. As noted above, to the extent that a small number of individuals have filed lawsuits for abusive purposes or based on fraudulent claims, many mechanisms already exist to address such litigation. Congress’s goal should be to

² H.R. 241 and H.R. 3765 would require individuals to wait as long as six months after providing the requisite notice before being permitted to enforce their rights, and H.R. 4719 would require individuals to wait as long as four months.

ensure that people with disabilities have access to places of public accommodation, not to ensure that they are stopped from enforcing their rights.

Misperceptions Voiced at the Hearing

While there was a suggestion in the hearing that Title II of the Civil Rights Act contains a notification requirement similar to those proposed in these bills, that suggestion is unfounded. There is no analogous notice requirement in Title II of the Civil Rights Act. The only “notice” requirement in Title II is 42 U.S.C. § 2000a-3, which requires plaintiffs to notify state enforcement authorities of an intent to sue in federal court to allow the state 30 days to take action itself under similar state law requirements. This notice is not to permit a business to take corrective action before being sued or to limit enforcement by victims of discrimination; it is simply to notify state governments of potential violations and permit them to take enforcement action.

It was suggested at the hearing that businesses have been subjected to ADA litigation based on minor violations of the ADA such as signs that are the wrong color. Nothing in the ADA’s accessibility standards requires signs to be any particular color—signs are merely required to have contrast between the characters and the background in order to ensure that they are readable.

We appreciate the opportunity to provide this feedback and look forward to working with you to ensure that people with disabilities can enforce their right to access places of public accommodation and be treated as full and equal members of society. Please contact Jennifer Mathis, Bazelon Center for Mental Health Law at jenniferm@bazelon.org or at 202-467-5730 or Dara Baldwin, National Disability Rights Network at dara.baldwin@ndrn.org or 202-408-9514 ext. 102.

Sincerely,

ACCSES
American Association of People with Disabilities (AAPD)
American Foundation for the Blind (AFB)
American Music Therapy Association
Association of Assistive Technology Act Programs (ATAP)
Association of University Centers on Disabilities (AUCD)
Autistic Self Advocacy Network (ASAN)
Bazelon Center for Mental Health Law
Disability Rights and Education Defense Fund (DREDF)
Easterseals
Epilepsy Foundation
Justice in Aging
Learning Disabilities Association of America
Lutheran Services in America Disability Network
Mental Health America (MHA)

The Advocacy Institute
The Arc of the United States
National Association of Councils on Developmental Disabilities (NACDD)
National Council on Independent Living (NCIL)
National Disability Rights Network (NDRN)
Paralyzed Veterans of America (PVA)

Allies of CCD:

Ability Center of Greater Toledo
Advocacy Center of Louisiana
Association of Late Deafened Adults
Association on Higher Education and Disability (AHEAD)
Civil Rights Education and Enforcement Center
Colorado Cross Disability Coalition
Disability and Civil Rights Clinic: Advocating for Adults with Intellectual and Developmental Disabilities, Brooklyn Law School
Disability Rights California
Disability Rights New Jersey
Disability Rights Oregon
Disability Rights Pennsylvania
Disability Rights Tennessee
Disability Rights Texas
Equip for Equality, Inc.
Everyone Reading, Inc.
Goldstein, Borgen, Dardarian & Ho
Helping Educate to Advance the Rights of the Deaf (HEARD)
Jo Anne Simon, P.C.
Law Office of Charles Weiner
Law Office of Lainey Feingold
Law Office of Ellen Saideman
Law Office of Michelle Uzeta
Maryland Disability Law Center
National Association of the Deaf
National Federation of the Blind
National LGBTQ Task Force Action Fund
Office of Protection and Advocacy for Persons with Disabilities (CT P&A)
Oregon Communications Project
Washington Civil and Disability Advocate
Washington State Communication Access Project