

AMERICANS WITH DISABILITIES ACT (ADA) REGULATIONS
REQUIRE DETAILED SELF-EVALUATION OF ACCESSIBILITY

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The *Tyler* decision described herein was brought to any attention by John McGovern. John is an attorney and executive director of the Northern Suburban Special Recreation Association in Northfield, Illinois. Since its inception, John has kept the National Recreation and Park Association abreast of the Americans with Disabilities Act (ADA) and its applicability to public park and recreation agencies. Most notably, McGovern is the author of an ADA compliance manual published by NRPA.

During the 1994 Congress for Recreation and Parks in Minneapolis, John and I had a brief discussion regarding recent developments in the ADA. We both agreed that it was important to keep the parks and recreation field apprised of federal court decisions which discuss the legal responsibilities of public entities under the ADA. As a follow-up to our conversation, McGovern provided me with his written analysis of the *Tyler* opinion. As characterized by McGovern, the *Tyler* decision recognized that public entities, as the beneficiaries of federal funding, have been subject to accessibility requirements under Section 504 of the Rehabilitation Act of 1973. Accordingly, McGovern found that *Tyler* holds that "ADA self evaluations need only address issues not adequately addressed under 504." More importantly, however, McGovern noted as follows that public entities "cannot rely solely on old section 504 plans."

Tyler makes it clear that the old approach under 504 may be inadequate. The court questions the adequacy of 1984 access documents and transition plans, noting that much has changed since then, both in the sense of new programs and new means of accommodation.

Accordingly, using the following presentation of the *Tyler* decision as a gauge, public park and recreation agencies must be able to produce for public inspection a sufficiently detailed self-evaluation of programs, facilities, and services which satisfies ADA regulatory requirements.

ILL TAKE MANHATTAN

In the case of *Tyler v. City of Manhattan*, 849 F.Supp. 1429 (Dist. Kansas 1994), plaintiff Lewis "Toby" Tyler brought suit against the defendant City of Manhattan, Kansas under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. In his complaint, Tyler alleged, in part, that the City had violated the ADA "by failing to complete an acceptable self-evaluation" as required by federal regulations for the implementation of the ADA.

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As a result of a gunshot wound to the head, Tyler was partially paralyzed and confined to a wheelchair. Accordingly, the City conceded that Tyler was a "qualified individual with a disability" as defined by Title II of the ADA, 42 U.S.C. § 12131(2). Further, the City did not dispute that it was "public entity" for purposes of Title II of the ADA which included any local government employing more than 50 persons.

In this particular instance, the City had "appointed a committee ("ADA Committee") to facilitate compliance with the ADA and to identify priorities," including "a self-evaluation for the purpose of complying with ADA's implementing regulations." The federal district court described the City's ADA self-evaluation process as follows:

The ADA Committee's membership included City employees and persons with disabilities. In preparing the ADA self-evaluation, the City and its ADA Committee reviewed and relied upon the 1984 self-evaluation prepared by the City for the purpose of complying with Section 504 of the Rehabilitation Act of 1973. The self-evaluation prepared for the purpose of complying with the ADA and its implementing regulations consisted of the following:

1. A one-page document listing the programs and services originally evaluated in 1984 as part of the transition plan required by section 504 of the Rehabilitation Act of 1973. The document also states that programs, activities, or services that could be made accessible to the handicapped by non-structural means were deemed to be accessible.

2. A one-page document captioned "ADA Services and Programs Policy," which essentially states the City's policy prohibiting discrimination on the basis of disability, and provides that the policy applies to all City-funded services, programs, and activities. The policy document designates the Department of Human Resources as being responsible for compliance with the ADA.

3. An undated one-page list of city buildings and facilities identified for purposes of the self-evaluation, indicating whether the facility is used by the general public, for programs, or as an employee work center.

4. An undated one-page list of buildings surveyed for purposes of evaluating their physical accessibility. The buildings listed duplicate those in Item 3.

5. Several multi-page self-evaluation checklists prepared in 1984 by recipients of federal housing funds and federal revenue sharing funds.

In response to Tyler's allegations of inadequacy, the City maintained that its self-evaluation met "the

minimum requirements of the regulations implementing the ADA."

SELF-EVALUATION REQUIREMENTS

As cited by the court, federal ADA regulations promulgated by the Department of Justice to implement Part A of Title II (28 C.F.R. § 35.150) "generally require each public entity to conduct a self-evaluation" which addresses the following:

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

(b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.

(c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection: (1) A list of the interested persons consulted; (2) A description of areas examined and any problems identified; (3) A description of any modifications made.

(d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation. Among other things, the implementing regulations also prohibit a public entity from excluding a qualified individual with a disability from participation in its services, programs, or activities or denying such an individual the benefits of its services, programs, or activities, because the entity's facilities are inaccessible.

As characterized by the court, the City maintained that "its self-evaluation appropriately relied upon and adopted the self-evaluation it conducted in 1984 for purposes of complying with section 504 of the Rehabilitation Act of 1973."

The City argues that the regulation does not require public entities that have completed Section 504 self-evaluations to complete duplicative evaluations of facilities for purposes of the ADA. Essentially, the City argues that it has met the "minimum" requirements of Title II in performing the required self-evaluation.

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However, based upon the evidence and record in this case, the federal district court found itself "unable to conclude as a matter of law that the City's self-evaluation complies with 28 C.F.R. § 35.105."

The City is correct that the regulation does not require duplication of the self-evaluation conducted by the City for purposes of complying with section 504 of the Rehabilitation Act. On the other hand, the regulation does not permit a public entity to rely solely on its section 504 evaluation to meet the ADA's requirement for a self-evaluation. Indeed, section 35.105(d) explicitly provides that the self-evaluation requirement applies only to those policies and practices that were not included in the previous self-evaluation.

The language of the regulation clearly recognizes that the scope of the ADA self-evaluation is broader than that required by section 504. Yet, the City's ADA self-evaluation appears to be nothing more than the previous self-evaluation conducted in 1984 for purposes of complying with section 504, with the addition of two new pages which essentially do nothing more than assert that the City will comply with the ADA.

Indeed, the great bulk of the documents included within the City's exhibit labelled "self-evaluation plan" are in fact exact duplicates of documents prepared in 1984. The regulation upon which the City relies, however, explicitly provides that the ADA self-evaluation requirement applies only to policies and practices not included in the previous self-evaluation. Only the first two pages of the exhibit appear to have been newly generated for purposes of meeting the ADA self-evaluation requirement.

Specifically, the court found itself "hard pressed to conclude that these two pages alone reflect a good faith intent on the part of the City to carry out the type of self-evaluation envisioned by the ADA regulations."

One of the two pages is a statement of the City's policy against discriminating on the basis of disability. While the court finds this policy completely consistent with the ADA, a statement of anti-discrimination policy is not the same as an evaluation of the extent to which current services, policies, and practices do not or may not meet the requirements of Title II and its implementing regulations.

The City's reply brief states that its ADA policy allows for a "day-to-day evaluation of programs and activities and the flexibility to modify or move programs that are or may become inaccessible under individual circumstances." However, the Title II implementing regulations clearly call for the City to conduct a comprehensive self-evaluation within one year of the effective date of the regulations.

Accordingly, the court found that "the regulations promulgated by the Department of Justice to enforce Title II do not permit the City to exercise a 'day-to-day evaluation;' nor do they afford the City the

'flexibility' to make modifications of programs that 'are or may become inaccessible' on a case-by-case basis."

Rather, the regulations impose an affirmative duty on the City to ensure its services, programs, and activities are accessible to those with disabilities. The City is required by the regulations to conduct a self-evaluation to identify compliance deficiencies, and proceed to correct those deficiencies whether or not a particular qualified individual with disabilities is presently excluded from access by such deficiencies.

The City's 1984 self-evaluation appears to have comprehensively reviewed the accessibility of city buildings and facilities as of 1984, and at least some programs and activities that were recipients of federal funds in 1984. However, it is a disputed issue of fact whether the ADA self-evaluation addressed all of the City's current services, policies, and practices, and the effects thereof, to determine the degree of their compliance with the ADA. This is the explicit requirement of 28 C.F.R. § 35.105(a).

As described by the court, in promulgating the ADA regulations, the Department of Justice elaborated on the intent of the self-evaluation requirement" as follows:

Section 35.105 establishes a requirement, based on the section 504 regulations for federally assisted and federally conducted programs, that a public entity evaluate its current policies and practices to identify and correct any that are not consistent with the requirements of this part.

Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with disabilities, which has promoted both effective and efficient implementation of section 504. The Department expects that it will likewise be useful to public entities newly covered by the ADA.

Paragraph (d) provides that the self-evaluation required by this section shall apply only to programs not subject to section 504 or those policies and practices, such as those involving communications access, that have not already been included in a self-evaluation required under an existing regulation implementing section 504. Because most self-evaluations were done from five to twelve years ago, however, the Department expects that a great many public entities will be reexamining all of their policies and programs. Programs and functions may have changed, and actions that were supposed to have been taken to comply with section 504 may not have been fully implemented or may no longer be effective. In addition, there have been statutory amendments to section 504 which have changed the coverage of section 504, particularly the Civil Rights Restoration Act of 1987, Public Law No. 100-259, 102 Stat. 28 (1988), which broadened the definition of a covered "program or activity."

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Under the circumstances of this case, the federal district court found that "the City's ADA self-evaluation appears to rely almost exclusively on the self-evaluation conducted in 1984 for purposes of compliance with section 504."

The plan does not describe "in detail" the methods to be used to make the facilities accessible. Nor does it specify a schedule for taking the necessary steps to make the facilities accessible... For example, on the page for the city zoo, the following entry appears under the heading "Necessary structural changes (list features and how each is inaccessible):"Modify or add within this facility: Entry Gate; Restrooms; Drinking Fountain; Lower Tier Ramping."

As a result, the court found that the City's ADA self-evaluation "falls short of compliance with 28 C.F.R. § 35.105."