

STATE FAIR FAILS ADA ACCESSIBILITY TEST FOR EXISTING FACILITIES

James C. Kozlowski, J.D., Ph.D.

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In the case of *Chaffin v. Kansas State Fair Board*, , 348 F.3d 850 (10th Cir. 2003) several wheelchair-bound patrons of the Kansas State Fair (KSF) alleged continuing violations of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134

In response to plaintiffs' claims, the federal district court identified numerous deficiencies at Fair facilities, including twenty-five buildings and areas that did not comply with ADA standards. As a result, the federal district court ordered the Fair "to complete a self-evaluation and transition plan" in order to comply with various federal regulations enacted to implement the ADA. The Fair appealed this order, prompting the opinion described below.

FACTS

On September 16, 2000, Plaintiff Mandy Chaffin went to the Kansas State Fair to attend a concert at the Grandstand, and was seated in the designated wheelchair section of the facility-a platform at the front of the Grandstand on which all persons in wheelchairs are placed. Chaffin states that she could not see anything on the stage because the people who stood in front of her blocked her view. Although security guards at the concert, upon Chaffin's request, told the people standing in front of Chaffin to sit down, once the security guards walked off, these people would stand up again.

Chaffin also states that she soiled herself at the concert because she could not reach the restroom in time because of the overly-crowded wheelchair seating in the handicapped section of the Grandstand. In order for a wheelchair patron to reach the restroom, many of the other wheelchairs between the platform and the restroom would have to be moved. None of those people were permitted to return to their spaces until the person who had gone to the bathroom returned.

Plaintiff Tiffany Nickel has had problems with the parking at the State Fair. According to Nickel, the free parking lot where she was directed to park was far away from the fair and contained potholes. As a result, she chose to pay to park in a closer but unpaved parking lot.

Plaintiff Cecil Stinbrink alleges that he was seated in the Grandstand handicapped section where he was climbed over, stepped on, and bumped into by other attendees. Because of the crowd sitting in the wheelchair section of the Grandstand, he could not get out of the section for food or use the restrooms until the shows were over. Additionally, Stinbrink states that he was denied access to the restroom because he relies on his wife's assistance, and there is no unisex restroom available at the Grandstand. Stinbrink also complains that the free parking provided by the State Fair was either too far from his point of interest at the fairgrounds, or too difficult to use due to its swampy conditions.

MEANINGFUL ACCESS

The operative language of the ADA, 42 U.S.C. § 12132, mandates 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 [public] entity."

In the opinion of the Fair, ADA compliance was evident in this particular instance "as long as Plaintiffs had 'access' to the State Fairgrounds and programs and services at the Kansas State Fair." Given such physical access to the fairgrounds, the Fair maintained that plaintiffs were not "excluded from" or "denied the benefits of" the Fair in violation of the expressed language of the ADA. The appeals court rejected the notion that "the ADA requires no more than mere physical access."

According to the federal appeals court, "the ADA requires public entities to provide disabled individuals 'meaningful access' to their programs and services." In assuring meaningful access, the court noted that "reasonable accommodations in the public entity's program or benefit may have to be made." Applying these principles to the facts of the case, the court found plaintiffs were denied access to the fair.

[M]ere physical presence on the fairgrounds—at least when coupled with being effectively trapped in a handicapped section, unable to leave for food or to use the restroom, unable to view the stage, and subjected to being climbed over, stepped on, and bumped into by other attendees—amounts to... a denial of the benefits of the fair.

In reaching this determination, the appeals court found that the challenged regulations "simply provide the details necessary to implement the statutory right created by § 12132 of the ADA." Moreover, in the opinion of the court, it was "clear that the type of discrimination prohibited in the ADAAG [i.e., ADA Accessibility Guidelines] falls squarely within the type prohibited by the ADA itself."

[In enacting the ADA] Congress prohibited a broad, comprehensive concept of discrimination, beyond discrimination motivated by a hostile discriminatory purpose. Congress enacted the ADA with the goal of assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency for [individuals with disabilities]." 42 U.S.C. § 12101(a)(8).

Congress noted that individuals with disabilities tend to be "isolated and segregated"... [through] the discriminatory effects of architectural barriers and transportation barriers; failure to make modifications to existing facilities and practices; and relegation to lesser services, programs, activities, benefits, and other opportunities.

PROGRAM ACCESSIBILITY

Since the fairgrounds were constructed before the effective date of the ADA (i.e., January 26, 1992), the court noted that the Fair "need only meet the 'program accessibility' standard for existing facilities." With respect to "existing facilities," the appeals court noted further that ADA regulations required public entities to "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and useable by individuals with disabilities." 28 C.F.R. § 35.150(a).

Pursuant to these regulations, the federal court acknowledged "Title II's emphasis on program accessibility rather than facilities accessibility." Specifically, the court noted that Title II of the ADA "was intended to ensure broad access to public services, while, at the same time, providing public entities with the flexibility to choose how to make access available."

As a result, the court found that ADA accessibility does not "necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities. Moreover, the court noted that "a public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance."

In providing accessibility, however, the court cautioned that any "alternative designs and technologies" which depart from the ADAAG regulatory guidelines must "provide substantially equivalent or greater access to and usability of the facility." 28 C.F.R. pt. 36, app. A, § 2.2.

[I]f other methods are not effective in achieving compliance with program accessibility, then alterations must be made that comply with the accessibility requirements of § 35.151, see 28 C.F.R. § 35.150(b)(1), and a "transition plan" must be developed that sets forth the steps necessary to complete the changes, § 35.150(d)(1).

Under 28 C.F.R. § 35.151(b), the facility "shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities." The alteration must either meet the Uniform Federal Accessibility Standards (UFAS), 41 C.F.R. pt. 101-19.6, app. A, or the ADAAG, or use other methods "when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided." 28 C.F.R. § 35.151(c).

Applying these regulatory requirements to the facts of the case, the federal appeals court concluded that the fairgrounds did not comply with the accessibility requirements of the ADAAG for existing facilities. In so doing, the court took particular note of the following deficiencies in the Grandstand:

[T]he upper level seating is not wheelchair accessible; the second floor is not accessible; the second floor concessions, restrooms, and drinking fountains are not accessible; the stage is not accessible; there is inadequate seating for the disabled; and there is inadequate ADA signage.

Moreover, the court found that “22 public restrooms throughout the fairgrounds are not handicap accessible, and many buildings simply are not accessible by handicapped people at all.”

On appeal, the Fair had argued that the court must “look at the accessibility of the facilities as a whole, not at individual elements” in determining program accessibility for existing facilities under the ADA. The appeals court agreed, but recognized that “facilities as a whole must be readily accessible even under the less stringent program accessibility standard for existing facilities.”

A violation of Title II does not occur only when a disabled person is completely prevented from enjoying a service, program, or activity. If a facility's wheelchair ramps are so steep that they impede a disabled person or if its bathrooms are unfit for the use of a disabled person, then it cannot be said that the facility is “readily accessible.”

Applying these principles to the facts of the case, the appeals court found that the inaccessibility of the “individual elements” throughout the fairground “add up to a wholesale exclusion of disabled individuals from buildings, restrooms, dining areas, and seating areas across the entire fairgrounds.” As a result, the appeals court agreed with the district court’s determination that “the Kansas State Fair, when viewed in its entirety and based on uncontroverted facts, is not readily accessible to and usable by individuals with disabilities.”

SELF-EVALUATION PLAN

According to the federal appeals court, the Fair, as a public entity covered by Title II, was required to prepare a self-evaluation plan in accordance with 28 C.F.R. § 35.105. As described by the federal appeals court the self-evaluation requirement for public entities under ADA regulations involved a two-step process to (1) identify all of its programs, activities, and services and (2) review all of the policies and practices that govern the administration of its programs, activities, and services to determine whether any “adversely affect the full participation of individuals with disabilities in the program.”

Following this review, the public entity “shall proceed to make the necessary modifications” for those services, policies and practices which do not meet ADA accessibility requirements. As noted by the court, public entities were to complete the required self-evaluation within one year of January 26, 1992. 28 C.F.R. § 35.105(a).

As cited by the court, federal regulations further stated that “the public entity must allow interested persons to comment” on the self-evaluation. Moreover, “if the public entity employs fifty or more people, it must maintain on file for three years after the self-evaluation a list of the interested persons consulted, a description of areas examined and problems identified, and a description of any modifications made.”

In developing an appropriate self-evaluation plan, the court referenced “[t]he Department of Justice's Title II Technical Assistance Manual [which] suggests that the following areas require ‘careful attention’ in a public entity's self-evaluation plan”:

whether any physical barriers exist; whether any policies and practices limit the participation of individuals with disabilities; whether communications with individuals with disabilities are as effective as communications with others; whether there are procedures to evacuate individuals with disabilities during an emergency; whether there are provisions for readers, interpreters, and other communication measures; and whether measures have been taken to ensure that employees are familiar with the policies ensuring the full participation of individuals with disabilities. U.S. Dep't of Justice, ADA Title II Technical Assistance Manual § II-8.200. [SEE: U.S. Dep't of Justice, ADA Title II Technical Assistance Manual § II-8.200, <http://www.usdoj.gov/crt/ada/taman2.html>.]

On appeal, the Fair contended that it had “already prepared a self-evaluation plan and a transition plan” making the district court’s order to complete these plans unnecessary. Specifically, the Fair claimed it had completed a number of documents and studies which effectively constituted a “self-evaluation and a transition plan” required by 28 C.F.R. §§ 35.105 and 35.150.

As described by the court, in 1998, the Fair had produced a report to “identify and provide cost estimates for solutions to fire safety and ADA deficiencies in buildings owned/managed by the Kansas State Fair.” Similarly, in 1999, the Fair completed a “Long-Range Master Plan” which included a list of eighteen bulleted “major recommendations” to achieve compliance “with all building and site ADA and code requirements.” The Master Plan, however, did not mention particular improvements under the ADA or “include any specific recommendations for improving access at the Fair for persons with disabilities.” In 2000, the Fair completed a “Life Safety, Egress, Fire Protection and Accessibility Analysis” of the Grandstand “which contained a single page of findings regarding the physical characteristics of the handicapped seating area.” Finally, in April 2002, the State Fair completed its “Additional ADA Transition Plan” which essentially “compiled the previous studies in a single package, and proposed renovation and structure modification schedules for parking facilities and the Grandstand at the State Fairgrounds.”

In the opinion of the federal appeals court, “[n]one of these reports, either individually or collectively” met the self-evaluation requirements of 28 C.F.R. § 35.105.

The plan for modifications to the grandstand does not meet ADAAG standards, which require dispersed seating for persons in wheelchairs. There are still twenty-two public restrooms on the Fairgrounds that do not comply with the accessibility requirements of the ADA, compared to twelve that do. Moreover, even after the completion of the Kansas State Fair Master plan, scheduled for either 2006 or 2008, there will still be approximately sixteen public restrooms that do not comply. Needless to say, the Master Plan does not discuss how the Fair's services, policies, or practices need to be modified to conform to ADA requirements.

Finally, the Fair points to the 2002 "Additional ADA Transition Plan." This document, which merely compiles the Fair's previous purported self-evaluation plans under a single cover, was properly characterized by the district court as "defendants' careful attempt to recast various proposals and studies from the previous decade as some kind of integrated ADA self-evaluation or transition plan . . . [that is] simply an after-the-fact, eleventh-hour attempt to re-package a hodge-podge of earlier, isolated proposals."

Further, in the opinion of the court, "[t]he 1998 ADA survey, which conveniently doubled as a fire safety survey, did nothing more than list certain ADA structural deficiencies and provide cost estimates for modifications." As a result, the court found that "[t]he survey simply failed to address the Fair's 'current services, policies, and practices, and the effects thereof' that do not meet the ADA. 28 C.F.R. § 35.105(a)."

In making this determination, the appeals court noted further that there was "no evidence that the Fair involved any interested persons to submit comments on the self-evaluation process" when these reports were being prepared.

TRANSITION PLAN

As described by the court, "in the event structural changes to facilities are to be undertaken to achieve program accessibility," Title II regulations (28 C.F.R. § 35.150(d)) also required "a transition plan setting forth the steps necessary to complete the changes." For any public entity employing more than fifty persons, this transition plan was to have been completed within six months of January 26, 1992 (the effective date of the ADA regulations). In addition, the regulations required that all interested persons be provided "[a]n opportunity to participate in the development of the transition plan." A copy of the transition plan was also to be made available for public inspection.

As cited by the court, at a minimum, federal regulations required the transition to include the following:

- (i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
- (ii) Describe in detail the methods that will be used to make the facilities accessible;
- (iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and
- (iv) Indicate the official responsible for implementation of the plan.

Applying these regulatory requirements to the facts of the case, the federal appeals court found “the Fair's purported transition plans fail to meet the minimum requirements of the Title II implementing regulations.” In reaching this determination, the court noted that “none of the documents included in the Additional ADA Transition Plan identifies the physical obstacles in the Fairgrounds, but only indicates generally the parts of the listed facilities that need to be modified.”

[M]any of the facilities at the Fairgrounds appear never to have been evaluated at all... Nor does the Additional ADA Transition Plan describe "in detail" the methods that will be used to make the facilities accessible. Throughout the Plan, the Fair points to physical barriers, but provides no solution to making the facilities accessible. When proposals are specified for making the facilities accessible, they are vague and unhelpful.

As a result, the court found “[t]he proposed methods to be used in making the Fairgrounds accessible contained in the Additional ADA Transition Plan thus fall woefully short of the detail required by the Title II implementing regulations.” Furthermore, the appeals court reiterated “the requirement that in preparing the transition plan, like the self-evaluation, a public entity is required to allow interested persons, including individuals with disabilities and their representatives, to participate in the development of the transition plan by submitting comments.”

Many individuals with disabilities have unique perspectives on a public entity's programs, activities, and services. For example, individuals with mobility impairments can readily identify barriers preventing their full enjoyment of the public entity's programs, activities, and services.

In closing, the appeals court noted that “the Fair should have performed its self evaluation and transition plans over ten years ago.” Despite such requirements under federal law, the court was unimpressed by the Fair's "Additional ADA Transition Plan" which was “not compiled until April 29, 2002 - two weeks after summary judgment papers were filed” in this case.

Having found the Fair in violation of the ADA, the appeals court affirmed the judgment of the federal district court in favor of plaintiffs.

On February 17, 2004, in an article entitled “Officials ponder how to make fair grandstand ADA-friendly,” the Hutchinson (Ks.) News reported that \$2.65 million was needed to make the fairgrounds compliant with the Americans with Disabilities Act.” This figure was cited in a 270-page report prompted by the above described court decision. <http://www.hutchnews.com/past/02-17-2004/local.html>

See also: “ADA Regulations Require Detailed Self-Evaluation Of Accessibility”
Kozlowski, James C. *Parks & Recreation*. Feb 1995. Vol. 30, Iss. 2; P. 14 (5 Pages)