

ADA REQUIRES INTEGRATION, PROHIBITS STEREOTYPED SEGREGATION OF DISABLED

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

© 1994 James C. Kozlowski

In the July 26, 1991 edition of the *Federal Register* (Volume 56, pages 35694-01), the Department of Justice (DOJ) issued its final rule and regulations regarding "Non-Discrimination on the Basis of Disability in State and Local Government Services." In pertinent part, these federal regulations implement Title II of the Americans with Disabilities Act (ADA). A recent edition of *Legal Issues in Recreation Administration* (LIRA) provided an extensive overview of these regulatory and statutory materials which effectively define individual rights and public agency responsibilities under Title II of the ADA. The following paragraphs describe several significant aspects of Title II ADA compliance, most notably the legal mandate that public entities provide services "in the most integrated setting appropriate to the needs of individuals with disabilities."

ARE YOU EXPERIENCED?

In pertinent part, these federal regulations (Title 28 Code of Federal Regulations, Part 35) define as follows the directive of Title II of the Americans with Disabilities Act (ADA) that public entities "provide an individual with a disability with an equal opportunity to participate in or benefit from its program simply because the person has a disability."

A public entity may not refuse to provide an individual with a disability with an equal opportunity to participate in or benefit from its program simply because the person has a disability. It is discriminatory to deny a person with a disability the right to participate in or benefit from the aid, benefit, or service provided by a public entity. The aids, benefits, and services provided to persons with disabilities must be equal to those provided to others, and the aids, benefits, or services provided to individuals with disabilities must be as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as those provided to others.

As noted by DOJ, "the general prohibitions against discrimination in the rule are generally based on the prohibitions in existing regulations implementing section 504 [of the Rehabilitation Act] and, therefore, are already familiar to State and local entities covered by section 504." (Under section 504, public entities, as recipients of federal funds, were already prohibited from discriminatory practices proscribed by the ADA.)

This regulation implements subtitle A of title II of the ADA, which applies to State and local governments. Most programs and activities of State and local governments are recipients of Federal financial assistance from one or more Federal funding agencies and, therefore, are already covered by section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) ("section 504"), which prohibits discrimination on the basis of handicap in federally assisted programs and activities...

This rule implements subtitle A of title II of the Americans with Disabilities Act, Public Law 101-336, which prohibits discrimination on the basis of disability by public entities. Subtitle A protects qualified individuals with disabilities from discrimination on the basis of disability in the services, programs, or activities of all State and local governments. It extends the prohibition of discrimination in federally assisted programs established by section 504 of the Rehabilitation Act of 1973 to all activities of State and local governments, including those that

do not receive Federal financial assistance and incorporates specific prohibitions of discrimination on the basis of disability from... the Americans with Disabilities Act.

This rule, therefore, adopts the general prohibitions of discrimination established under section 504, as well as the requirements for making programs accessible to individuals with disabilities and for providing equally effective communications. It also sets forth standards for what constitutes discrimination on the basis of mental or physical disability, provides a definition of disability and qualified individual with a disability, and establishes a complaint mechanism for resolving allegations of discrimination.

Therefore, the major effect of the ADA is to extend federal civil rights protection for the disabled to services not already covered by section 504 (i.e., generally, private and commercial accommodations and services which are not the recipients of federal funding.) Accordingly, to those public park and recreation administrators who find themselves at a total loss scrambling to address ADA mandates, one might ask: "Where were you and your agency during the past two decades in terms of section 504 compliance?"

ARE YOU "QUALIFIED"?

Although the ADA prohibits discrimination based solely on an individual's real or perceived disabling condition, the individual must still prove that he or she was "otherwise qualified individual" for the requested service. Within this context, a disabled individual is "qualified" when, "with reasonable accommodations," he or she can fulfill the "essential eligibility requirements" for participation in an activity. As a result, a public entity may "impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the safe operation of the program in question. "

Examples of safety qualifications that would be justifiable in appropriate circumstances would include eligibility requirements for drivers' licenses, or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

Further, DOJ noted that "[t]he 'essential eligibility requirements' for participation in some activities covered under this part may be minimal."

For example, most public entities provide information about their operations as a public service to anyone who requests it. In such situations, the only "eligibility requirement" for receipt of such information would be the request for it.

Where such information is provided by telephone, even the ability to use a voice telephone is not an "essential eligibility requirement," because § 35.161 requires a public entity to provide equally effective telecommunication systems for individuals with impaired hearing or speech.

LIMITED DISCRIMINATION EXCEPTIONS

DOJ acknowledged, however, that "identification of the 'essential eligibility requirements' may be more complex," particularly in activities where "questions of safety are involved." Under such circumstances, ADA regulations provide that "a public accommodation is not required to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public

accommodation, if that individual poses a direct threat to the health or safety of others." Within this context, a "direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services."

Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be "qualified," if reasonable modifications to the public entity's policies, practices, or procedures will not eliminate that risk.

However, DOJ cautions public entities that such "direct threat" determinations "may not be based on generalizations or stereotypes about the effects of a particular disability."

It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health.

As described by DOJ, Title II of the ADA "requires a public entity to make its programs accessible in all cases, except where to do so would result in a fundamental alteration in the nature of the program or in undue financial and administrative burdens." According to DOJ, this "fundamental alteration" exception is not an "absolute defense" relieving a public entity "of all obligations to individuals with disabilities." On the contrary, DOJ found that Congress intended "the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases."

Although a public entity is not required to take actions that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity.

It is the Department's view that compliance... would in most cases not result in undue financial and administrative burdens on a public entity. In determining whether financial and administrative burdens are undue, all public entity resources available for use in the funding and operation of the service, program, or activity should be considered. The burden of proving that compliance... would fundamentally alter the nature of a service, program, or activity or would result in undue financial and administrative burdens rests with the public entity... [The ADA regulations provide] a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides.

Accordingly, DOJ concluded that "[t]he decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee." Specifically, the regulations require that "[t]he determination must be made by a high level official, no lower than a Department head, having budgetary authority and responsibility for making spending decisions." Further, Title II ADA regulations require that "such a decision and must be accompanied by a written statement of the reasons for reaching that conclusion."

MOST INTEGRATED APPROPRIATE SETTING

As noted by DOJ, "Integration is fundamental to the purposes of the Americans with Disabilities Act." Accordingly, in "choosing among methods," the ADA regulations stipulate that "the public entity shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with disabilities."

This section requires that a public entity administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.

In providing such a setting, DOJ stated that "[s]tructural changes in existing facilities are required only when there is no other feasible way to make the public entity's program accessible." As a result, DOJ found that a public entity "may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate." Although ADA regulations permit a public entity "to develop separate or different aids, benefits, or services," such special accommodations must be "necessary to provide individuals with disabilities with an equal opportunity to participate in or benefit from the public entity's programs or activities." Further, such necessary "aids, benefits, or services" for disabled individuals must be "as effective as those provided to others."

More importantly however, in providing such "separate or different aids, benefits, or services," the ADA requires public entities to allow the "qualified individual with a disability" to choose whether or not to participate in a program "not designed to accommodate individuals with disabilities."

Even when separate or different aids, benefits, or services would be more effective, a qualified individual with a disability still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities.

Provision of segregated accommodations and services relegates persons with disabilities to

second-class status. For example, it would be a violation of this provision to... refuse to allow a person with a disability the full use of recreation or exercise facilities because of stereotypes about the person's ability to participate.

Promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and, in most instances, separate programs for individuals with disabilities will not be permitted... Even when separate programs are permitted, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.

In promulgating its Title II ADA regulations, DOJ found it "impossible to make a blanket statement as to what level of auxiliary aids or modifications would be required in the integrated program." As a result, DOJ advised as follows that "each situation must be assessed individually":

The starting point is to question whether the separate program is in fact necessary or appropriate for the individual. Assuming the separate program would be appropriate for a particular individual, the extent to which that individual must be provided with modifications in the integrated program will depend not only on what the individual needs but also on the limitations and defenses of this part[i.e., direct, threat, fundamental change, and undue financial burden].

In so doing, DOJ provided the following examples of modified participation by disabled individuals within an integrated program:

For example, it may constitute an undue burden for a public accommodation, which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program. The Department cannot identify categorically the level of assistance or aid required in the integrated program.

For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

In addition, it would not be a violation of this section for a public entity to offer recreational programs specially designed for children with mobility impairments. However, it would be a violation of this section if the entity then excluded these children from other recreational services for which they are qualified to participate when these services are made available to nondisabled children, or if the entity required children with disabilities to attend only designated programs.

Accordingly, ADA regulations require a public entity to provide its services "in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible. Further, the

ADA requires that "persons with disabilities must be provided the option of declining to accept a particular accommodation."

Section 501(d) [of the ADA] was designed to clarify that nothing in the ADA requires individuals with disabilities to accept special accommodations and services for individuals with disabilities that may segregate them... [N]othing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability.

For example, a blind individual may choose not to avail himself or herself of the right to go to the front of a line, even if a particular public accommodation has chosen to offer such a modification of a policy for blind individuals. Or, a blind individual may choose to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour.

The Act is not to be construed to mean that an individual with disabilities must accept special accommodations and services for individuals with disabilities when that individual can participate in the regular services already offered.

Finally, these regulations require as follows that "a public entity to disseminate sufficient information to applicants, participants, beneficiaries, and other interested persons to inform them of the rights and protections afforded by the ADA and this regulation."

Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe a public entity's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

As a result, it is imperative that public park and recreation agencies have a clear understanding of their legal obligations under Title II of the Americans with Disabilities Act and the federal regulations to provide recreational opportunities in the required appropriate, integrated setting.