

ADA Title II and Title III: Modification of Policies, Procedures, and Practices

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Reasonable Modification

- General Rule for the ADA:

A covered entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”

Citations

- Statute: 42 U.S.C. 12182(b)(2)(A)(ii)
- Title III Regulation: Department of Justice
 - Public Accommodations
 - 28 CFR 36.302
- Title II Regulation: Department of Justice
 - Public Entities
 - 28 CFR 35.130(b)(7)

It's Broad in Scope

- The police chief calls: there's a man in a wheelchair on the local road. Can he ticket him?
- A mother with a child with asthma has called the city command center and asked to stop the scheduled spraying for mosquitoes in her neighborhood.
- Your new Starbucks wants to put in a ramp, but it needs a variance from the city's 12-foot setback ordinance.

Broad in Scope (2)

- The local ARC chapter has asked you to create a simplified application for the eligibility form for cash benefits and emergency sheltering.
- A minister who uses a service animal wants to visit a churchgoer in the city hospital's emergency room.
- There's a Segway user at the security desk at the town hall and she wants to go to the town council meeting on the third floor.

Broad in Scope (3)

- A person who uses crutches has difficulty standing in line to vote and requests a place to sit down, and doesn't want to lose his place in line.
- A public agency does not allow food in its facility and has received a request for an exception for a person who has diabetes and needs to eat frequently to control her glucose level.
- The parents of a deaf swimmer request that the school district's league allow use of a visual cue (hand signal or flash of light) concurrently with the electronic beep used to start the race.

Broad in Scope (4)

- The county emergency preparedness center has received a series of requests from the cross-disability center for the county's shelters, including bedding for persons who cannot use cots, a quiet place for persons with autism, and refrigeration facilities for some medications.

Scope of “Necessary”

- Where failure to modify a policy, practice, or procedure denies a person with a disability the equal opportunity to participate in the program or enjoy its benefits, it meets “necessary” standard
- Provision extends beyond outright exclusion from program; ADA prohibits unequal participation
- Public entities must provide individual with a disability an opportunity to participate that is equal to that afforded others

General: Personal Services and Devices

- Entities not required to provide –
 - personal or individually prescribed devices (wheelchairs, prescription eyeglasses, or hearing aids) or
 - services of a personal nature (assistance in toileting or dressing
 - But note: Exception where personal services or devices are customarily provided to individuals served, such as in a hospital, nursing home, or jail

General: Limitations

- Many modifications are minor in nature.
- Entity not required to take steps that:
 - “fundamentally alter” the nature of the program or activity.
 - result in a direct threat to the health or safety of others.

General: Direct Threat

- A direct threat is a significant risk that cannot be eliminated or reduced to an acceptable level by the modification of its policies, practices, or procedures, or by the provision of auxiliary aids or services.
- The entity's determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability

PGA Tour, Inc. v. Martin

532 U.S. 661 (2001)

- Supreme Court has considered the “reasonable modification” provision
- Disabled golfer on the pro circuit requested waiver of walking rule
- Relying on district court finding that Martin endures greater fatigue even with a cart than his able-bodied competitors do by walking, and noting that the PGA allows the use of golf carts in several circumstances, Court found that walking rule is not compromised by allowing use of a cart and the modification doesn’t fundamentally alter golf tournament because it provides an exception to a peripheral tournament rule without impairing its purpose.

Specific Regulatory Provisions

Department of Justice Regulations

- Service Animals
- OPDMDs (Other Power-Driven Mobility Devices)
- Miniature Horses
- Ticketing
- Check-out Aisles
- Reservations at Places of Lodging
- “Regarded As” Disability

SERVICE ANIMALS

Basic Provision: A covered entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

Rule of Thumb: Allow service animal to go anywhere members of public go

Service Animal: definition

A dog that is individually trained to do work or perform tasks for the benefit of a person with a disability, including a physical, psychiatric, sensory, intellectual or other mental disability

Tasks must be directly related to the person's disability



What does this definition mean?

- Limits the species of service animals to dogs for the ADA
- Makes clear that comfort or emotional support animals are not covered
- Makes clear that those with psychiatric, intellectual, or other mental disabilities can use service dogs

Do Work or Perform Tasks

- Dog must be trained to take a specific action when needed to assist the person with a disability
- Examples
 - Dog trained to alert person with diabetes when her blood sugar reaches high or low levels
 - Dog trained to remind person with depression to take his medication
 - Dog trained to detect onset of a seizure and then help person with epilepsy remain safe during the seizure

Examples of Tasks (1)

The Usual Understanding

- Guiding or wayfaring for persons who are blind or have low vision
- Alerting persons who are deaf to sounds
- Pulling a wheelchair
- Retrieving items for persons who use wheelchairs

Examples of tasks (2)

- Assist during seizure
- Retrieve medicine or other items
- Help individual with dissociative identity disorder to remain grounded



Examples of tasks (3)

- Prevent/interrupt impulsive or destructive behavior
- Assist with balance, stability
- Provide non-violent protection or rescue work



Emotional support/comfort?

The provision of emotional support, comfort, or companionship are not considered work or tasks and animals performing only such tasks are not considered service animals



Dilip Vishwanat/Getty Images, for The New York Times

What Can I Ask? May Ask for a Demonstration?

- In situations where it is not obvious that the dog is a service animal, staff may only ask only two questions
 - Whether dog is required because of a disability
 - What work or tasks the dog is trained to perform
- Cannot request any documentation for the dog, require that the dog demonstrate its task, or inquire about the nature of the person's disability

Other issues

- Entity is not responsible for care or supervision of the dog
- No “service animal” license or documentation required.
- No deposits or pet fees
- Cannot exclude service dog because of the allergies or religious beliefs of others, including employees, but may consider these issues in how access is provided
- No exclusion of certain breeds of dogs

More Issues

- Dog not required to wear a vest, ID tag, or specific harness
- If city requires dog registration or vaccination, service animals are not exempt, but must meet local animal control or public health requirements -- But city may not create mandatory registration of service animals
- Persons who use more than one service animal to perform different tasks should generally be allowed with all dogs into public places

Exclusion of Service Dogs

- General Rule: Covered entities must permit service animals to enter all areas where members of the public go
- Two specific exceptions:
 - When the animal is out of control and the handler does not take effective action to control it
 - The animal is not housebroken

What is Handler's Control?

- Must have harness, leash, or other tether
- If handler is unable to use these because of disability, animal must otherwise be under the handler's control: voice control, signals, or other effective means

Other Disability Rights Laws

- Remember other disability rights laws may also apply to the entity
- And these laws may have different, more extensive coverage of service animals
- Fair Housing Act covers emotional support animals
- Air Carrier Access Act allows more questions to be asked
- State and local laws may provide different provisions

What Health Care Providers Are Covered?

- Hospitals
- Nursing homes
- Doctors' offices
- Pharmacies
- Home health agencies
- Community health centers and health clinics
- Alcohol and drug treatment centers

Issues in Health Care Facilities

- Controlling infection and ensuring health and safety of patients with health conditions, health care workers, and other individuals.
- Centers for Disease Control and Prevention has issued guidelines which are instructive: *Guidelines for Environmental Infection Control in Health Care Facilities (CDC Guidelines) (2003)*.

CDC Guidelines: Health Risks Posed by Service Animals

- No evidence exists that animals pose a more significant risk of transmitting infection than people.
- Therefore, a service animal should not be excluded from an area in a health care facility unless a patient's situation or a particular animal poses a greater risk that cannot be mitigated through reasonable measures.

CDC Guidelines: General Principle

Wherever health care personnel, visitors, and patients are permitted to enter care areas of a health care facility without taking additional precautions to prevent transmission of infection, then service animals must also be allowed access with their handlers.

Where May a Service Animal Go?

Generally, Yes

- Emergency room
- Patient rooms
- Radiology unit
- Treatment rooms
- Allergy clinic
- Cafeteria
- Waiting areas
- Nursing homes

Generally, No

- Operating room
- Areas treating immunocompromised patients
- Some ICUs
- Burn units
- Isolation rooms
- Rooms requiring special ventilation

The focus is on the use of the particular area.

OPDMDs



Other Power-Driven Mobility Device (OPDMD)

“[A]ny mobility device powered by batteries, fuel, or other engines—whether or not designed primarily for use by individuals with mobility disabilities—that is used by individuals with mobility disabilities for the purpose of locomotion.”



Wheelchairs and OPDMDs

Two tiers of devices, two approaches

Wheelchairs and manually powered mobility aids

- Wheelchairs, walkers, crutches, canes, braces: Permitted in any area open to pedestrian use

Other power-driven mobility devices

- Devices not necessarily designed for use by people with disabilities: **Make reasonable modifications to permit use by people with disabilities**

OPDMD's: What are they?

- Golf cars
- Segways or other electronic personal assistance mobility devices
- Any mobility device that is not a wheelchair that is designed to operate in areas without defined pedestrian routes

Use of OPDMDs

- Covered entities must make reasonable modifications to permit individuals with mobility disabilities to use OPDMDs
- The entity can demonstrate that the class of device cannot be operated in accordance with legitimate safety requirements adopted by the entity
- Must be based on actual risks, not on mere speculation or stereotypes, using specific assessment factors

Specific Assessment Factors

- Public entity may consider five specific assessment factors in determining whether a particular other power-driven mobility device and be allowed in a specific facility as a reasonable modification.
- Factor One: Type, size, weight, dimensions, and speed of the device.

Specific Assessment Factors

- Factor Two: Facility's volume of traffic (which may vary at different times of the day, week, month, or year).
- Factor Three: The facility's design and operational nature (indoors v. outdoors, square footage, existence of stationary devices, availability of storage facilities).

Specific Assessment Factors

- Factor Four: Whether legitimate safety requirements can be established to permit the safe operation of the device in the specific facility.
- Factor Five: Whether the specific device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management law and regulations.

Permissible Questions

- Public entities may ask individuals using an other power-driven mobility device for a credible assurance that the device is required because of a disability.
- An assurance may include, but does not require, a valid State disability parking placard.
- A verbal assurance not contradicted by observation is considered a credible assurance.

Impermissible Questions

Entities may not ask an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual's disability.

Remember: Use of OPDMDs

- Burden is on entity to demonstrate use is not reasonable: that the class of OPDMD cannot be operated in accordance with legitimate safety requirements adopted by the entity.



OPDMD Policies

The Department of Justice regulation does not require, but it encourages, entities to develop written policies specifying when other power-driven mobility devices will be permitted on their premises and to communicate those policies to the public.

Proposed Policy Approach

- Develop a policy by building/area and inform the public
 - Clearly state circumstances under which permitted (follow assessment factors)
 - Specific rule
 - Procedure for assessment
 - Consider grouping by type
- Publish and distribute generally, e.g. on website

Policy examples

- Government building: no gas-driven devices, no use of escalators, maximum speed
- Trails and other outdoor areas: may prohibit certain types that may damage particular environment (e.g., ATV's in cross county ski area, on narrow trails)

Miniature Horses

- Allow miniature horses into facilities of covered entities if horse has been individually trained to do work or perform tasks for an individual with a disability
- Public entity may take into account series of assessment factors to determine whether to allow miniature horse into a specific facility

Miniature horses

- Generally range in height from 23 to 34 inches
- Weigh 70-80 pounds
- Are not considered service animals



Miniature horses

- Assessment factors
 - Type, size, weight (whether facility can accommodate)
 - Handler's control
 - Whether housebroken
 - Legitimate safety requirements of specific facility



Ticketing

- ADA rules apply to selling tickets for assigned seats at concerts, plays, lectures, and sporting events
- For single events or for series of events
- Very specific provisions, covering eight areas, including
 - Ticket sales
 - Ticket prices

Ticketing, Continued

- Identification of available accessible seating
- Purchasing multiple tickets
- Hold and release of tickets for accessible seating
- Ticket Transfer
- Secondary ticket market, and
- Prevention of fraud in purchase of tickets for accessible seating

Ticket Sales

- Tickets for accessible seating must be sold
 - during the same hours,
 - during the same stages of ticket sales (pre-sales, promotions, lotteries, wait lists, special fan clubs)
 - under the same terms and conditions, and
 - through the same methods of distribution (including Internet and third party vendors),as all other tickets for the same event or series of event are sold.

Ticket Prices

- Tickets for accessible seating must be available at all price levels for every event or series of events
- Ticket prices for accessible seats may not be higher than prices for tickets in the same seating area for the same event or series of events

Ticket Prices (Continued)

- If venue cannot provide accessible seating at a particular price level because of existing architectural barriers, then percentage of tickets for accessible seating that should have been available at that price level but for the barriers must be offered for sale at the original price in another location in the venue

Identification of Accessible Seating

- Ticket seller must provide the same information about accessible seats as is provided about non-accessible seats
- May include seating maps, brochures, pricing charts or other information
- In same text or visual representations as used for other seats, in hard copy and on the Internet

Purchasing Multiple Tickets

- A person with a disability or a third party buying on that person's behalf can purchase 3 additional seats in the same row and contiguous to the accessible seat
- If ticket sales are restricted for all patrons to less than 4 tickets, same restriction may apply to person with a disability

Purchasing Multiple Ticket (Continued)

- If entity sells more than 4 tickets at a time to general population, must offer same number for accessible tickets
- In this situation, the number of seats sold above 4, need not be in the same row, but should be as close as possible to the accessible seat

Hold and Release of Accessible Seating

- Unsold tickets for accessible seats may be released for sale to individuals with disabilities only when all non-accessible seats have been sold, or when all non-accessible seats in a designated price category or designated seating area have been sold and the tickets for accessible seating are in the same designated price category or area

Ticket Transfer

- Persons with disabilities who hold tickets for accessible seating shall be permitted to transfer tickets to third parties

- Under the same terms and conditions
- And to the same extent

as other spectators holding the same type of ticket

Secondary Ticket Market

- Covered entities must modify their policies, practices, or procedures to
 - Make sure that an individual with a disability may use a ticket acquired in the secondary ticket market under the same terms and conditions as others, and
 - Allow an individual with a disability who acquires tickets for non-accessible seats on the secondary market to exchange to accessible seats in a comparable location if they are available

Prevention of Fraud

- Ticket seller may not require proof of disability, such as a doctor's note, before selling tickets for accessible seating.
- Ticket seller may ask if the individual buying the ticket for accessible seating has a mobility disability or a disability that requires the use of the accessible features of the accessible seating.

Prevention of Fraud (2)

- Covered entity may investigate the potential misuse of accessible seating where there is good cause to believe that such seating has been purchased fraudulently.
- Covered entity may warn purchasers that accessible seating is for individuals with disabilities and that ticket holders for accessible seating who purchase tickets fraudulently are subject to relocation.

Check-Out Aisles

- A store with check-out aisles shall ensure that an adequate number of accessible check-out aisles are kept open during store hours
- If some check-out aisles are closed, the store shall ensure that an equivalent level of convenient service is provided to individuals with disabilities as is provided to others.
- If only one check-out aisle is accessible, and it is generally used for express service, one way of providing equivalent service is to allow persons with mobility impairments to make all their purchases at that aisle.

Reservations at Places of Lodging

- Covered entities using reservations for a place of lodging made by any means, including by telephone, in-person, or through a third party, shall
 - (i) Ensure that individuals with disabilities can make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms;
 - (ii) Identify and describe accessible features in the hotels and guest rooms in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs;

Reservations (Continued)

(iii) Hold vacant accessible guest rooms for use by individuals with disabilities until all other guest rooms of that type have been rented and the accessible room requested is the only remaining room of that type;

(iv) Once reserved, ensure that the guest rooms requested are blocked and removed from all reservations systems; and

(v) Guarantee that the specific accessible guest room reserved through its reservations service is held for the reserving customer, regardless of whether a specific room is held in response to reservations made by others.

“Regarded As”

A covered entity is not required to provide a reasonable modification to an individual who meets the definition of “disability” solely under the “regarded as” prong of the definition of “disability”.