

MAKING REASONABLE MODIFICATIONS TO POLICIES, PRACTICES, AND PROCEDURES

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GENERAL PROVISIONS IN LAW AND REGULATION

Reasonable modifications

A public 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 public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 CFR 35.130 (b) (7)

Why reasonable modifications?

- Sometimes things are done just because “we’ve always done it that way.”
- A practice that seems neutral may make it difficult or impossible for a person with a disability to participate.

Specific applications

- Allowing person to “bump” to front of line or sit while waiting
- Emergency evacuation, sheltering
- Modifying “no pets” policy
- Allowing mobility devices
- Modifying event ticketing processes
- Moving the place of a meeting

Scope of “necessary”

- Provision extends beyond outright exclusion from program; ADA prohibits unequal participation
- Where failure to modify policy denies a person with a disability the equal opportunity to participate in the program or enjoy its benefits, it meets “necessary” standard
- Courts are requiring “meaningful access” to entire “experience”

Examples of policy barriers: What reasonable modifications might work?

- A city requires a driver's license as proof of identity for obtaining services.
- A town doesn't allow anything to encroach on sidewalks within a certain set-back area. Because of this, a particular restaurant can't build a ramp to the front door in order to provide access.

Meaningful access

Some courts require that accommodations ensure meaningful access and enjoyment of the entire experience

Kalani v. Starbucks Corp., 117 F. Supp. 3d 1078 (N.D. Cal. 2015)

- Entity met new construction standards, but accessible tables faced the wall
- Court: Starbucks violated the ADA by denying the Starbucks experience of a welcoming coffeehouse environment, sense of community

https://scholar.google.com/scholar_case?case=3857610096695703199&q=+Kalani+v.+Starbucks+Corp.&hl=en&as_sdt=20000006
or search Google Scholar for case

Full and equal enjoyment

- FedEx Field must provide “auxiliary access” to the content of all broadcasts over its public address system, including music lyrics.
 - Game-related information
 - Emergency and public address announcements
 - Words to music and other entertainment
 - Play-by-play announcements, referee calls, advertisements, cheers
- Options: LED boards, Jumbotron, printed lyrics, captioned television
- Decision based on entitlement to “full and equal enjoyment” of the experience

Feldman v. Pro Football, Inc., Nos. 09-1021, 09-1023, 2011 WL 1097549,
<http://www.leagle.com/xmlResult.aspx?xmlDoc=In%20FCO%2020110325102.xml&docbase=CSLWAR3-2007-CURR> (4th Cir. March 25, 2011) (unpublished)

Limitations

Entity not required to take steps that:

- “fundamentally alter” the nature of the program or activity (that is, it wouldn’t be the same program).
- result in a direct threat to the health or safety of others.

Source of “fundamental alteration” concept

Southeastern Community College v. Davis

- Section 504 decision by the Supreme Court
- Exempting a deaf applicant (who relied on lip reading) from certain clinical components of a nursing program would fundamentally alter the nature of the college's nursing program, as she would not be fully prepared for the career of a licensed registered nurse.

442 U.S. 397 (1979).



Fundamental alteration: Casey Martin case

- Allowing use of a cart (to decrease fatigue from walking) would NOT fundamentally alter the nature of the golf competition.
- PGA Tour v. Martin, U.S. 532 U.S. 661 (2001)



What would you do? (1)

A City museum has a variety of artifacts. Can a person who is blind or has low vision handle these objects to get a better understanding of them?

- A newspaper from 1901?
- A sculpture of a current prominent figure?
- The interior of a Model T?

What would you do? (2)

Your city offers a live show at your small planetarium, where a group of people stands and looks up through an opening at the night sky. The lights are off so you can see the stars.

A person who is deaf wants to bring a friend to interpret the narration and explanation into sign language. He will need to have the lights on so the interpreter is visible to him.

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 public 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.

Personal services and devices

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, unless customarily provided, such as in a hospital or nursing home).

What would you do? (3)

- The mayor has scheduled a list of witnesses for next week's city council meeting. One person on the list says she has an environmental disability and asks that you establish a policy prohibiting attendance at the hearing for person who wear fragrances, including perfumes, aftershaves, or deodorants, as well as persons wearing recently dry-cleaned clothes. She would also like to have a cell-phone-free area.

What would you do? (4)

- The City's ambitious plan to install curb cuts at all traffic intersections will be completed in five years. In the meantime several residents who use wheelchairs have been using the roadways for moving around their neighborhoods. Local residents have complained about the safety hazard and the police chief has asked them to stop, but they have refused. The police chief wants to start ticketing them.

SPECIFIC AREAS ADDRESSED BY DOJ REGULATION

DOJ 2010 regulation revisions

- Service animals
- Miniature horses
- Mobility devices
- Hotel reservations
- Testing
- Event ticketing



Service animals and the ADA

Basic Provision: A public 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 an individual with a disability, including a physical, psychiatric, sensory, intellectual or other mental disability



What does this definition mean?

- Limits the species of service animals to dogs for the ADA
- Comfort or emotional support animals are not covered
- Those with psychiatric, intellectual, or other mental disabilities can use service dogs

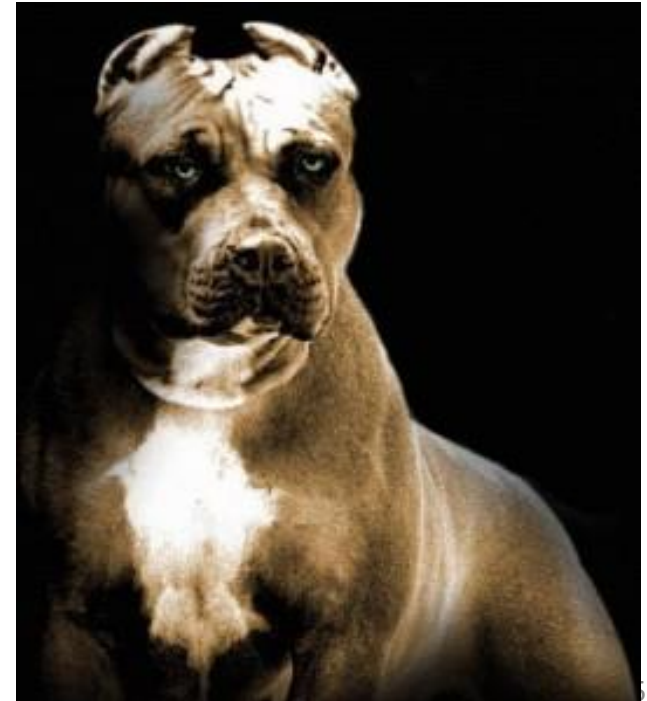
What can I ask?

May I ask for a demonstration?

Permissible Inquiries: Can ask only two questions
(when it's not obvious)

1. Whether dog is required because of a disability
2. What work or tasks the dog is trained to perform

Cannot ask for demonstration



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

Issues recently addressed by Department of Justice

- Hotels: no fee, can't leave dog in room
- Ambulances, arrest vehicles: must take dog or make arrangements for pick-up and care
- Local ordinances: local dog licensing and vaccination requirement are ok, special registration of service dogs is not
- Pools: no dogs in pool, but can wait at edge
- Multiple service dogs allowed
- Hospitals: dog can join patient in room

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.

Guidelines for Environmental Infection Control in Health Care Facilities (Centers for Disease Control Guidelines), 2003.

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.

What would you do? (5)



The people who staff a station/tent at the county fair won't let animals in because there is food there.

What would you do? (6)

- A veteran from the Iraqi war with PTSD and traumatic brain injury is scheduled for surgery in the county hospital. He wants his service dog to stay with him in his room during his entire stay.

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**

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



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.



What would you do? (7)

There's a Segway user at the ticketing desk to the county's schools annual musical at the comprehensive high school auditorium. His daughter has a part in the play, but he says he doesn't want to be separated from his Segway.

What would you do? (8)

The local ARC chapter has asked you to go to the city's legal counsel and police chief to create a simplified Miranda warnings for the police to use during arrests for persons with intellectual disabilities. They have also offered to train the police for a fee.

Testing Accommodations

- New Department of Justice guidance on testing accommodations, particularly standardized exams and other high-stakes tests that are gateways to educational and employment opportunities
 - High school equivalency exams (GED)
 - College entrance exams (SAT or ACT)
 - Exams for admission to professional and graduate schools (LSAT, MCAT, GRE, or GMAT)
 - Licensing exams for trade or professional purposes (bar or medical exams, cosmetology, plumbing)

Examples: Testing Accommodations

- Braille or large-print exam booklets
- Screen reading technology
- Scribes to record answer or dictated notes
- Extended time
- Distraction-free room
- Physical prompts (for persons with hearing loss)
- Permission to bring and take medications during an exam (e.g., insulin)

Ticketing (1)

- 2010 ADA rules apply to selling tickets for assigned seats at concerts, plays, lectures, and sporting events
- For single events or for series of events

Ticketing (2)

Very specific provisions, covering eight areas, including

- Ticket sales
- Ticket prices
- 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

PRACTICAL TIPS

Determining what is reasonable (1)

- If the modification is relatively easy, you may want to just do it.
- If not, evaluate the request and make a determination.
- Do your research first.

Determining what is reasonable (2)

Talk to the requestor

- Is the person a qualified individual with a disability (meets essential eligibility requirements)?
- Exactly what is requested and why? What is the barrier?
- How will the change make the program or service more accessible?
- Are there alternatives?

Determining what is reasonable (3)

Understand the program: talk with managers/staff

- Who does it serve? What is its purpose?
- Are there eligibility requirements? Are they necessary?
- Do federal/state laws or regulations mention the requirement?
- How is it described to the public (flyers, web, registration)?
- If the program can not make the change, why not? What can it do?

Determining what is reasonable (4)

- Consider resources and defenses
 - Does the modification change the eligibility requirements or change the program?
- Research and make a decision
 - Check resources on line, cases, settlements
 - If denial of specific request, consider alternatives
 - Document any denial and reasons
 - Be ready to explain your decision

Resources

- Specific guidance on www.ada.gov
 - New ADA Technical Assistance for State and Local Governments
 - Testing Accommodations
 - Frequently Asked Questions about Service Animals and the ADA, July 2015
 - Revised ADA Requirements: Ticket Sales
 - Revised ADA Requirements: Service Animals
 - Wheelchairs, Mobility Aids, and Other Power-Driven Mobility Devices
 - Guidance for child welfare agencies, August 2015
- ADA National Network
 - 800-949-4232
 - www.adata.org
- ADA Information Line
 - 800-514-0301
 - 800-514-0383 (tty)

What would you do? (9)

Library computer stations

A library is closed for renovation, so patrons must use a very busy nearby library. Mr. Chin, who has multiple disabilities impacting his vision and manual dexterity, requests that he be permitted unlimited time on the one accessible computer instead of following the one-hour limit.

The library manager tells you that patrons are already fighting over the computers and she has had to call the police. She says she cannot make this change. It will set a precedent and she will be inundated with similar requests.

What would you do? (10A)

Seating space open to the public (1 of 2)

Recently several people have been staying during almost the entire business hours in your building's public space (lobby, cafeteria, library, neighborhood center). Some of them appear not to have a home or place to go during the day. How would you approach each of these?

1. A man sits in the cafeteria and talks softly (often to himself or to someone who is not there) in spurts.
2. A woman sits in the lobby and frequently talks loudly (often to herself or to someone who is not there), sometimes yelling and talking nonsense.
3. Same as 2., but in a library.

What would you do? (10B)

Seating space open to the public (1 of 2)

4. A woman who uses a walker and walks slowly has an accident a few times a week because she cannot make it to the accessible bathroom on time. The building maintenance staff is complaining to you about the extra and unexpected cleaning they have to do.
5. A woman who uses a wheelchair has several complaints: There is not adequate space for her to get between tables in her wheelchair. There is no table that she can pull up to in her chair. The people in the cafeteria refuse to carry her tray or drink to her table.
6. You have had a few people with disabilities who are accompanied by personal aides of the opposite sex; the person with a disability wants to use the public restroom, but all the restrooms are single-sex.

What would you do? (11)

Mobile medical care

The County operates a mobile health care screening van that is not accessible to people with mobility disabilities. Is this a violation of the ADA? If so, what steps can it take to remedy it?

What would you do? (12)

Juror accommodations

The jury has been chosen for a long trial. You receive these requests.

1. A juror reveals that she has diabetes and asks that she be able to
 - (a) bring a snack into the courtroom and the jury room (both of which are banned by the court's policy), so she can control her blood sugar,
 - (b) take breaks to monitor her glucose levels.
2. A juror reveals that she has narcolepsy, which causes her to fall asleep suddenly and involuntarily. She asks that
 - (a) a juror or someone else be assigned to nudge her if she falls asleep
 - (b) she be allowed to take a short nap if necessary at times.
3. That same juror reveals that she also may lose consciousness for about 30 minutes if she is startled or sneezes. Although this has only happened a few times to her, she wants you to be aware of it and to allow a short recess if that happens.
4. A juror who has a severe mobility disability asks to bring his personal assistant with him and asks that he not be required to be present before 9:30 a.m., because he has to wake up four hours before he leaves his home, in order for his medication (which he takes in the morning) to take effect and for his assistant to bathe and dress him for the day. ⁵¹

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