The Americans with Disabilities Act (ADA) Proposed Regulations

Nancy Lee Jones
Legislative Attorney

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Summary

The Americans with Disabilities Act (ADA) has often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964. As stated in the act, its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." (42 U.S.C. §12101(b)(1)) On June 17, 2008, the Department of Justice (DOJ) issued notices of proposed rulemaking (NPRM) for ADA title II (prohibiting discrimination against individuals with disabilities by state and local governments), and ADA title III (prohibiting discrimination against individuals with disabilities by places of public accommodations). These proposed regulations are detailed and complex. They would adopt accessibility standards consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board. More specifically, the regulations include more detailed standards for service animals and power-driven mobility devices, and provide for a "safe harbor" in certain circumstances. Comments on the regulations were due by August 18, 2008. After consideration of the comments received, the regulations are currently with the Office of Management and Budget.

Background

On July 23, 2004, the Architectural and Transportation Barriers Compliance Board (Access Board) published ADA[1] and Architectural Barriers Act Accessibility Guidelines (ADAAG). These guidelines in part provided detailed guidance on play and recreation areas, lodging at a place of education, and communications requirements. These guidelines have no legal effect and serve as guidance only until adopted by the Department of Justice in final regulations. In its June 17, 2008, NPRMs, DOJ proposed the adoption of Parts I and III of the Access Board guidelines and also proposed several other amendments. [2]

Safe Harbor

The adoption of the Access Board guidelines would serve to increase accessibility; however, the Department of Justice expressed concern about the potential effect of these changes on existing structures. To address these concerns, DOJ added "safe harbor" provisions for both titles II and III. For title II, which applies to states and localities, individuals with disabilities must be provided access to programs "when viewed in their entirety."

Unlike title III, a public entity under title II is not required to make each of its existing facilities accessible. However, in order to provide certainty to public entities and individuals with disabilities, DOJ's proposed regulations add a "safe harbor" provision stating that "public entities that have brought elements into compliance in existing facilities are not, simply because of the Department's adoption of the 2004 ADAAG as its new standards, required to modify those elements in order to reflect incremental changes in the proposed standards."[3]

Title III of the ADA, which covers places of public accommodation, requires each covered facility to be accessible but only to the extent that accessibility changes are "readily achievable." The proposed regulations for title III, like those for title II, also contain a "safe harbor" provision. This provision would presume that a qualified small business has done what is readily achievable in a given year "if, in the prior tax year, it spent a fixed percentage of its revenues on readily achievable barrier removal."[4] DOJ stated that it was concerned that "the incremental changes in the 2004 ADAAG may place unnecessary cost burdens on businesses that have already removed barriers by complying with the 1991 Standards in their existing facilities."[5] DOJ solicited comments on whether public accommodations that operate existing facilities with play or recreation areas should be exempted from compliance with certain requirements.

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[1] 42 U.S.C. §§12101 *et seq.* For a more detailed discussion of the ADA, see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by Nancy Lee Jones. Legislation which would amend the definition of disability in the ADA passed the House on June 25, 2008. For a discussion of this legislation see CRS Report RS22901, *The Americans with Disabilities Amendments Act*, by Nancy Lee Jones.

[2] 73 FED. REG.34466, 34508 (June 17, 2008) http://www.ada.gov/NPRM2008/ADAnprm08.htm.

[3] 73 FED. REG. 34485 (June 17, 2008); Proposed 28 C.F.R. §35.150.

[4] 73 FED. REG. 34515 (June 17, 2008); Proposed 28 C.F.R. §36.304(d)(5).

[5] 73 FED. REG. 34514 (June 17, 2008). This proposal was strongly criticized as contrary to the intent of the ADA and discouraging planning to remove significant architectural barriers. See Disability Rights Education and Defense Fund, Comments on the U.S. Department of Justice Notice of Proposed Rulemaking http://www.dredf.org/DOJ_NPRM/DREDF_comments_DOJ_NPRM_08.pdf

Service Animals

The proposed regulations for both titles II and III contain virtually identical language relating to service animals. They define service animal as meaning "any dog or other common domestic animal individually trained to do work or perform tasks for the benefit of a qualified individual with a disability.... " Some examples provided were guiding individuals who are blind, pulling a wheelchair, assisting an individual during a seizure, and retrieving medicine or the telephone. The term "service animals" would not include farm animals or wild animals, such as non human primates (including those born in captivity), reptiles, ferrets, amphibians, and rodents. Assistance for individuals with psychiatric, cognitive and mental disabilities was specifically included; however, "[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or to promote emotional well-being are not service animals."[6]

Generally, a public entity (title II) or a public accommodation (title III) must modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability. If the entity can show that the use of the service animal would fundamentally alter the entity's service, program, or activity, the service animal need not be allowed. The proposed regulations delineate exceptions where a service animal may be removed. These include where the animal is out of control or not housebroken, and where the animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable accommodation.[7] If the animal is excluded because of these reasons, the entity must give the individual with a disability the opportunity to participate without the animal.[8] The work the service animal performs must be directly related to the individual's disability and the animal must be individually trained, housebroken, under the control of its handler, and have a harness, leash, or other tether.[9] A public entity or public accommodation is not responsible for supervising the animal and, although the entity may not ask about the individual's disability or require documentation, the entity may ask what work the animal has been trained to perform.[10] Finally, an individual with a service animal must be allowed access to areas open to the public, program participants, and invitees, and there shall be no special fees or surcharges although there may be charges for damages caused by the service animal.[11]

In its discussion of the proposed regulations, the Justice Department observed that it received a large number of complaints about service animals and that there was a trend toward the use of wild or exotic animals. The Justice Department also noted a distinction between "comfort animals"that have the sole function of providing emotional support and which would not be covered, and "psychiatric service animals" which may be trained to provide a number of services, such as reminding an individual to take his or her medicine, and which would be covered. However, DOJ specifically recognized "that there are situations not governed exclusively by the title II and title III regulations, particularly in the context of residential settings and employment,

[6] Proposed 28 C.F.R. §§35.104, 36.104.

[7] Proposed 28 C.F.R. §§35.136(b), 36.302(c)(2).

[8] Proposed 28 C.F.R. §§35.136(c), 36.302(c)(3).

[9] Proposed 28 C.F.R. §§35.136(d), 36.302(c)(4).

[10] Proposed 28 C.F.R. §§35.136(e-f), 36.302(c)(5-6).

[11] Proposed 28 C.F.R. §§35.136(g-h), 36.302(c)(7-8).

where there may be compelling reasons to permit the use of animals whose presence provides emotional support to a person with a disability."[12]

Power-Driven Mobility Devices

Since 1990 when the ADA was enacted, the choices of mobility aids for individuals with disabilities have increased dramatically. Individuals with disabilities have used not only the traditional wheelchair but also large wheelchairs with rubber tracks, riding lawn mowers, golf carts, gasoline-powered two-wheeled scooters, and Segways. DOJ indicated that it had received inquiries concerning whether these devices need to be accommodated, the impact of these devices on facilities, and personal safety issues.

The proposed regulations under both titles II and III include sections on mobility devices. They require a public entity under title II or a public accommodation under title III to permit individuals with mobility impairments to use wheelchairs, scooters, walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility impairments in areas open to pedestrian use.[13] A public entity or public accommodation under title III must make reasonable modifications in its policies and procedures to permit the use of other power-driven mobility devices by individuals with disabilities unless it can be demonstrated that such use is not reasonable or would result in a fundamental alteration of the nature of the services or programs.[14] In addition, a public entity or a public accommodation under title III shall establish policies permitting the use of other power-driven mobility devices when reasonable. The determination of reasonableness is to be based on

- the dimensions, weight, and operating speed of the mobility device in relation to a wheelchair;
- the potential risk of harm to others by the operation of the mobility device;
- the risk of harm to the environment or natural or cultural resources; and
- the ability of the public accommodation to stow the mobility device when not in use if requested by a user.[15]
- A public entity or public accommodation under title III may ask a person using a power-driven mobility device if the mobility device is required because of the person's disability, but may not ask questions about the person's disability.[16] DOJ solicited comments on whether there are certain types of power-driven mobility devices that should be accommodated; whether motorized devices that use fuel,

[12] 73 FED. REG. 34473, 34516 (June 17, 2008). For a discussion of the arguments for and against the proposed regulation's provisions on service animals see Rebecca Skloot, "Creature Comforts," THE NEW YORK TIMES MAGAZINE 34 (January 4, 2009). One disability organization has supported DOJ's use of the phrase "do work or perform tasks" in the definition of service animal but has objected to the exclusion of miniature horses since they are seen as a viable option to a service dog for those who are allergic to dogs or prefer an animal with a longer life span. http://www.dredf.org/DOJ_NPRM/DREDF_comments_DOJ_NPRM_08.pdf

[13] Proposed 28 C.F.R. §§35.137(a), 36.311(a).

[14] Proposed 28 C.F.R. §§35.137(b), 36.311(b).

[15] Proposed 28 C.F.R. §§35.137(c), 36.311(c).

[16] Proposed 28 C.F.R. §§35.137(d), 36.311(d).

such as all terrain vehicles, should be covered; and whether power-driven mobility devices should be categorized by intended function, indoor or outdoor use, or some other factor.[17]

Other Provisions in the Proposed Regulations for Title II (Public Entities) and Title III (Places of Public Accommodation)

The proposed title II and title III regulations contain a number of other provisions. The title II proposed regulations include provisions on program accessibility, including play areas, swimming pools, and dormitories and residence halls at educational facilities, assembly areas, and medical care facilities.[18] Accessibility requirements for detention and correctional institutions are also included in the proposed title II regulations[19] as are provisions on ticketing for accessible seating,[20] and communications.[21]

The title III proposed regulations, like the title II proposed regulations, contain provisions on ticketing for accessible seating,[22] provisions relating to play areas and swimming pools,[23] and provisions on communications.[24] Accessibility requirements for place of lodging, including housing at a place of education, are included.[25] A new provision for examinations is added that specifies that if any request for documentation is required, the requirement is to be "reasonable and limited to the need for the modification or aid requested."[26] DOJ noted that this change was made to eliminate inappropriate or burdensome requests by testing entities.[27]

Author Contact Information

Nancy Lee Jones
Legislative Attorney
njones@crs.loc.gov, 7-6976

[17] 73 FED. REG. 34481, 34540 (June 17, 2008).
[18] Proposed 28 C.F.R. §§35.150-35.151.
[19] Proposed 28 C.F.R. §35.152.
[20] Proposed 28 C.F.R. §35.138.
[21] Proposed 28 C.F.R. §§35.160-35.161.
[22] Proposed 28 C.F.R. §36.302.
[23] Proposed 28 C.F.R. §36.304.
[24] Proposed 28 C.F.R. §36.303.
[25] Proposed 28 C.F.R. §36.406.
[26] Proposed 28 C.F.R. §36.309.
[27] 73 FED. REG. 34539 (June 17, 2008).