

Recreation Access Rights Under the ADA

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The Americans with Disabilities Act (ADA) has changed the way in which public and private agencies provide recreation opportunities. This paper will review the rights of the consumer of recreation and leisure services under the ADA and discuss some of the key administrative and court decisions that have shaped those rights.

This information applies to opportunities provided by units of state and local government (such as a parks and recreation department), private for-profit entities (such as a health club or an adventure outfitter), and nonprofit organizations (such as a YMCA or community sports association). This paper briefly discusses the differences between those types of agencies, but the focus here is more on what is similar, not what is different.

There is an important concept in determining the length to which an entity must go for ADA compliance. This concept, undue burden, is discussed in this paper. It is also important to review how consumers can enforce those rights. This paper does that, and notes the resources that recreation consumers can use to find out more about your rights, and how to enforce those rights. This paper will provide the names and numbers and websites of local and national organizations that know recreation, and the right to access.

WHAT'S DIFFERENT TODAY?

The ADA was adopted in 1990. Over the last decade, we have seen many administrative complaints and many court decisions. The vast majority of these decisions have upheld the right of people with disabilities to enjoy recreation in the most integrated setting. Some of these decisions speak about the right to an individualized assessment (*Anderson v. Little League*); sign language interpreters (*Bay Area Red Cross and the Department of Justice*); most integrated setting and one-to-one staff accommodations (*Barrington Park District and the Department of Interior*); behavior management plans and accommodations (*Thomas v. Davidson Academy*); changes in rules and policies (*Detroit Lions Football Club and the Department of Justice*); and the retention of recreation programs for people with disabilities (*Concerned Citizens v City of West Palm Beach*). This paper will talk about these and other decisions that affect the right to recreation. As an aside though, why is there such interest in recreation? Recreation participation results in the acquisition of social skills, leisure skills, and is enjoyable. The recreation experience builds self-esteem, reduces stress, and improves the quality of life. No wonder everyone, including people with disabilities, want access to recreation.

RIGHTS UNDER THE ADA

There are many rights created by the ADA. This paper discusses those that are most critical to the pursuit of recreation. Some are illustrated with a short case study.

Right to the Most Integrated Setting

The recreation consumer with a disability has the right to participate in the most integrated setting. This is defined in the U.S. Department of Justice guidelines as the setting in which interaction between people with and without disabilities is provided to the maximum extent feasible.

In effect, every single recreation and sport opportunity that is offered for people without disabilities is also available to the consumer who has a disability. With a reasonable accommodation, he or she will be able to participate alongside neighbors, relatives, friends, and others without disabilities in the pursuit of exciting, rewarding, and challenging sport and recreation opportunities. While separate programs, designed just for people with disabilities, are permissible and may in certain instances be preferred by the recreation consumer, the integrated opportunity must be provided.

Case Study: Barrington Park District

Barrington, Illinois is an affluent northwest suburb of Chicago. The Barrington Park District is a special purpose unit of local government, which provides recreation and park services. Funded by its own property tax levy and user fees, the Park District offers extensive services to its residents. In 1996, a child with an attention deficit disorder registered for an after-school program conducted by the Park District. This attempt to seek recreation in the most integrated setting got off to a rocky start when the child, in a manifestation of his disability, displayed aggressive and disruptive behavior, but not threats of harm toward others.

The Park District asked its Therapeutic Recreation staff to evaluate the situation and the staff suggested two things: a behavior plan and the assignment of a one-to-one staff. The Park District implemented both recommendations and the boy's behavior moderated, allowing full participation.

At some point, and for unknown reasons, the Park District decided to release the one-to-one staff. As might be expected, the behavior plan then failed and the boy resumed his aggressive and disruptive behavior. The Park District then removed him from the program. In response to a complaint filed by the boy's mother, the U.S. Department of Interior National Park Service investigation sided with the child, saying the most integrated setting is his right and that, importantly, the cost of the one-to-one staff was not an undue burden.

Right to Participate

A person with a disability has the right to register for and participate in recreation or leisure activities. In effect, every single parks and recreation program offered for people with disabilities is available to people without disabilities. So long as he or she meets "essential eligibility" requirements required of all registrants, such as registering before the program is full and paying the same registration fee that others pay, participation should be welcomed. There may be other essential eligibility requirements, such as being able to serve, hit a backhand, and hit a forehand, for someone wishing to participate in an intermediate tennis tournament. These vary from activity to activity.

Right to Reasonable Accommodations

A person with a disability has the right to reasonable accommodations, provided by the activity organizer or sponsor, to meet essential eligibility requirements, if necessary to facilitate or enable participation in the activity of his or her choice. Accommodations include changes in rules and policies; extra staff for the coaching or management of the activity; a sign language interpreter or other aids for recreation consumers who are deaf or hard of hearing; braille or large print documents for recreation consumers who are blind or have impaired vision; and other efforts to facilitate participation.

There is a limit to what is reasonable. An accommodation that results in an unfair competitive advantage in a competitive sport is unreasonable. But, this is a person-by-person, sport-by-sport decision. Those that are too costly or too difficult may also be an undue burden on the provider.

Case Study: Wythe County

The Wythe County Recreation Commission (Virginia) and an affiliated nonprofit organization were the subjects of a complaint regarding a basketball league. A child who uses a wheelchair registered after successfully participating in a school district physical education basketball unit on a mainstreamed basis. League officials permit involvement, but with limitations. These include no on-the-court play and parental supervision while on the bench. The family filed a complaint with the U.S. Department of Interior. In its decision, the DOI agrees with the County and league on the play issue (DOI does tell the league the child does not have to have a parent on the bench with him). DOI believes the child would be a "competitive disadvantage" to his teammates, thereby fundamentally altering the nature of basketball for ten year olds. This is an appropriate decision if the DOI investigators have indeed observed the boy in practice and determined that his teammates are disadvantaged by his presence. DOI, in closing, advises County to attempt a wheelchair basketball league.

Contrast two other situations with the Wythe County decision. A swimmer with a disability in Connecticut was allowed to participate even though he had never earned his team a point in competition. And, a high school wrestler in Washington State placed second in the State Wrestling Tournament several years ago. The wrestler was a double amputee and pinned many of his opponents...he clearly did not have a competitive disadvantage. These emphasize the need to make this decision person-by-person, sport by sport.

Right to Adaptive Equipment

Another type of reasonable accommodation is the use of adaptive equipment. There are many examples of the successful use of adaptive equipment in current sport and recreation programs. Devices to enable better grasping are readily available on fishing rods, golf clubs, and other equipment. Padding or protective equipment is adapted or available for almost every sport, and is often the same safety equipment used by athletes in that sport, or in other sports.

Right to an Assessment or Evaluation

A recreation consumer shall not be discriminated against because of a perception of risk or a strict application of safety policies and rules. Recreation and sport providers must assess risk and the individual participant's ability and experience in the sport or activity. The assessment must include a consideration of how reasonable accommodations such as rule changes or adaptive equipment would eliminate or minimize the risk and enable participation in the activity. However, this assessment should be applied to all registrants, including those without disability. For example, a registrant for a kayaking class should be able to demonstrate the ability to swim unassisted, perhaps with the reasonable accommodation of a personal flotation device, regardless of whether he or she has a disability.

Case Study: Anderson v. Little League

This 1992 decision is one of the first under the ADA. Anderson was the third base coach on a Little League team in Arizona. Little League USA rules, at that time, prohibited a person in a wheelchair from being on the field. League officials in Arizona had not enforced this rule and Anderson had enjoyed participating. In 1992, Arizona Little League informed Anderson it would enforce Little League USA rules in the state tournament. Anderson's team had qualified for the tournament, but now Anderson could not be on the field.

The Little League rule was adopted for the safety of participants. But rules, by their very nature, tend to discriminate. If Anderson wanted to be on the field, he had no choice but to go to court. He did, winning an injunctive order prohibiting Little League from enforcing the rule. The Court said that Little League's strict application of the rule to Anderson, without an assessment of his ability, an identification of the risk he posed, and the consideration of reasonable accommodations, violated his rights under the ADA. In effect, the Little League rule treats all people with disabilities the same without regard for the facts. Can Anderson avoid a third baseman chasing a foul ball? Can Anderson avoid a runner rounding third for home? Can Anderson avoid a foul ball line drive off the bat of a ten year old? Those are the questions Little League should have asked, and then considered accommodations such as protective gear, or moving the third base box.

As an aside, this is a classic reminder to know your customer. Anderson was a Federal District Court judge.

Other Rights: Disparate Impact

People with disabilities shall not be discriminated against by an unfair application of administrative rules or policies. Many rules and policies exist for good reasons. However, when the rule is implemented, it cannot have a greater impact on people with disabilities than on people without disabilities.

Case Study: Concerned Citizens v. City of West Palm Beach

In 1993, the City of West Palm Beach faced a \$9 million budget deficit. It ordered all departments to make substantial reductions in expense. The Parks & Recreation Department cut all program areas 15% to 20% (sports, tennis, aquatics, centers, etc.).

And, the City eliminated (a 100% cut!) its segregated special recreation programs for people with disabilities, but failed to train recreation staff on accommodating people with disabilities in inclusive settings. The Court said the "extreme disparity" in cuts (20% vs. 100%) violates the ADA and ordered reinstatement of programs.

In this climate of budget cuts, tax caps, and caps on user fees, it is not uncommon to see a budget reduced. However, when reductions do occur, there should be an equitable balance between cuts. A city could not propose to eliminate all sign language interpreters, or all programs staffed by a therapeutic recreation specialist, unless it was eliminating all recreation programs.

Other Rights: Fees

No sport or recreation provider shall charge a higher fee, or a surcharge, for the cost of accommodations or the cost of providing recreation in the most integrated setting. In public park and recreation programs, a fee for inclusive involvement that requires an accommodation is no different than a fee charged to other participants who do not have a disability. Assume in a golf lesson that the instructor uses oral instruction. For a golfer who is deaf, the oral instruction will not be understandable. The parks and recreation department shall provide a sign language interpreter for that golfer and cannot charge the golfer a fee for the lesson and then add a fee for the sign language interpreter. It can only charge the same fee it charges to other golfers.

Case Study: Detroit Lions Football Club and the Department of Justice

Like many pro sport teams, the Detroit Lions worked with various youth groups in Michigan to promote attendance at games. The Lions invited youth groups to submit entries and then, by lottery, the Lions would choose a team to visit a game and have seats for \$1 each.

The team that won was a wheelchair sport team. When advised of this fact by the team representative, the Lions said the fee would have to be higher than \$1. When told some of the kids who would attend did not use wheelchairs, the Lions pointed out the shortage of companion seats and said those children would have to sit elsewhere. The Lions also noted their policy requiring people with disabilities to arrive for a visual inspection to determine that the patron did indeed use a wheelchair.

The U.S. Department of Justice, in response to a complaint, ordered the Lions to change their "see first" policy, to permit companion seating, and to charge people with disabilities the same fee charged other persons. The Lions were also ordered to provide more than \$50,000 in merchandise to help support the team.

Other Rights: Public Entities Shall Not Provide Substantial Support

Title II of the ADA prohibits the 85,000 units of state and local government in the United States from providing substantial support to entities or organizations which do discriminate in the provision of service in programs or facilities owned or operated by the public entity. This simple concept is grounded in the belief that public facilities or areas, paid for by taxpayers, shall not be used for a discriminatory purpose. That outcome means that the taxpayer with a disability is literally having "his" property used to discriminate against him.

What is substantial support? The Title II guideline does not define it well. Perhaps the best way to consider this is by asking if the entity withdrew its facilities or support, would the third party organization be able to continue the program? If the third party organization pays the same fee for use of the facility or field as any other group does, it is hard to win the argument that substantial support is provided. But if the state or local government provides free use or reduced fee use, staff to maintain the field or court, timekeepers, registration materials, supervision, free or reduced fee office space, than substantial support is more likely to exist. The entity is free to provide substantial support...just not to an association or organization that violates the ADA.

Case Study: Wadsworth Community Consolidated School District

The U.S. Department of Education ordered the Wadsworth Community Consolidated School District in Illinois to cease making school gyms available to an unaffiliated community association. The association operated a popular floor hockey league for youth. During the registration process, it blatantly discriminated against a child with a cognitive impairment by refusing to allow the child to register, despite the fact there was room in the league, the child was the appropriate age, and the father was willing to pay the registration fee.

The father sought accommodations from the league and the boy, with intervention from the Illinois Attorney General, was eventually given a tryout. Better than Anderson, but still not sufficient, as the tryout identified issues such as failure to avoid contact with other players and being struck by the ball, common occurrences for any first-time floor hockey player. The league refused to consider reasonable accommodations (adaptive equipment, changes in policies, extra staff on the court, etc). The father filed a complaint with the U.S. Department of Education, which issued the final order.

Other Rights: Changes to Rules and Policies

The sport and recreation industry, whether public or private, is heavy with rules. The provider of service wants the 500th customer that day to have the same quality of experience as the 1st customer that day. But rules by their very nature tend to discriminate. When changing a rule will not fundamentally alter the nature of the program, service, or activity, and will enable a person with a disability to participate, the rule should be changed for that instance. This concept applies to both the rules and policies administering the program, and the rules of play for the activity itself.

An example of the latter is a change in the rules of play for tennis. Allowing a player in a wheelchair to hit to the doubles lines evens the playing field, but does not change the fundamental nature of play: serve, volley, point. Nor does allowing the player using a wheelchair to play the ball before it hits the court a third time.

Other Rights: Behavior Management and Changes to Rules and Policies

An issue deserving its own discussion is the application of behavior rules as an element of essential eligibility. Many recreation providers require patrons to adhere to certain behavior rules: no running on the pool deck, no dunking at the lunchtime basketball league, no cursing at other patrons or employees. However, some disabilities manifest themselves in ways that

produce unusual behavior. An accommodation of that behavior, so long as it does not fundamentally alter the nature of the activity, is appropriate.

This may require sport and recreation providers to become adept at identifying the cause of the behavior, determining how to avoid the cause, creating a plan for staff to use, and managing the behavior when it does occur. The removal of a registrant from a program because of unusual behavior, unless an accommodation such as one-to-one staff or a behavior plan has been attempted, fails to meet the standard set by the ADA.

The Title II and Title III regulations set a strict test for removal. The behavior must pose a direct threat (imminent threat of physical harm) to others. In other words, disruptive behavior, such as wandering around a sport facility instead of participation, may not rise to the "direct threat" level.

It is important therefore to set rules that are always enforceable. A "no dunking" rule is easy to objectively measure and easy to enforce: suspend the dunker from that game. A "no cursing" rule is much more subjective, and harder to enforce. Civil cursing occurs frequently in sports and recreation: by players, spectators, and even officials. The frequency of lunchtime dunking is relatively low. The frequency of cursing in sport and recreation is relatively high. This paper takes no position on the appropriateness of cursing in sports and recreation. But from an enforcement perspective a "no cursing" rule would be very, very difficult to enforce. In addition, cursing virtually never rises to the level of direct threat (imminent physical harm).

Case Study: Thomas v. Davidson Academy

In this case, a student at a strict boarding school violated school conduct codes during an outburst related to her disability. Faced with punishment by school administrators, who did not acknowledge that the behavior was related to the student's disability and only saw that it violated rules, the student went to Court. The Court ruled that "...blind adherence to policies and standards is precisely what (laws like the ADA) are intended to prevent, responding with leniency to the student's violations of the accepted norms of student conduct...was a reasonable accommodation". In recreation, we should expect to see similar decisions. Some earlier decisions focus on behavior (Barrington Park District).

UNDUE BURDEN

The Title II regulation issued July 26, 1991 by the U.S. Department of Justice identifies three elements of undue burden: economic burden, administrative burden, and fundamental alteration in the nature of the program.

ECONOMIC BURDEN

If an accommodation would cost much and benefit few, it need not be made. But this is to be narrowly interpreted. The cost of the accommodation is to be compared to the entire budget of the entity, not just the division or program. Therefore, a city parks and recreation department program accommodation would have the cost compared to the entire operating budget of the city. In Barrington Park District, discussed earlier, the cost of the one-to-one staff for 10 hours a week for 20 weeks was around \$2,000. The DOI agreed it was not an economic burden. In

another decision (Pocantico Hills, New York), the U.S. Department of Education said a \$1,300 cost (less than 1% of budget) for an additional employee in a summer camp program was not an economic burden. Economic burden alone will not apply in the vast majority of accommodations.

ADMINISTRATIVE BURDEN

If it is too difficult to find the expertise to make the necessary accommodation, it need not be made. An example is the use of a sign language interpreter. It is possible that in rural settings, where sign language interpreters are likely to be few and far between, a sport and recreation provider may not be able to secure an interpreter at the time and place necessary. If so, it shall provide other effective accommodations, such as a notetaker, or a script of oral instruction. There is no clear guidance on how hard the entity must try to find, in this example, a sign language interpreter. Again, this provision is to be narrowly interpreted.

FUNDAMENTAL CHANGE IN THE NATURE OF THE ACTIVITY

When the accommodation fundamentally changes the nature of the program, it need not be made. The sport of sand volleyball is an example. A player in a wheelchair cannot maneuver in the sand. But, the sand can be paved to allow a player who uses a wheelchair to play volleyball. But then it becomes volleyball, not sand volleyball. Paving the court is not required. Other accommodations though may be effective. One example is lowering the net and requiring all players to play sit-volleyball.

Hint: public entities, if denying an accommodation because it is an undue burden, must make a memo to file that describes the request, why it was denied, and options considered.

APPLICABILITY TO PUBLIC AND PRIVATE ENTITIES

The general concepts discussed above apply to private entities, such as a Gold's Gym or Bally's Fitness Center under Title III of the ADA, and to a YMCA or a Boy's and Girl's Club under Title III as well. The concepts above are principally drawn from Title II of the ADA. Congress intended units of state and local government to act quicker and have a higher threshold for ADA compliance than Title III agencies. For example, a small gym with a \$700,000 operating budget may more easily show undue economic burden than a gym managed by a city parks and recreation department with a \$7 million budget, within a city with a \$35 million budget.

Only two types of entities are exempt from the ADA provisions discussed here: private clubs (where membership requires a nomination and a substantial initial fee, along with substantial annual obligations) and religious organizations (arguably a church basketball league for members of the church only might fit this very narrow exception). However, remember that the ADA does not exist in a vacuum: state or local laws may apply similar non-discriminatory requirements to churches and private clubs.

ENFORCEMENT

The ADA sets forth three means of enforcing its provisions. Each is different and the consumer should choose the method that best suits his or her situation. There are some differences in enforcement against private entities and those are described below.

A state or local government with 50 or more employees is required to have an internal complaint process under the ADA. This allows for a less adversarial approach to dispute resolution. Consumers who believe their rights have been violated may try this less formal approach for prompt resolution of problems. There is no obligation for a private entity to have an internal complaint process. However, it is recommended strongly as a way to provide for a less expensive and more prompt response.

The U.S. Department of Justice investigates *administrative complaints* against private entities such as adventure outfitters, health and fitness clubs, and nonprofits. The recreation consumer who wins a complaint to DOJ will benefit from injunctive relief (an order from DOJ to the provider which requires it to change policy, provide accommodations, make programs inclusive, etc) and the losing defendant pays the consumers legal fees and costs.

Recognizing it cannot handle all complaints, DOJ established "designated agencies" for complaints in certain areas. For example, the U.S. Department of Interior National Park Service investigates administrative complaints against state or local government providers of recreation and sport opportunities, and the U.S. Department of Education investigates complaints against educational agencies such as school districts and colleges. Designated agencies can order a unit of state or local government to provide injunctive relief as well as the payment of legal fees and costs.

Administrative complaints are a powerful tool and should not be overlooked when considering how to enforce the ADA. Court dockets are clogged and going to court is very time consuming. Administrative complaints can be an effective and efficient alternative to court.

But, the absolute right to enforce ADA provisions in federal district court is powerful. The consumer may go directly to court and claim that a private entity or a unit of state or local government has violated his or her rights under the ADA. A recreation consumer is not required to exhaust administrative remedies before going to court. In court, the consumer wins injunctive relief and payment of legal fees and costs. In addition, if the court complaint is against a private entity and pattern or practice of discrimination is found, the Court may award punitive damages. For example, if the CEO of a national fitness chain writes a memo to regional managers, ordering them not to pay for sign language interpreters, that is a pattern or practice of discrimination. Punitive damages may not exceed \$50,000 for the first offense and \$100,000 for the second offense. These funds are to be paid to the U.S. Department of Justice to enhance its enforcement effort.

RESOURCES

U.S. Department of Justice

Information on enforcement of the ADA and how to file a complaint under the ADA

(800) 514-0301 (voice)

(800) 514-0383 (tty)

www.usdoj.gov/crt/ada/adahom1.htm

Disability and Business Technical Assistance Center
Information on the Americans with Disabilities Act
(800) 949-4232 (voice/tty)
www.adata.org