INTRODUCTION:

On September 15, 2010, the U.S. Department of Justice (“DOJ”) issued revisions to its regulations implementing Title II (which applies to state and local government programs) and Title III (which applies to places of public accommodation, including private colleges and universities) of the ADA, 28 C.F.R. Parts 35-36. [1] While affecting a broad array of facilities and building elements, the revised regulations have particular impact with respect to campus athletic facilities, and also set forth specific requirements regarding ticket sales for accessible seating and “effective communication.”

DISCUSSION:

When do the revised regulations take effect?

The revised Title II and Title III regulations both took effect on March 15, 2011. [2] Consequently, revised regulatory provisions addressing ticket sales for accessible seating and effective communication already are in effect.

What are the new requirements for ticket sales?


The revised regulations include several new requirements pertaining to ticket sales for “accessible seating,” which is defined to include wheelchair locations and corresponding companion seats. [3] Overall, tickets for accessible seating must be made available for sale during the same hours, through the same methods of distribution, and under the same terms and conditions as other tickets. [4] This includes making accessible seating available during the same stages of ticket sales, including
presales, lotteries, subscription or “season ticket” sales, and general sales. Individuals with disabilities must be able to purchase tickets for accessible seating through all the same methods that other tickets are available for purchase. For example, if other tickets can be purchased not only from the Box Office but also through other methods such as a website or a third-party ticket vendor, the purchase of tickets for accessible seating cannot be restricted to just the Box Office.

Additionally, if a facility provides materials for the general public, such as seating maps, brochures and pricing charts, these materials must also identify the location of accessible seating. Upon request, a facility must also inform individuals purchasing tickets for accessible seating of the locations of all unsold or available accessible seats, as well as describing the features of the seating in enough detail to reasonably permit an individual with a disability to make an independent assessment whether the seats meet his or her needs.

2. Pricing

Tickets for accessible seating must be made available at all price levels. Moreover, the DOJ has indicated that the dispersion of accessible seating among price categories should be proportional to that of other seating. For example, if a facility has three price categories, each encompassing one-third of the facility’s total seats, then roughly one-third of the accessible seats also should be represented in each of the three price categories. In existing facilities, physically locating accessible seating within each price category may not be readily achievable or even feasible. In that circumstance, a facility can instead offer a proportionate number of accessible seats at the same price level in a nearby or similar accessible location. For example, if the least expensive price category encompasses 25% of a facility’s total seats, then roughly 25% of the facility’s accessible seating must be priced at the least expensive category even though such seating is physically located in a more expensive price category. In no event can the price of accessible seating exceed that of other seating in the same section.

Accordingly, institutions will need to review -- and, if necessary, adjust -- the pricing schemes utilized in their athletic facilities to ensure that accessible seating is available at all price categories. For facilities that are multi-purpose or that host events with varying price schemes, this review should be performed on an event-by-event basis.

3. Multiple Companions and Group Sales

For purposes of design and construction, the 2010 Standards do not change the requirement that each wheelchair space must have at least one adjacent companion seat. The revised regulations make clear, however, that a facility cannot limit the number of companion seats an individual with a disability may purchase, unless other individuals are so limited (e.g., for conference play-offs, all purchasers are limited to four tickets). Individuals with disabilities must be able to purchase the same number of tickets as other patrons, but the revised regulations do not require that all of the companions be located in a wheelchair seating area. Rather, a facility must permit an individual with a disability who purchases a wheelchair space to purchase up to three additional contiguous companion seats (in-filling other wheelchair spaces if necessary), provided such seats are available. A facility is not required to displace prior purchasers. If such seats are not available, or if the individual wishes to purchase additional companion seats, the facility must offer seats for the additional companions that are located as close as possible to the accessible seats.

Group sales may pose unique challenges. Depending on the size of the group, seating the group together may not be possible. Alternatively, at the time of purchase, there may no longer be accessible seating available in the same price category or section where the group desires to purchase seats. If dividing a group becomes necessary, the group must be divided in such a way that individuals using wheelchairs are not isolated from their group. A facility should look for ways to accommodate the group so that individuals using wheelchairs are seated with at least some of their
4. Hold and Release of Accessible Seating

The ADA requires that individuals with disabilities be given priority to purchase accessible seating, but it also permits a facility to release accessible seating for sale to individuals without disabilities when such seats are not needed to accommodate individuals with disabilities. For the first time, the revised regulations set forth express criteria to govern such release. A facility may choose to release accessible seating under the following three circumstances: 1) when all non-accessible seats in the facility have sold out (exclusive of suites, luxury boxes, etc.); 2) when all non-accessible seats in a specific designated area (such as the floor sections or a mezzanine area) have sold out, at which point the facility can release accessible seating in that same designated area; or 3) when all non-accessible seating in a specific price category sells out, at which point the facility can release accessible seating in the same price category. Although the revised regulations do not define “sell-out,” the DOJ has indicated that it did not intend to interfere with the industry practice of defining a sell-out as exclusive of “scattered singles.” While a facility can choose among any of these methods, it must adhere to a single method for a particular event. A facility may choose to follow a different method for different events, and doing so may be particularly advantageous for multi-purpose venues (e.g., following the price category method for events with multiple price points and the designated area method for general admission events).

The sale of tickets on a subscription or “series-of-event” basis poses unique concerns with respect to the release of accessible seating. The sale of released accessible seating to individuals without disabilities on a subscription or series-of-event basis raises a potential risk that the accessible seats will remain unavailable to individuals with disabilities in perpetuity. The revised regulations do permit released accessible seating to be sold to individuals without disabilities on a subscription or series-of-event basis; however, a facility must establish a process that prevents automatic reassignment of the seats for future seasons or series.

The revised regulations do not mandate a specific method for doing so. One approach is to include in the terms of the ticket sale the fact that the seats being purchased constitute accessible seating and that the purchaser will have no right to renew the same seats for future seasons or series, should the seats be needed to accommodate individuals with disabilities. When ownership rights are attached to subscription or series-of-event tickets, the facility must reasonably modify its policies, practices, and procedures so that when such tickets for accessible seating are forfeited or returned, individuals with disabilities have an opportunity to purchase such tickets. In choosing whether, or how many, accessible seats to release for sale to individuals without disabilities on a season ticket or long-term basis, a facility must leave sufficient flexibility for game-day change-outs to accommodate persons with disabilities obtaining tickets through secondary market transfers. “Secondary market” refers to the transfer of tickets by the original purchaser, whether by resale, gift, or other exchange.

5. Ticket Transfers and the Secondary Market

A facility must permit individuals with disabilities to transfer their tickets for accessible seating to third parties under the same terms and conditions and to the same extent as other spectators holding the same type tickets. If other individuals are permitted to transfer their tickets (e.g., through resale or gift to friend or coworker), individuals with disabilities must be permitted to do the same, including transferring their tickets to individuals without disabilities. This requirement applies whether the tickets are for a single event or sold on a series-of-event or subscription basis. For example, to the extent a facility permits individuals to share in the purchase of a season ticket, an individual with a disability also must be permitted to purchase a season ticket in conjunction with individuals without disabilities.

A facility also must permit individuals with disabilities to use tickets obtained through the “secondary ticket market” (under the same terms and conditions as others acquiring tickets in the secondary
ticket market). As noted above, the secondary ticket market refers to the secondary transfer of tickets, whether by resale, gift, or other exchange. If the ticket is for an inaccessible seat, a facility must allow the individual to exchange the ticket for accessible seating in a comparable location if accessible seating is vacant at the time the individual presents the ticket for exchange. [19]

6. Prevention of Fraud

Potential abuse of accessible seating opportunities has always been a concern, and this is even more so given the new regulatory requirements regarding hold, release, and transfer of tickets for such seating. While a facility cannot require proof of disability for the purchase of accessible seating, the revised regulations do permit a facility to make a limited inquiry in order to deter misuse of accessible seating. [20] With respect to tickets for a single event, a facility may inquire only if the accessible seats are being purchased for an individual with a mobility disability or other disability requiring the use of the accessible features of the seating. [21] For subscription or series-of-event tickets, a facility can require that an individual purchasing accessible seats attest to this in writing. [22] The revised regulations also expressly authorize a facility to investigate potential misuse of accessible seating where there is good cause to believe that such seating has been purchased fraudulently. [23]

Do the revised regulations address captioning?

No. Although the DOJ originally had proposed to address requirements for captioning at sporting venues in its rulemaking, [24] it declined to do so in the final revised regulations, stating that the issue requires further consideration and review. The DOJ also noted, however, that “the 1991 Title II and Title III regulations and statutory requirements are not in any way affected by” this decision. [25]

Neither Title II nor Title III of the ADA itself, nor their implementing regulations, expressly mandate captioning. Under both Title II and Title III, covered entities are required to furnish appropriate auxiliary aids and services “where necessary to ensure effective communication” with individuals with disabilities. [26] The determination of which auxiliary aid is appropriate is fact specific, and it will depend on the nature of the communication and the needs of the particular individual. For example, a sign interpreter would not provide effective communication for individuals who are deaf or hard of hearing impaired but do not use sign language. In determining the appropriate auxiliary aid or service, entities covered by Title II must give primary consideration to the requested preference of the individual with a disability. [27] Entities covered by Title III are not required to do so, so long as the aid or service provided results in effective communication; but these entities should consult nonetheless with the individual with a disability to determine his or her particular communication needs. [28]

Even though the DOJ chose not to specifically address captioning in sports facilities, the issue has been the subject of recent litigation (against both professional and collegiate sports facilities). In Feldman v. Pro Football, Inc., [29] the first and to date only decision of its kind, the U.S. Court of Appeals for the Fourth Circuit held that Title III of the ADA requires a football stadium to provide auxiliary access to the aural content broadcast over the stadium’s public address system. This included game-related information, emergency information, and other public address announcements, including advertisements, music lyrics, or other entertainment content. While the Fourth Circuit held that “effective communication” requires access to such information, it declined to specifically mandate captioning, inasmuch as the auxiliary aid requirement is a flexible one and the type of auxiliary aid necessary for effective communication will vary with context. The Fourth Circuit also noted that a captioning requirement might pose an undue burden for some stadiums or fundamentally alter the goods or services being provided (defenses that were not raised in the case).

Given the high profile of this particular issue, entities should carefully assess available options for providing effective communication. Facilities that do provide captioning services employ a variety of methods, such as open captioning on the scoreboard, open captioning on separate boards or
screens, transmitting captions to smartphone devices, and transmitting captions to other handheld devices using a facility’s WiFi network. Each option has its advantages and disadvantages, but captioning displayed directly on (or immediately adjacent to) the scoreboard or center-hung scoreboard appears to be the preferred method among the deaf and hard of hearing community.

**Do the revised regulations otherwise address the obligation to provide effective communication?**

Yes. The revised regulations clarify certain aspects of the obligation to provide auxiliary aids and services necessary to ensure effective communication:

- This obligation extends both to an individual with a disability and to their companions with disabilities. [30] To the extent those individuals have different communication needs, different auxiliary aids or services may be required.

- Auxiliary aids and services must be provided in an accessible format, in a timely manner and in a way that protects the privacy and independence of the individual with a disability. [31]

- Specific definitions of a “qualified reader” and “qualified interpreter” are included in the revised regulations. Such individuals must be able to read/interpret effectively, accurately and impartially using any necessary specialized vocabulary. [32]

- An entity cannot require that an individual with a disability bring another individual to interpret for him or her, but it can rely on a companion accompanying the individual with a disability to act as an interpreter under certain limited circumstances. In emergency situations involving an imminent threat to the safety or welfare of an individual or the public, a companion (even if a minor child) can act as an interpreter if no other interpreter is available. Otherwise, a covered entity can rely on an adult companion to interpret only if the individual with a disability requests that the companion interpret, the companion agrees to do so, and reliance on the companion “is appropriate under the circumstances.” [33]

Additionally, the 2010 Standards require that an assistive listening system be provided in assembly areas where audible communication is integral to the use of the space and audio amplification is provided. [34] The 2010 Standards significantly reduce the minimum number of receivers that larger assembly areas must provide. Whereas the 1991 Standards require receivers equal to 4% of the total seats, the 2010 Standards employ a graduated approach: 4% for the first 500 seats, 3% of seats from 501 to 1000, 2% of seats from 1001 to 2000, and 1% of seats in excess of 2,000. [35] Additionally, at least 25%, but no fewer than two, receivers must be hearing-aid compatible. [36]

**CONCLUSION:**

The DOJ’s revised Title II and Title III regulations significantly impact the physical accessibility, design, and construction of campus athletic facilities, as well as the manner in which such facilities are operated. Institutions should proactively assess their existing athletic facilities, as discussed in Part I of this NACUANOTE series. Institutions also should review and update their existing ticket sale policies and practices to ensure compliance with the new requirements for ticket sales.
regarding accessible seating. Implementing and updating written policies and training those personnel involved in ticket sales are key steps in ensuring compliance and preventing inadvertent violations of the new requirements. Finally, if your institution conducts ticket sales through third party vendors, you should ensure that the third-party vendor complies with the ADA’s requirements. Including specific language regarding ADA compliance in contracts with such vendors is highly recommended.

FOOTNOTES


FN5. Id. §§ 35.138(b), 36.302(f)(2).

FN6. Id.

FN7. Id. §§ 35.138(c), 36.302(f)(3).


FN9. Id. §§ 35.138(d)(1), 36.302(f)(4)(i). If other patrons are limited to less than four tickets, a facility can similarly limit the number of companion seats an individual purchasing accessible seating can purchase. Id. §§ 35.138(d)(3), 36.302(f)(4)(iii). For example, if a facility limits purchases to 2 tickets, then an individual purchasing a wheelchair space also can be limited to two tickets – the wheelchair space plus a single companion seat.


FN12. Id. §§ 35.138(e), 36.302(f)(5).
FN13.  

FN14.  
U.S. Dep't of Justice, ADA 2010 Revised Requirements: Ticket Sales, at 4 (July 7, 2011).

FN15.  
Id. §§ 35.138(e)(3)(i), 36.302(f)(5)(iii).

FN16.  
Id. §§ 35.138(e)(3)(ii), 36.302(f)(5)(iv).

FN17.  

FN18.  
Id. §§ 35.138(f), 36.302(f)(6).

FN19.  
Id. §§ 35.138(g), 36.302(f)(7).

FN20.  
Id. §§ 35.138(h), 36.302(f)(8).

FN21.  
Id. §§ 35.138(h)(1), 36.302(f)(8)(i).

FN22.  
Id. §§ 35.138(h)(2), 36.302(f)(8)(ii).

FN23.  
Id. §§ 35.138(h)(3), 36.302(f)(8)(iii).

FN24.  
Specifically, in its Notice of Proposed Rulemaking issued June 17, 2008, the DOJ proposed that stadiums with seating capacity of 25,000 or more be required to provide captioning on scoreboards and video monitors for safety and emergency information. 73 Fed. Reg. 34,466, 34,555 (June 17, 2008) (proposed § 36.303(g)); id. at 34,508 (proposed § 35.160(e)). Although the proposed captioning requirement was limited in its reach, the DOJ expressly sought public comment on whether it should apply to venues regardless of size (or alternatively whether a different seating capacity would be more appropriate); whether captioning should be required for all public address announcements, as opposed to just safety and emergency information; and whether the regulation should specify the means through which the captioning must be provided, or whether any effective means would be sufficient (e.g., scoreboards, lineboards, handheld devices or other means). 73 Fed. Reg. at 34,498, 34,532.

FN25.  

FN26.  
Id. §§ 35.160(a), 36.303(c).

FN27.  
Id. § 35.160(b)(2).
FN28.  
Id. § 36.303(c)(1)(ii).

FN29.  

FN30.  
Id. §§ 35.160(a)(1), 36.303(c)(1).

FN31.  
Id. §§ 35.160(b)(2), 36.303(c)(1)(ii).

FN32.  
Id. §§ 35.104, 36.104.

FN33.  
Id. §§ 35.160(c)(1)-(3), 36.303(c)(2)-(4).

FN34.  
2010 Standards, § 219.2.

FN35.  

FN36.  
2010 Standards, § 219.3.

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**RESOURCES:**

- [NACUA Resource Page on ADA Facilities Access](#)
- [U.S. Department of Justice’s Americans with Disabilities Act Web site](#) (text of regulations, technical assistance materials, useful checklists and settlements)
- [U.S. Department of Justice, ADA 2010 Revised Requirements: Effective Date and Compliance Date](#) (Feb. 16, 2011)
- [U.S. Department of Justice, ADA 2010 Revised Requirements: U.S. Dep’t of Justice, ADA 2010 Revised Requirements: Ticket Sales](#) (July 7, 2011)
- [ADA National Network links](#). The ADA National Network consists of ten federally funded Regional ADA National Network Centers (formerly known as Disability and Business Technical Assistance Centers) located throughout the United
States that provide information, guidance and training on the ADA.

- AccessibilityOnline: [www.accessibilityonline.org](http://www.accessibilityonline.org). A collaborative training program between the ADA National Network and the U.S. Access Board, which is hosted by the Great Lakes ADA Center. The program includes a series of free webinars and audio conferences on different topics of accessibility. Sessions are held on a monthly basis and cover a variety of topics concerning accessibility to the built environment, information and communication technologies, and transportation. The website includes an archive of prior webinars and audio conferences.

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