



U.S. Department of Justice

Civil Rights Division

*Disability Rights Section - NYA
950 Pennsylvania Ave, NW
Washington, DC 20530*

VIA FIRST CLASS MAIL, FACSIMILE, AND E-MAIL

February 21, 2012

Mr. Kevin L. Maher
Senior Vice President for Governmental Affairs
American Hotel and Lodging Association
1201 New York Avenue, NW
Suite 600
Washington, DC 20005

Dear Mr. Maher:

It was a pleasure to meet with you and representatives of the American Hotel & Lodging Association (AH&LA) recently to hear AH&LA thoughts and concerns with respect to the application of the ADA requirements for accessible entry and exit for swimming pools and spas, given the approach of the March 15, 2012 compliance date for the 2010 ADA Standards. We appreciate your statement that AH&LA members are committed to compliance with the Americans with Disabilities Act and to ensuring that their facilities are accessible to individuals with disabilities.

As we understood from your remarks at the outset of the February 8, 2012 meeting, AH&LA members continue to have questions regarding their obligations to remove architectural barriers in existing facilities, particularly as those obligations pertain to swimming pools and spas. In particular, you requested guidance for AH&LA members about the effect of the March 15, 2012 effective date for the 2010 ADA Standards for Accessible Design (2010 Standards) with respect to readily achievable barrier removal obligations in swimming pools and spas; whether installation of a portable lift at poolside would ever satisfy an entity's readily achievable barrier removal obligations; and whether safety considerations can be taken into account in determining whether barrier removal in existing pools and spas is readily achievable. We hope that our discussion last week was helpful to AH&LA, and, toward that end, we write to memorialize that discussion with respect to the major issues raised in the meeting.

As you know, the Department of Justice published its revised final regulations implementing the ADA for title II (State and local government services) and title III (public accommodations and commercial facilities) on September 15, 2010. See 75 FR 56163. The revised ADA rules are the result of a six-year process to update the Department's regulations. As part of this process, the Department sought extensive public comment, issuing an Advance

Notice of Proposed Rulemaking (ANPRM) on September 30, 2004, 69 FR 58768 and two Notices of Proposed Rulemaking (NPRM) on June 17, 2008, 73 FR 34466 (title II) and 73 FR 34508, (title III). The Department also held a public hearing on the NPRMs and during the comment period received over 4,435 written public comments.

The revised regulations update the general nondiscrimination provisions implementing the ADA; with some exceptions, revisions to these general nondiscrimination provisions have been in effect since March 2011. The revised regulations also adopt revised design requirements for new construction and alterations, known as the 2010 ADA Standards for Accessible Design. The 2010 Standards update requirements for accessible fixed or built-in elements that were originally covered in the 1991 ADA Accessibility Guidelines (1991 Standards) and also establish new (“supplemental”) requirements for a variety of recreational facilities, including requirements for accessible means of entry and exit for swimming pools and spas. New construction and alterations started on or after March 15, 2012 are generally required to comply with the 2010 Standards. In addition, effective March 15, 2012 the 2010 Standards must be used while meeting ongoing barrier removal obligations, which are discussed in more detail below.

Public accommodations must undertake readily achievable barrier removal.

Title III of the ADA requires that public accommodations (e.g., owners, operators, lessors and lessees of hotels, resorts, swim clubs, and sites of events open to the public) remove physical barriers in each existing building or facility to the extent that it is readily achievable to do so (i.e., easily accomplishable and able to be carried out without much difficulty or expense). Known as readily achievable barrier removal, this requirement has been in effect since January 26, 1992, and public accommodations since that date have been required to engage in barrier removal in existing buildings and facilities on an ongoing basis. The regulation implementing the ADA barrier removal obligation recognizes that it is not always readily achievable to remove all architectural barriers in an existing building at the outset, and, as discussed further below, sets forth priorities for removal of barriers over time.

As discussed above, the 2010 Standards add supplemental requirements to the ongoing barrier removal obligation, including requirements for accessible means of entry and exit for pools, spas, and wading pools. These requirements are found at sections 242 and 1009 of the 2010 Standards. If a hotel or motel has more than one pool, it must remove barriers, to the extent that it is readily achievable, at each pool. If it is not readily achievable to immediately provide an accessible means of entry and exit at every pool, then the covered entity must remove barriers to the extent that it is readily achievable to do so. It is important to note that the barrier removal obligation is a continuing one, and it is expected that a business will take steps to improve accessibility over time.

To determine whether it is readily achievable to provide an accessible means of entry to an existing pool, public accommodations should consider the following factors:

- The nature and cost of the action;

- Overall resources of the site or sites involved, the number of persons employed at the site, the effect on expenses and resources, legitimate safety requirements that are necessary for safe operation, including crime prevention measures, or the impact otherwise of the action upon the operation of the site;
- The geographic separateness and relationship of the site(s) to any parent corporation or entity;
- The overall resources of any parent corporation or entity, if applicable; and
- The type of operation or operations of any parent corporation or entity, if applicable.

The 2010 Standards apply to “fixed” or built-in elements. A “fixed” element is one that is attached to a covered building or facility. Therefore, for an existing pool with less than 300 linear feet of pool wall, for example, removing barriers will involve providing one accessible means of entry, meaning a built-in or “fixed” pool lift or a sloped entry that complies with the 2010 Standards to the extent that it is readily achievable to do so (larger pools with 300 or more linear feet of pool wall are required to have two accessible means of entry, with at least one being a pool lift or sloped entry). If, in our example, an entity chooses to use a lift complying with the 2010 Standards that is removable or otherwise designated as “portable,” it may do so, so long as while the lift is provided at the pool, it is affixed in some manner to the pool deck or apron.

If installation of a fixed lift or sloped entry is not readily achievable, then a public accommodation may consider alternatives such as use of a portable pool lift that is *not* affixed to the pool facility but incorporates features that in all other respects comply with the 2010 Standards, or the public accommodation may consider other readily achievable accessible means of entry, such as a transfer wall or pool stairs. However, the 2010 Standards’ emphasis on the provision of a lift or a sloped entry recognizes the fact that many people with mobility disabilities rely more heavily on these means to independently enter and exit a pool.

When selecting equipment, the public accommodation should factor in the staff and financial resources needed to keep the pool equipment available and in working condition at poolside. Once provided, a pool lift or other accessible means of entry must remain in place and be operational during all times that the pool is open to guests. Accessible features are only required to be available for use when the facility is available to the public. Thus, pool lifts or other accessible means of entry may be stored away from the pool while the pool is closed. For example, if a pool is closed during the winter months, the public accommodation is free to remove the lift from the pool deck and store it.

Determining what is readily achievable requires a fact-specific analysis.

During our meeting, you asked us to provide definitive answers to several broad questions pertaining to readily achievable barrier removal. As we explained, while we

understand your desire for definitive answers, such questions cannot be answered in the abstract. The ADA clearly requires places of public accommodation to remove existing barriers that are structural in nature to the extent that it is readily achievable to do so. However, the Department's regulation does not establish a "quantifiable connection" or other mathematical formula to determine if barrier removal is "readily achievable."

When the original title III regulation was being drafted, the Department considered – but ultimately rejected – the idea of trying to establish a mathematical formula because it is virtually impossible to devise a specific ceiling on compliance costs that would adequately take into account the vast diversity of enterprises covered by the ADA's public accommodations requirement, and the economic situation that any particular entity would find itself in at any moment. Therefore, the regulation requires that the determination as to whether the removal of a specific barrier is readily achievable must be made on a case-by-case basis after a thorough consideration of the factors established in the statute. The decision should be made by each public accommodation in consultation with its own legal advisors and others.

If the place of public accommodation is a facility that is owned or operated by a parent entity that conducts operations at many different sites, the public accommodation must consider the resources of both the local facility and the parent entity to determine if required barrier removal is "readily achievable." The administrative and fiscal relationship between the local facility and the parent entity must also be considered in evaluating what resources are available for any particular act of barrier removal.

In striking a balance between guaranteeing access to individuals with disabilities and recognizing the legitimate concerns of businesses and other private entities, the ADA has always allowed for "legitimate safety requirements" to be taken into account in determining whether an action is readily achievable. *See* 28 C.F.R. § 36.104 (definition of "readily achievable"). As explained in the preamble to the 1991 regulation, a public accommodation may consider legitimate safety requirements in its assessment of whether barrier removal is readily achievable, "so long as the requirements are based on actual risks and are necessary for safe operation of the public accommodation." *See id.* pt. 36, App. C, p. 885 (2011). Speculation or unsubstantiated generalizations about safety concerns or risks cannot form the basis of a legitimate safety requirement.

With respect to safety concerns expressed during the meeting about pool lifts in unattended pools, we note that the Access Board addressed this very issue in September 2002 in conjunction with its promulgation of its final rule adopting its ADA/ABA Accessibility Guidelines for Recreation Facilities. *See* 67 FR 56352 (September 3, 2002). These guidelines were incorporated into the Access Board's 2004 ADA/ABA Accessibility Guidelines which were subsequently adopted by the Department as part of the 2010 Standards:

Comment. A few commenters expressed safety concerns where pool lifts are provided in pools that are unattended.

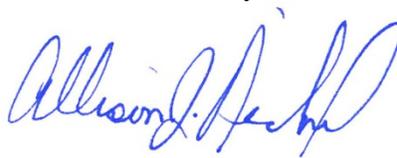
Response. Pool lifts have been commercially available for over 20 years. While the Board recognizes that inappropriate use of pool lifts may result in accident or injury, the Board is not aware of any incidents of injury or accidents involving pool lifts. The Board is also not aware of any evidence that shows that pool lifts are any less safe than other components of a pool facility, such as other means of pool entry, when they are used inappropriately. Manufacturers are also incorporating features which are intended to discourage inappropriate use, such as fold-up seats and covers.

See 67 FR at 56379. The Board's discussion is wholly consistent with the Department's regulatory approach which permits consideration of legitimate safety requirements to inform the readily achievable analysis but insists that such requirements be based on *actual* risks and be *necessary* for safe operation of the public accommodation.

In closing, we believe that it is important to reemphasize that determining whether removal of a particular barrier is readily achievable requires a case-by-case assessment that may vary from business to business and sometimes from one year to the next for the same business. If a public accommodation determines that its facilities have barriers that should be removed pursuant to the ADA, but it is not readily achievable to undertake all of the modifications immediately, the Department recommends, as it has for many years, that the public accommodation develop an implementation plan designed to achieve compliance with the ADA's barrier removal requirements over time. Indeed, the March 15, 2012 effective date for the 2010 Standards reflects an 18-month delay in implementation of the revised requirements, which delay was provided, in part, to allow businesses sufficient time to consider the new requirements while developing plans to meet their on-going barrier removal obligations. Such a plan, if appropriately designed and diligently executed, may well serve as evidence of a good faith effort to comply with the ADA's barrier removal requirements.

We hope that this information is helpful. Please do not hesitate to contact the Department if we may be of assistance with this or any other matter.

Sincerely,



Allison Nichol
Chief
Disability Rights Section

cc: Minh N. Vu, Esq., Seyfarth Shaw LLP