

# **The Americans With Disabilities Act: Historical Background and Implications for Physical Education and Recreation**

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## **■ PURPOSE AND INTRODUCTION**

The Americans with Disabilities Act of 1990 (ADA) was signed into law July 26, 1990 (P.L. 101-336). The employment subchapter provisions became effective on July 26, 1992 for employers of 25 or more persons. On July 26, 1994, employers of 15 or more persons will be affected. According to the ADA, a disability is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual" (Sec. 12102). The ADA prohibits discrimination against individuals with disabilities in four areas: employment, public services and transportation, public accommodations, and telecommunications.

The purpose of this article is to acquaint the reader with the background and purpose of the Act. Two provisions are especially important to individuals working in the fields of physical education and recreation. These provisions are SUBCHAPTER I--EMPLOYMENT, and SUBCHAPTER III--PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES. The authors' comments will focus on these two topics. This article does not analyze those portions of the ADA which deal with public transportation and telecommunications service. These sections are not directly applicable to physical education and recreation specialists.

## **■ HISTORICAL BACKGROUND: ATTITUDES AND LEGISLATION**

In early civilizations, handicapped individuals may have been left to the ravages of the elements. "In early Greek and Roman days individuals with disabilities were excluded from society, neglected, and often left to die" (Seaman & DePauw, 1989, p. 2). Such practices represented a survival of the fittest. According to Seaman and DePauw, "The onset of Christianity eventually changed that practice" (p.2). Despite the salutary influence of Christianity, the middle ages viewed an individual with disabilities with superstition and fear. Physical and mental disabilities were believed to be caused by Satan (Fait, 1972). The Renaissance accorded greater dignity to individuals with handicapping conditions. Attitudes of the public were improving.

Physical activity for disabilities has been practiced for centuries. Ancient historical drawings in China dating back to 3,000 B.C. revealed the therapeutic use of gymnastics. In the 1800s in Europe gymnastic activities were prescribed for medical purposes. Movement was used to improve body function (Cratty, 1989). Actual education of disabled individuals began in the late seventh and eighteenth centuries (Seaman & DePauw, 1989). The first department of corrective physical education in the United States was established at Harvard in 1879 (Fait, 1972). Thus, despite its ancient origin, physical education for the handicapped is a recently developed concept within the educational community in the United States.

Legislative enactments have encouraged programs for the handicapped. In the United States, following World War I and World War II, legislation focused on both the military and civilian disabled (Auxter & Pyfer, 1985). Legislative acts to this end included the Smith-Sears Act of 1918, the National Civilian Vocational Rehabilitation Act of 1920, and the Social Security Act of 1935. The Vocational Rehabilitation Act of 1943 provided for both physical and vocational rehabilitation (Auxter & Pyfer, 1985). This, however, was only a part of the overall trend which was to culminate in the Americans With Disabilities Act of 1990.

Two cases should be noted briefly. In *Brown v. Board of Education of Topeka* (1954), the notion of separate but equal schools for the races was challenged and found unequal. True equality postulated an integrated school system. Then, in *Mills v. Board of Education* (1972), the Court held that emotionally disturbed children should be placed in as normal a setting as possible. As a result of these and other cases, progress was made toward education of disabled individuals.

In 1973, Congress passed the Rehabilitation Act of 1973 (P.L. 93-112). Section 504 of the Act stated that, "No qualified individual shall be excluded from participation or denied the benefits under any program receiving financial assistance." Administrative Regulations adopted pursuant to the Act covered both nonacademic and extracurricular activities (42 Fed. Reg. 22676-22702, 1977). The law stated that reasonable accommodations for intramural as well as interscholastic participation should be made. In accordance with the new law, public schools began to make accommodations for handicapped students. Section 504 of the Act was the focal point for litigation by individuals who believed that they were not accorded the benefits provided by the law.

The Rehabilitation Act was followed by the Education for All Handicapped Children Act (P.L. 94-142). When Congress was formulating P.L. 94-142, they used an established Massachusetts law for guidance. Additionally, the Congress was influenced by the lobbying efforts of the American Alliance for Health, Physical Education, Recreation and Dance (AAHPERD). AAHPERD directed its lobbying efforts toward obtaining a statute which would include physical education as a means of helping handicapped children.

In 1975, the Education for All Handicapped Children Act (P.L. 94-142) was passed. In that law, physical education was specifically noted as a content area. The avowed purpose of the Act was to give educational opportunities in the least restrictive environment to all handicapped children. According to the law, achievable objectives must be specified in an individualized education program. Parents must be informed and understand the programs designed for their children. During

the 1980s, at least 30% of the litigation in the public schools involved handicapped students—an increase of 600% (Zirkel, 1990).

In 1990, the Education for the Handicapped Act was amended and renamed the Individuals With Disabilities Education Act (IDEA)(P.L. 101-476). The new law provided federal funds for all states. In turn, the states were asked to provide a free, appropriate public education for disabled children, ages 3 through 21.

As early as 1966, the Bureau of Education for the Handicapped, located in the U.S. Office of Education, began to fund grants to train special physical educators. At the same time, this bureau allocated money for special demonstration and research projects. Thus, physical education and special education began to merge at the national level at this time. Nevertheless, the task of education was still addressed in a somewhat ineffectual and fragmented manner.

Problems for the handicapped were not confined to the schools. Existing laws failed to provide adequate enforcement provisions. The preliminary work, as evidenced by legislation cited above, awaited fruition through the enactment of the Americans With Disabilities Act in 1990 and the Civil Rights Act of 1991 (P.L. 102-166). The ADA afforded added protection for the disabled. The Civil Rights Act of 1991 extended the remedies of the ADA.

## ■ CONDITIONS NOTED IN THE ADA

Prior to the ADA, according to the statute, there were serious social problems in dealing with individuals with disabilities. Historically, these individuals were isolated, segregated, and discriminated against.

Discrimination against individuals with disabilities persisted in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services (Sec. 12101, a, 3). Prior to the ADA, there was often no effective legal recourse to redress discrimination against Americans with disabilities (Sec. 12101, a, 4).

Discrimination grew out of overprotective rules, failure to make modification to facilities, exclusionary standards, segregation, and relegation to lesser programs and other opportunities (Sec. 12101, a, 5). Further, there was strong evidence that Americans with disabilities occupied an inferior status and were seriously disadvantaged (Sec. 12101, a, 6).

Individuals with disabilities were relegated to positions which did not measure their true abilities (Sec. 12101, a, 7). Equality of opportunity was needed in order to bring about economic self-sufficiency (Sec. 12101, a, 8). A tremendous expense resulted from lack of employment and the denial of opportunities to handicapped individuals (Sec. 12101, a, 9).

The Americans With Disabilities Act of 1990 may benefit as many as 43,000,000 Americans (Sec. 12101, a, 1). As previously noted, some provisions of the law are now in effect.

## ■ CIVIL RIGHTS ACT OF 1991

The ADA has been strengthened by the Civil Rights Act of 1991. The Civil Rights Act extends the remedies of the ADA to include compensatory and punitive

damages for intentional discrimination. It also authorizes jury trials for intentional discrimination. Provisions for jury trial, punitive damages, compensatory damages, together with liability for expert witness fees and attorney fees, are important. These provisions enable the Act to be enforced more effectively. American citizens working for American companies in other countries are also included in the ADA.

## ■ PURPOSE OF ADA

The purpose of the Act is: (1) to provide a national mandate for elimination of discrimination against individuals with disabilities; (2) to provide enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the federal government plays a central role in enforcing these standards; and (4) to address discrimination against individuals with disabilities free from the defense of sovereign immunity (Sec. 12101, b, 1-4).

Two subchapters of the ADA will be discussed here: Subchapter I—The Employment Regulations, and Subchapter III—Public Accommodations and Services Operated by Private Entities. As previously stated, this article does not discuss public transportation and telecommunications.

## ■ SUBCHAPTER 1 - EMPLOYMENT PROVISIONS

The ADA contains many provisions which are helpful to the employer. These provisions include the following:

Employers can ask about a person's ability to perform a job (Sec. 12112, d, 2, B). They cannot require a test that tends to screen out a person with disabilities (Sec. 12112, d, 6).

Employment is not required when it will pose a direct threat to the health or safety of others (Sec. 12113, b). For example, food handlers who have communicable diseases are not safe (Sec. 12113, d, 2).

When an accommodation is necessary because of a disability, the accommodation must be reasonable. It may be permissible to restructure the job, modify work schedules, change policies, reassign to a vacant position, or to provide assistive equipment or readers (Sec. 12111, 9, A, B).

An accommodation must be tested against the defense of undue hardship (Sec. 12111, 10, A, B). The size and nature of the business are considerations (Sec. 12111, 10, A, B). Tax breaks are given for businesses which make physical accommodations.

Good faith efforts to adhere to the provisions of the Americans With Disabilities Act will mitigate and, in some cases, excuse noncompliance. Records of such efforts should be kept.

## Medical Examinations

Questions about medical problems should not be asked in an interview (Sec. 12112, c, 2, A). Medical examinations may be required following an offer of employment if they are required of all employees (Sec. 12112, c, 3).

It is permissible to test for illegal drugs and alcohol use (Sec. 12114, c, 1-4). This is not interdicted by limitations as to medical examinations (Sec. 12114, d, 1, 2). Preemployment drug screenings may be allowed if they are required of all

employees. Drug addiction is not a disability (Sec. 12114, a). The use of alcoholic beverages and illegal drugs may be prohibited on the job (Sec. 12114, c, 1-4).

Persons who have received treatment for alcohol and drug abuse are protected under the law (Sec. 12114, b, 1, 2, 3). Homosexuality is not considered a disability (29 CFR §1630.3, d and e).

### **Nonrequirements (Conspicuous Omissions)**

There are some things that the ADA does not do. It does not provide for quotas or provide for affirmative action. It does not provide for preferential treatment in employment matters. The ADA does not have retroactive application. Furthermore, it does not authorize punitive damages against a state or provide for compensatory damages absent intentional discrimination. (See Civil Rights Act of 1991).

### **Cautions for Employers**

The Americans With Disabilities Act does require the ability to perform the essential functions of the job. Hence, the job analysis and description are extremely important.

The employer is advised to stress caution in several areas such as: (1) job descriptions which have not been carefully crafted as to essential functions; (2) interviews that are not carefully constructed; (3) statements or actions which reflect a direct bias or prejudice against individuals with disabilities; (4) requirements for medical examinations prior to hire; and (5) requirements for medical examinations after hire which are not required of everyone.

## **■ SUBCHAPTER III - PUBLIC ACCOMMODATIONS REGULATIONS**

A public accommodation means a facility operated by a private entity whose operations affect commerce and fall within 12 separate categories. Among these categories are schools, places of recreation, gymnasiums, and health spas, auditoriums, hotels, restaurants, offices of health-care providers or other service establishments, day care centers, and public transportation terminals.

Secular private schools are impacted by the law. Church-affiliated schools are exempt from compliance. Public schools were previously covered under Section 504 of P.L. 93-112, the Rehabilitation Act of 1973, as amended. Many schools will be in compliance if they are in previous compliance with Section 504.

The ADA provides that individuals shall not be discriminated against "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation..." (Sec. 12182). An individual may not be denied participation, or forced to participate in or benefit from goods, services, facilities, advantages or accommodations that are not equally afforded to other individuals. Separate benefits may be provided if that action is necessary to provide the person or class with opportunities that are as effective as those provided to other non-handicapped individuals (Sec. 12182). The handicapped individual must be allowed to participate in programs or activities that are not separate or apart.

## **Safety and Insurance**

Legitimate safety requirements that are necessary for safe operation may be imposed. These requirements must be based on actual risks, not on speculation. Refusal of service may not occur because insurance company coverage does not cover persons with disabilities.

## **Removal of Barriers**

Under the law, public accommodations shall remove architectural barriers in facilities when this removal is easily accomplished. This includes installing ramps, widening doors, repositioning telephones, providing access to restroom facilities, etc. (See Uniform Federal Accessibility Standards 1984 for further information). A priority list for barrier removal is included in the ADA. Alternatives to barrier removal are listed for public accommodations in which barrier removal is not readily achievable. These include relocation of activities and providing home delivery.

## **Examinations and Courses**

Any private entity that offers examinations or courses relating to credentialing or licensing, etc., shall make examinations and courses accessible. This includes designing and administering examinations in a manner which would measure the skill and knowledge of the person effectively. This may mean offering the test in braille or providing courses through videotapes, cassettes, or notes.

## **Personal Devices and Services**

Auxiliary aids and services must be provided to individuals with vision or hearing handicaps unless it causes an undue burden on the entity. Public accommodations are not required to provide personal devices such as wheelchairs or hearing aids. Furthermore, personal services such as eating, toileting, or dressing are not required.

## **Transportation**

Even though transportation is not the main function of the public accommodation, some transportation services are covered by the ADA. These include student transportation systems, shuttle busses and transportation within recreational facilities such as stadiums and zoos. Barriers shall be removed where such removal is readily achievable. Specific requirements for transportation are included in section 306 of the ADA (Sec. 12186).

## **New Construction and Alterations**

Public structures occupied since January 26, 1993 must be designed and constructed in compliance with the ADA. Alterations to structures after January 26, 1993 must comply to the "maximum extent feasible." Elevators in facilities less than three stories are not required in most cases. However, if physics is offered on the second floor of a school, there should be some way to make that course accessible to a disabled student. Alterations to paths of travel should include the path of travel to the altered area and the restrooms, telephones, and drinking fountains, unless the cost of such alterations is disproportionate to the overall cost of alteration construction.

## Considerations

There are particular considerations for recreational and fitness facilities, goods, and services. The law provides for separate but equal classes to accommodate the needs of handicapped individuals. The individual must be able to participate in regular classes.

The law takes into consideration the size of buildings, the nature of the facility, and the undue hardship alterations would make. Accessibility paths are a concern.

Safety may be a legitimate concern. Such a concern should be documented with statistics concerning risks, not opinions. Safety to others can be a consideration.

New construction must be designed and implemented for disabled individuals. As noted earlier, this portion of the law took effect January 26, 1993. All government facilities, services, and communications must be accessible and meet the requirements of Section 504 of the Rehabilitation Act of 1973.

## ■ CONCLUSION

The relationship of the ADA to other historical acts was noted in the introduction. It is important to recall that the ADA broadens protection beyond that accorded to the Vocational Rehabilitation Act of 1973. The ADA is amended by the Civil Rights Act of 1991. This amendment greatly enhances the Act's effectiveness. Provisions for jury trial, punitive damages, compensatory damages, together with liability for expert witness fees and attorneys fees, are important. In general, the lower federal courts have held the Civil Rights Act of 1991 is not retroactive.

Disabled persons who feel their rights have been violated can file a complaint with an appropriate federal agency. Following an investigation of the complaint, the agency can file a lawsuit against the offending employer or business.

Employers in the fields of health, physical education, recreation, and sport may have distinctly different jobs and employment needs. A little forethought and knowledge of the Americans With Disabilities Act should help employers who want to aid the handicapped and their business.

Public Accommodations operated by private entities are covered under the law. Disabled individuals should not be discriminated against on the basis of goods, services, facilities, and advantages of accommodations. Accommodations are tested against the defense of undue hardship.

Democracy postulates the inherent dignity of the individual. Democracy postulates equality before the law. Democracy postulates that ours is a government of laws rather than a government of people. The Americans with Disabilities Act conforms to these basic postulates.

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