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MEMORANDUM

DATE: February 27, 2012

TO: Ms. Susan Moerschel, DNREC
Division of Parks and Recreation

FROM: Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

RE: Use of Electronic Personal Assistance Mobility Devices

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Natural Resources and Environmental Control's (DNRECs) proposed draft policy regarding other power-driven mobility devices (OPDMDs). SCPD certainly appreciates the opportunity to provide commentary and has the following observations.

Federal Background

As background, the United States Department of Justice completed the laborious and lengthy process of revising the ADAAG and its ADA compliance regulations for public entities. A new regulation, 28 CFR Section 35.137 governs the extent to which covered entities (including state programs such as parks) must accommodate "mobility devices." The implementation date for this regulation is March 12, 2012.

The federal regulation basically carves up "Mobility Devices" into two types: wheelchairs and OPDMDs. Wheelchairs are defined in the regulations as manual or power devices designed for a person with a mobility impairment with primary use indoors or both indoors and outdoors. Entities must allow wheelchairs (including scooters) to be used anywhere that a pedestrian is allowed to travel.

The federal rules are more complex for OPDMDs. OPDMDs are other powered devices used by people with mobility impairments (whether or not designed as such) used for locomotion, designed to operate without defined pedestrian routes, and that are not wheelchairs (see 28 CFR Section 35.104). Entities are required to make reasonable accommodations in practices and

policies to allow the use of OPDMDs under 28 CFR 35.137 unless they can demonstrate at a class of OPDMDs cannot be operated in accordance with legitimate safety requirements.

Consequently, entities may impose legitimate safety requirements pursuant to a procedure highlighted in 28 CFR 35.130(h). Entities are required to establish policies regarding the permitted use of OPDMDs within the parameters of several articulated factors. Generally, these are weight, speed and dimensions; volume of pedestrian traffic at the site; the facility's design and operational characteristics; whether legitimate safety requirements can be established to permit the safe operation of the device; and whether use of the device creates a substantial risk of serious harm to the immediate environment, natural or cultural resources, or violates Federal law. The preamble to the federal regulation makes clear that any restrictions must be based on actual risks and not mere speculation about the device or how it will be operated. The burden of proof is on the entity to establish that an OPDMD cannot be safely used in a particular facility.

Finally, the federal regulation covers the manner in which an entity can require verification that a user of a OPDMD actually needs to use the device. The rule requires the entity to accept a state-issued disabled parking placard or identification card, as proof, although it cannot demand or require the presentation of such documentation. The entity is required to accept "creditable assurance" from the person that the mobility device is required. This can be by verbal assurances not contradicted by observable fact.

Analysis of Proposed DNREC Policy

Generally, the proposed draft policy appears to lack cohesion and may be contradictory in several places. In particular, the policy refers at various times to OPDMDs but then at certain points seems to apply only to electronic personal assistance mobility devices (EPAMDs). It would be helpful to further clarify the scope of the policy in the beginning, and also re-order the sections. Regarding the proposed policy, SCPD has the following specific observations and recommendations.

1. In Section 3, Paragraph C, the definition of an OPDMD is found in 28 CFR Section 35.104, not 35.150.

2. In Section 3, Paragraph D, the word "are" should be substituted for "is" after "State Parks" in both the first and second sentences.

3. Section 6 only addresses Electronic Personal Assistance Mobility Devices such as Segways. Section 6, Part E seems to imply that no motorized gas-powered vehicles will be allowed in any location, or at least ones that have non-highway tires, handle bars, or that are straddled. Does this mean that other non-electric powered OPDMDs are allowed? This needs to be fleshed out in much greater detail. What is the logic behind this rule? Why are these particular devices banned? Or are they? Section 7, paragraph C seems to allow all OPDMDs in all areas open to pedestrians subject to listed restrictions. Why is there a specific policy for EPAMDs and not one for other types of devices?

4. Section 6 delineates a number of dimensional requirements for permissible EPAMDs. What is the source of these dimensions?

5. SCPD is not clear on the scope of Section 7. First, these restrictions appear to apply to wheelchairs and EPAMDs, but the two types of mobility devices are not interchangeable and are treated differently under the federal regulations. People using wheelchairs "shall be permitted" in any area open to pedestrian use. It would be advisable to issue separate safety rules for the operation of wheelchairs to the extent such rules are permissible.

6. Section 7, Paragraph C appears to apply to all OPDMDs. The following sections D-H should probably be subsections of C, as these sections limit "C."

7. In Section 7, Paragraph G, the language does not mirror the federal regulation. The operation of the device must create a "substantial risk of serious harm to the immediate environment or natural or cultural resources." It is not a reasonableness standard. See 28 CFR 137(b)(2)(v).

8. Two of the three pictures used to represent "EPDMDs" are wheelchairs and not EPAMDs. To reiterate, there are no permissible restrictions on the use of wheelchairs. There may be permissible restrictions to EPAMDs. This is an extremely important concept.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the proposed draft polity.

cc: Mr. Charles Salkin
Mr. David Bartoo
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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control of the miniature horse; whether the miniature horse is housebroken; and whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation. In addition, paragraphs (c)–(h) of this section, which are applicable to dogs, also apply to miniature horses.

Ponies and full-size horses are not covered by § 35.136(i). Also, because miniature horses can vary in size and can be larger and less flexible than dogs, covered entities may exclude this type of service animal if the presence of the miniature horse, because of its larger size and lower level of flexibility, results in a fundamental alteration to the nature of the programs activities, or services provided.

Section 35.137 Mobility devices.

Section 35.137 of the NPRM clarified the scope and circumstances under which covered entities are legally obligated to accommodate various "mobility devices." Section 35.137 set forth specific requirements for the accommodation of "mobility devices," including wheelchairs, manually-powered mobility aids, and other power-driven mobility devices.

In both the NPRM and the final rule, § 35.137(a) states the general rule that in any areas open to pedestrians, public entities shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, including walkers, crutches, canes, braces, or similar devices. Because mobility scooters satisfy the definition of "wheelchair" (*i.e.*, "manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor, or of both indoor and outdoor locomotion"), the reference to them in § 35.137(a) of the final rule has been omitted to avoid redundancy.

Some commenters expressed concern that permitting the use of other power-driven mobility devices by individuals with mobility disabilities would make such devices akin to wheelchairs and would require them to make physical changes to their facilities to accommodate their use. This concern is misplaced. If a facility complies with the applicable design requirements in the 1991 Standards or the 2010 Standards, the public entity will not be required to exceed those standards to accommodate the use of wheelchairs or other power-driven mobility devices that exceed those requirements.

Legal standard for other power-driven mobility devices. The NPRM version of § 35.137(b) provided that "[a] public entity shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public entity can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration in the public entity's service, program, or activity." 73 FR 34466, 34505 (June 17, 2008). In other words, public entities are by default required to permit the use of other power-driven mobility devices; the burden is on them to prove the existence of a valid exception.

Most commenters supported the notion of assessing whether the use of a particular device is reasonable in the context of a particular venue. Commenters, however, disagreed about the meaning of the word "reasonable" as it is used in § 35.137(b) of the NPRM. Advocacy and nonprofit groups almost universally objected to the use of a general reasonableness standard with regard to the assessment of whether a particular device should be allowed at a particular venue. They argued that the assessment should be based on whether reasonable modifications could be made to allow a particular device at a particular venue, and that the only factors that should be part of the calculus that results in the exclusion of a particular device are undue burden, direct threat, and fundamental alteration.

A few commenters opposed the proposed provision requiring public entities to assess whether reasonable modifications can be made to allow other power-driven mobility devices, preferring instead that the Department issue guidance materials so that public entities would not have to incur the cost of such analyses. Another commenter noted a "fox guarding the hen house"-type of concern with regard to public entities developing and enforcing their own modification policy.

In response to comments received, the Department has revised § 35.137(b) to provide greater clarity regarding the development of legitimate safety requirements regarding other power-driven mobility devices and has added a new § 35.130(h) (Safety) to the title II regulation which specifically permits public entities to impose legitimate safety requirements necessary for the safe operation of their services, programs, and activities. (*See* discussion below.) The Department has not retained the proposed NPRM language stating that an other power-driven mobility device can be excluded if a public entity can demonstrate that its use is unreasonable or will result in a fundamental alteration of the entity's service, program, or activity, because the Department believes that this exception is covered by the general reasonable modification requirement contained in § 35.130(b)(7).

Assessment factors. Section 35.137(c) of the NPRM required public entities to "establish policies to permit the use of other power-driven mobility devices" and articulated four factors upon which public entities must base decisions as to whether a modification is reasonable to allow the use of a class of other power-driven mobility devices by individuals with disabilities in specific venues (*e.g.*, parks, courthouses, office buildings, etc.). 73 FR 34466, 34504 (June 17, 2008).

The Department has relocated and modified the NPRM text that appeared in § 35.137(c) to new paragraph § 35.137(b)(2) to clarify what factors the public entity shall use in determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification. Section 35.137(b)(2) now states that "[i]n determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under (b)(1), a public entity shall consider" certain enumerated factors. The assessment factors are designed to assist public entities in determining whether allowing the use of a particular other power-driven mobility device in a specific facility is reasonable. Thus, the focus of the analysis must be on the appropriateness of the use of the device at a specific facility, rather than whether it is necessary for an individual to use a particular device.

The NPRM proposed the following specific assessment factors: (1) The dimensions, weight, and operating speed of the mobility device in relation to a wheelchair; (2) the potential risk of harm to others by the operation of the mobility device; (3) the risk of harm to the environment or natural or cultural resources or conflict with Federal land management laws and regulations; and (4) the ability of the public entity to stow the mobility device when not in use, if requested by the user.

Factor 1 was designed to help public entities assess whether a particular device was appropriate, given its particular physical features, for a particular location. Virtually all commenters said the physical features of the device affected their view of whether a particular device was appropriate for a particular location. For example, while many commenters supported the use of another power-driven mobility device if the device were a Segway® PT, because of environmental and health concerns they did not offer the same level of support if the device were an off-highway vehicle, all-terrain vehicle (ATV), golf car, or other device with a fuel-powered or combustion engine. Most commenters noted that indicators such as speed, weight, and dimension really were an assessment of the appropriateness of a

particular device in specific venues and suggested that factor 1 say this more specifically.

The term "in relation to a wheelchair" in the NPRM's factor 1 apparently created some concern that the same legal standards that apply to wheelchairs would be applied to other power-driven mobility devices. The Department has omitted the term "in relation to a wheelchair" from § 35.137(b)(2)(i) to clarify that if a facility that is in compliance with the applicable provisions of the 1991 Standards or the 2010 Standards grants permission for an other power-driven mobility device to go on-site, it is not required to exceed those standards to accommodate the use of other power-driven mobility devices.

In response to requests that NPRM factor 1 state more specifically that it requires an assessment of an other power-driven mobility device's appropriateness under particular circumstances or in particular venues, the Department has added several factors and more specific language. In addition, although the NPRM made reference to the operation of other power-driven mobility devices in "specific venues," the Department's intent is captured more clearly by referencing "specific facility" in paragraph (b)(2). The Department also notes that while speed is included in factor 1, public entities should not rely solely on a device's top speed when assessing whether the device can be accommodated; instead, public entities should also consider the minimum speeds at which a device can be operated and whether the development of speed limit policies can be established to address concerns regarding the speed of the device. Finally, since the ability of the public entity to stow the mobility device when not in use is an aspect of its design and operational characteristics, the text proposed as factor 4 in the NPRM has been incorporated in paragraph (b)(2)(iii).

The NPRM's version of factor 2 provided that the "risk of potential harm to others by the operation of the mobility device" is one of the determinants in the assessment of whether other power-driven mobility devices should be excluded from a site. The Department intended this requirement to be consistent with the Department's longstanding interpretation, expressed in § II–3.5200 (Safety) of the 1993 Title II Technical Assistance Manual, which provides that public entities may "impose legitimate safety requirements that are necessary for safe operation." (This language parallels the provision in the title III regulation at § 36.301(b).) However, several commenters indicated that they read this language, particularly the phrase "risk of potential harm," to mean that the Department had adopted a concept of risk analysis different from that which is in the existing standards. The Department did not intend to create a new standard and has changed the language in paragraphs (b)(1) and (b)(2) to clarify the applicable standards, thereby avoiding the introduction of new assessments of risk beyond those necessary for the safe operation of the public entity. In addition, the Department has added a new section, 35.130(h), which incorporates the existing safety standard into the title II regulation.

While all applicable affirmative defenses are available to public entities in the establishment and execution of their policies regarding other power-driven mobility devices, the Department did not explicitly incorporate the direct threat defense into the assessment factors because § 35.130(h) provides public entities the appropriate framework with which to assess whether legitimate safety requirements that may preclude the use of certain other power-driven mobility devices are necessary for the safe operation of the public entities. In order to be legitimate, the safety requirement must be based on actual risks and not mere speculation regarding the device or how it will be operated. Of course, public entities may enforce legitimate safety rules established by the public entity for the operation of other power-driven mobility devices (*e.g.*, reasonable speed restrictions). Finally, NPRM

factor 3 concerning environmental resources and conflicts of law has been relocated to § 35.137(b)(2)(v).

As a result of these comments and requests, NPRM factors 1, 2, 3, and 4 have been revised and renumbered within paragraph (b)(2) in the final rule.

Several commenters requested that the Department provide guidance materials or more explicit concepts of which considerations might be appropriate for inclusion in a policy that allows the use of other power-driven mobility devices. A public entity that has determined that reasonable modifications can be made in its policies, practices, or procedures to allow the use of other power-driven mobility devices should develop a policy that clearly states the circumstances under which the use of other power-driven mobility devices by individuals with a mobility disability will be permitted. It also should include clear, concise statements of specific rules governing the operation of such devices. Finally, the public entity should endeavor to provide individuals with disabilities who use other power-driven mobility devices with advanced notice of its policy regarding the use of such devices and what rules apply to the operation of these devices.

For example, the U.S. General Services Administration (GSA) has developed a policy allowing the use of the Segway® PT and other EPAMDs in all Federal buildings under GSA's jurisdiction. *See* General Services Administration, *Interim Segway® Personal Transporter Policy* (Dec. 3, 2007), available at *http://www.gsa.gov/graphics/pbs/Interim_Segway_Policy_121007.pdf* (last visited June 24, 2010). The GSA policy defines the policy's scope of coverage by setting out what devices are and are not covered by the policy. The policy also sets out requirements for safe operation, such as a speed limit, prohibits the use of EPAMDs on escalators, and provides guidance regarding security screening of these devices and their operators.

A public entity that determines that it can make reasonable modifications to permit the use of an other power-driven mobility device by an individual with a mobility disability might include in its policy the procedure by which claims that the other power-driven mobility device is being used for a mobility disability will be assessed for legitimacy (*i.e.*, a credible assurance that the device is being used for a mobility disability, including a verbal representation by the person with a disability that is not contradicted by observable fact, or the presentation of a disability parking space placard or card, or State-issued proof of disability); the type or classes of other power-driven mobility devices are permitted to be used by individuals with mobility disabilities; the size, weight, and dimensions of the other power-driven mobility devices that are permitted to be used by individuals with mobility disabilities; the speed limit for the other power-driven mobility devices that are permitted to be used by individuals with mobility disabilities; the places, times, or circumstances under which the use of the other power-driven mobility device is or will be restricted or prohibited; safety, pedestrian, and other rules concerning the use of the other power-driven mobility device; whether, and under which circumstances, storage for the other power-driven mobility device will be made available; and how and where individuals with a mobility disability can obtain a copy of the other power-driven mobility device policy.

Public entities also might consider grouping other power-driven mobility devices by type (*e.g.*, EPAMDs, golf cars, gasoline-powered vehicles, and other devices). For example, an amusement park may determine that it is reasonable to allow individuals with disabilities to use EPAMDs in a variety of outdoor programs and activities, but that it would not be reasonable to allow the use of golf cars as mobility devices in similar circumstances. At the same time, the entity may address its concerns about factors such as space limitations by disallowing use of EPAMDs by members

of the general public who do not have mobility disabilities.

The Department anticipates that, in many circumstances, public entities will be able to develop policies that will allow the use of other power-driven mobility devices by individuals with mobility disabilities. Consider the following example:

A county courthouse has developed a policy whereby EPAMDs may be operated in the pedestrian areas of the courthouse if the operator of the device agrees not to operate the device faster than pedestrians are walking; to yield to pedestrians; to provide a rack or stand so that the device can stand upright; and to use the device only in courtrooms that are large enough to accommodate such devices. If the individual is selected for jury duty in one of the smaller courtrooms, the county's policy indicates that if it is not possible for the individual with the disability to park the device and walk into the courtroom, the location of the trial will be moved to a larger courtroom.

Inquiry into the use of other power-driven mobility device. The NPRM version of § 35.137(d) provided that "[a] public entity may ask a person using a power-driven mobility device if the mobility device is needed due to the person's disability. A public entity shall not ask a person using a mobility device questions about the nature and extent of the person's disability." 73 FR 34466, 34504 (June 17, 2008).

Many environmental, transit system, and government commenters expressed concern about people feigning mobility disabilities to be able to use other power-driven mobility devices in public entities in which their use is otherwise restricted. These commenters felt that a mere inquiry into whether the device is being used for a mobility disability was an insufficient mechanism by which to detect fraud by other power-driven mobility device users who do not have mobility disabilities. These commenters believed they should be given more latitude to make inquiries of other power-driven mobility device users claiming a mobility disability than they would be given for wheelchair users. They sought the ability to establish a policy or method by which public entities may assess the legitimacy of the mobility disability. They suggested some form of certification, sticker, or other designation. One commenter suggested a requirement that a sticker bearing the international symbol for accessibility be placed on the device or that some other identification be required to signal that the use of the device is for a mobility disability. Other suggestions included displaying a disability parking placard on the device or issuing EPAMDs, like the Segway® PT, a permit that would be similar to permits associated with parking spaces reserved for those with disabilities.

Advocacy, nonprofit, and several individual commenters balked at the notion of allowing any inquiry beyond whether the device is necessary for a mobility disability and encouraged the Department to retain the NPRM's language on this topic. Other commenters, however, were empathetic with commenters who had concerns about fraud. At least one Segway® PT advocate suggested it would be permissible to seek documentation of the mobility disability in the form of a simple sign or permit.

The Department has sought to find common ground by balancing the needs of public entities and individuals with mobility disabilities wishing to use other power-driven mobility devices with the Department's longstanding, well-established policy of not allowing public entities or establishments to require proof of a mobility disability. There is no question that public entities have a legitimate interest in ferreting out fraudulent representations of mobility disabilities, especially given the recreational use of other power-driven mobility devices and the potential safety concerns created by having too many such devices in a specific facility at one time. However, the privacy of individuals with mobility disabilities and respect for those individuals, is also vitally important.

Neither § 35.137(d) of the NPRM nor § 35.137(c) of the final rule permits inquiries into the nature of a person's mobility disability. However, the Department does not believe it is unreasonable or overly intrusive for an individual with a mobility disability seeking to use an other power-driven mobility device to provide a credible assurance to verify that the use of the other power-driven mobility device is for a mobility disability. The Department sought to minimize the amount of discretion and subjectivity exercised by public entities in assessing whether an individual has a mobility disability and to allow public entities to verify the existence of a mobility disability. The solution was derived from comments made by several individuals who said they have been admitted with their Segway® PTs into public entities and public accommodations that ordinarily do not allow these devices on-site when they have presented or displayed State-issued disability parking placards. In the examples provided by commenters, the parking placards were accepted as verification that the Segway® PTs were being used as mobility devices.

Because many individuals with mobility disabilities avail themselves of State programs that issue disability parking placards or cards and because these programs have penalties for fraudulent representations of identity and disability, utilizing the parking placard system as a means to establish the existence of a mobility disability strikes a balance between the need for privacy of the individual and fraud protection for the public entity. Consequently, the Department has decided to include regulatory text in § 35.137(c)(2) of the final rule that requires public entities to accept the presentation of a valid, State-issued disability parking placard or card, or State-issued proof of disability, as verification that an individual uses the other power-driven mobility device for his or her mobility disability. A "valid" disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance's requirements for disability placards or cards. Public entities are required to accept a valid, State-issued disability parking placard or card, or State-issued proof of disability as a credible assurance, but they cannot demand or require the presentation of a valid disability placard or card, or State-issued proof of disability, as a prerequisite for use of an other power-driven mobility device, because not all persons with mobility disabilities have such means of proof. If an individual with a mobility disability does not have such a placard or card, or State-issued proof of disability, he or she may present other information that would serve as a credible assurance of the existence of a mobility disability.

In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a verbal representation, not contradicted by observable fact, shall be accepted as a credible assurance that the other power-driven mobility device is being used because of a mobility disability. This does not mean, however, that a mobility disability must be observable as a condition for allowing the use of an other power-driven mobility device by an individual with a mobility disability, but rather that if an individual represents that a device is being used for a mobility disability and that individual is observed thereafter engaging in a physical activity that is contrary to the nature of the represented disability, the assurance given is no longer credible and the individual may be prevented from using the device.

Possession of a valid, State-issued disability parking placard or card or a verbal assurance does not trump a public entity's valid restrictions on the use of other power-driven mobility devices. Accordingly, a credible assurance that the other power-driven mobility device is being used because of a mobility disability is not a guarantee of entry to a public entity because, notwithstanding such credible assurance, use of the device in a particular venue may be at odds with the legal standard in § 35.137(b)(1) or with

one or more of the § 35.137(b)(2) factors. Only after an individual with a disability has satisfied all of the public entity's policies regarding the use of other power-driven mobility devices does a credible assurance become a factor in allowing the use of the device. For example, if an individual seeking to use an other power-driven mobility device fails to satisfy any of the public entity's stated policies regarding the use of other power-driven mobility devices, the fact that the individual legitimately possesses and presents a valid, State-issued disability parking placard or card, or State-issued proof of disability, does not trump the policy and require the public entity to allow the use of the device. In fact, in some instances, the presentation of a legitimately held placard or card, or State-issued proof of disability, will have no relevance or bearing at all on whether the other power-driven mobility device may be used, because the public entity's policy does not permit the device in question on-site under any circumstances (*e.g.*, because its use would create a substantial risk of serious harm to the immediate environment or natural or cultural resources). Thus, an individual with a mobility disability who presents a valid disability placard or card, or State-issued proof of disability, will not be able to use an ATV as an other power-driven mobility device in a State park if the State park has adopted a policy banning their use for any or all of the above-mentioned reasons. However, if a public entity permits the use of a particular other power-driven mobility device, it cannot refuse to admit an individual with a disability who uses that device if the individual has provided a credible assurance that the use of the device is for a mobility disability.

Section 35.138 Ticketing

The 1991 title II regulation did not contain specific regulatory language on ticketing. The ticketing policies and practices of public entities, however, are subject to title II's nondiscrimination provisions. Through the investigation of complaints, enforcement actions, and public comments related to ticketing, the Department became aware that some venue operators, ticket sellers, and distributors were violating title II's nondiscrimination mandate by not providing individuals with disabilities the same opportunities to purchase tickets for accessible seating as they provided to spectators purchasing conventional seats. In the NPRM, the Department proposed § 35.138 to provide explicit direction and guidance on discriminatory practices for entities involved in the sale or distribution of tickets.

The Department received comments from advocacy groups, assembly area trade associations, public entities, and individuals. Many commenters supported the addition of regulatory language pertaining to ticketing and urged the Department to retain it in the final rule. Several commenters, however, questioned why there were inconsistencies between the title II and title III provisions and suggested that the same language be used for both titles. The Department has decided to retain ticketing regulatory language and to ensure consistency between the ticketing provisions in title II and title III.

Because many in the ticketing industry view season tickets and other multi-event packages differently from individual tickets, the Department bifurcated some season ticket provisions from those concerning single-event tickets in the NPRM. This structure, however, resulted in some provisions being repeated for both types of tickets but not for others even though they were intended to apply to both types of tickets. The result was that it was not entirely clear that some of the provisions that were not repeated also were intended to apply to season tickets. The Department is addressing the issues raised by these commenters using a different approach. For the purposes of this section, a *single event* refers to an individual performance for which tickets may be purchased. In contrast, *a series of events* includes, but is not limited to, subscription events,

(iii) Whether the miniature horse is housebroken; and

(iv) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

(3) Other requirements. Paragraphs 35.136 (c) through (h) of this section, which apply to service animals, shall also apply to miniature horses.

§ 35.137 Mobility devices

(a) Use of wheelchairs and manually-powered mobility aids. A public entity shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities in any areas open to pedestrian use.

(b) (1) Use of other power-driven mobility devices. A public entity shall make reasonable modifications in its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless the public entity can demonstrate that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements that the public entity has adopted pursuant to § 35.130(h).

(2) Assessment factors. In determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under paragraph (b)(1) of this section, a public entity shall consider:

(i) The type, size, weight, dimensions, and speed of the device;

(ii) The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);

(iii) The facility's design and operational characteristics (e.g., whether its service, program, or activity is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user);

(iv) Whether legitimate safety requirements can be established to permit the safe operation of the other power-driven mobility device in the specific facility; and

(v) Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws and regulations.

(c)(1) Inquiry about disability. A public entity shall not ask an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual's disability.

(2) Inquiry into use of other power-driven mobility device. A public entity may ask a person using an other power-driven mobility device to provide a credible assurance that the mobility device is required because of the person's disability. A public entity that permits the use of an other power-driven mobility device by an individual with a mobility disability shall accept the presentation of a valid, State-issued, disability parking placard or card, or other State-issued proof of disability, as a credible assurance that the use of the other power-driven mobility device is for the individual's mobility disability. In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a public entity shall accept as a credible assurance, a verbal representation, not contradicted by observable fact, that the other power-driven mobility device is being used for a mobility disability. A "valid" disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance's requirements for disability placards or cards.

§ 35.138 Ticketing

(a) (1) For the purposes of this section, "accessible seating" is defined as wheelchair spaces and companion seats that comply with sections 221 and 802 of the 2010 Standards along with any other seats required to be offered for sale to the individual with a disability pursuant to paragraph (d) of this section.

(2) Ticket sales. A public entity that sells tickets for a single event or series of events shall modify its policies, practices, or procedures to ensure that individuals with disabilities have an equal opportunity to purchase tickets for accessible seating:

(i) During the same hours;

(ii) During the same stages of ticket sales, including, but not limited to, pre-sales, promotions, lotteries, wait-lists, and general sales;

(iii) Through the same methods of distribution;

(iv) In the same types and numbers of ticketing sales outlets, including telephone service, in-person ticket sales at the facility, or third-party ticketing services, as other patrons; and

(v) Under the same terms and conditions as other tickets sold for the same event or series of events.

(b) Identification of available accessible seating. A public entity that sells or distributes tickets for a single event or series of events shall, upon inquiry:

(1) Inform individuals with disabilities, their companions, and third parties purchasing tickets for accessible seating on behalf of individuals with disabilities, of the locations of all unsold or otherwise available accessible seating for any ticketed event or events at the facility;

(2) Identify and describe the features of available accessible seating in enough detail to reasonably permit an individual with a disability to assess independently whether a given accessible seating location meets his or her accessibility needs; and

(3) Provide materials, such as seating maps, plans, brochures, pricing charts, or other information, that identify accessible seating and information relevant thereto with the same text or visual representations as other seats, if such materials are provided to the general public.

(c) Ticket prices. The price of tickets for accessible seating for a single event or series of events shall not be set higher than the price for other tickets in the same seating section for the same event or series of events. Tickets for accessible seating must be made available at all price levels for every event or series of events. If tickets for accessible seating at a particular price level are not available because of inaccessible features, then the percentage of tickets for accessible seating that should have been available at that price level (determined by the ratio of the total number of tickets at that price level to the total number of tickets in the assembly area) shall be offered for purchase, at that price level, in a nearby or similar accessible location.

(d) Purchasing multiple tickets. (1) General. For each ticket for a wheelchair space purchased by an individual with a disability or a third-party purchasing such a ticket at his or her request, a public entity shall make available for purchase three additional tickets for seats in the same row that are contiguous with the wheelchair space, provided that at the time of purchase there are three such seats available. A public entity is not required to provide more than three contiguous seats for each wheelchair space. Such seats may include wheelchair spaces.

this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) *Complaint procedure.* A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

§§ 35.108 - 35.129 [Reserved]

Subpart B -- General Requirements

§ 35.130 General prohibitions against discrimination

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability --

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections --

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

§ 35.131 Illegal use of drugs

(a) General. (1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

properties designated as historic under State or local law.

Housing at a place of education means housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term illegal use of drugs does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means a person who has a disability. The term individual with a disability does not include an individual who is currently engaging in the illegal use of drugs, when the public entity acts on the basis of such use.

Part 8 Section 35.104

Other power-driven mobility device **means any mobility device powered by batteries, fuel, or other engines – whether or not designed primarily for use by individuals with mobility disabilities – that is used by individuals with mobility disabilities for the purpose of locomotion, including golf cars, electronic personal assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to opera in areas without defined pedestrian routes, but that is not a wheelchair within the meaning of this section. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).**

Public entity means --

(1) Any State or local government

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

Qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Qualified interpreter **means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.**

Qualified reader **means a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary.**

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended.

Service animal **means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individuals's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing nonviolent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.**

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

Video remote interpreting (VRI) service **means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images as provided in § 35.160(d).**

Wheelchair **means a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor, or of both indoor and outdoor locomotion. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207 (c)(2).**

§ 35.105 Self-evaluation.

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

(b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.

(c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A list of the interested persons consulted;

(2) A description of areas examined and any problems identified; and

(3) A description of any modifications made.

(d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self- evaluation.

§ 35.106 Notice

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

§ 35.107 Designation of responsible employee and adoption of grievance procedures

(a) *Designation of responsible employee.* A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under