



HAVE YOUR CAKE AND EAT IT

USING ESSENTIAL ELIGIBILITY CRITERIA (EEC) UNDER THE ADA TO PROTECT YOUR PROGRAM AND INCREASE INCLUSIVITY

PINNACLE RISK STRATEGIES, PLLC





WHO WE ARE



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GOALS (WHAT IS THIS SESSION ABOUT?)

- Basics of **Title III** of the Americans with Disabilities Act (ADA).
- Tools to develop essential eligibility criteria (EEC) for program activities.
- Interactive.





DISCLAIMER!

- We're attorneys. But we're not YOUR attorney.
- Session information is GENERAL, not SPECIFIC legal advice.
- Consult with legal counsel about your specific matters.



WHY DOES MY PROGRAM NEED EEC?

- EEC can help you:
 - Manage program risk.
 - ✓ Understand your program.
 - ✓ Understand your participants' essential abilities.
 - ✓ Avoid disputes.
 - Increase program diversity and inclusion.
 - ✓ Eliminate speculation & arbitrary factors.
 - ✓ Make reasonable accommodations.
 - ✓ Welcome all.





GET OUTDOORS ON ALL TERRAIN (GOAT) GET YOUR GOAT!™

- You run GOAT: multi-day, multi-sport trips—hiking/backpacking, biking, climbing, yoga, and skiing/snowboarding.
- Trips run year-round in several locations across the United States.
- Mother with a child who is deaf calls to ask about Kelly participating on a trip.





ADA OVERVIEW

- Passed in 1990 by large, bi-partisan margins.
- Purpose:
 - Include people with disabilities. **BROAD!**
 - Provide **EQUAL ACCESS.**

¹42 U.S.C. § 12181(1), (7), 12182; 28 C.F.R. §§ 36.102, 36.104, 36.201.

²42 U.S.C. §§ 12131(1), 12132; 28 C.F.R. §§ 35.102(a), 35.104.

³29 U.S.C. § 794.



ADA OVERVIEW

- What is a **“disability”**?
 - Physical/mental impairment substantially limiting major life activity.
 - Record of impairment.
 - Regarded as having an impairment.
- What is a **“major life activity”**?
 - E.g., caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, and working.

ADA OVERVIEW

- **You are subject to the ADA if . . .**
 - You're a **private business/organization** open to the public.¹
 - You're a **state/local government organization**.²
 - You operate under a **permit/receive financial assistance** from the federal government.³



ADA OVERVIEW

- ***What must you do?***

- Not discriminate!
 - a. no intentional discrimination.
 - b. no disparate impact.
 - c. failure to make reasonable accommodations.
- Give equal access to your programs.
 - Make reasonable modifications in policies, practices, or procedures and provide aids and services as needed.

See 42 U.S.C. § 12181(a)-(b).



ADA OVERVIEW

- ***Exceptions to the ADA accommodation requirements:***
 - **Direct threat** to safety.
 - **Fundamentally alter** the program.
 - **Undue burden.**

See 42 U.S.C. §§ 12182(a)-(b); 28 C.F.R. §§ 36.104, 36.202, 36.203, 36.208, 36.301, 36.302, 36.303.



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- Trips run year-round in several locations across the United States.
- Mother with a child who is deaf calls to ask about Kelly participating on a trip.
- ***Does the ADA apply to GOAT???***
- ***How do you respond to Kelly's mom?***





ESSENTIAL ELIGIBILITY CRITERIA (EEC)

- *Who can participate?*
 - Those who meet essential eligibility criteria (requirements) (EEC).
- *What does that mean??*
 - PURPOSE:
 - Establish **functions** required to participate, focusing on **risk management**.
 - GOALS:
 - Determine whether good fit for participant and good fit program.
 - **Transparent, objective, clear** dialogue; apply **equally to everyone!**

EEC are codified in Title III: 42 U.S.C. § 12182(b)(2)(A)(i); and Title II: 42 U.S.C. § 12131(2); and in regulation: 28 C.F.R. § 36.301.



ESSENTIAL ELIGIBILITY CRITERIA (EEC)

- *Who drafts EEC?*
 - You!



ESSENTIAL ELIGIBILITY CRITERIA (EEC)

- *How to develop EEC?*
 - ✓ Write down **all activities** your program conducts.
 - ✓ **Break down program/activity into stages**, e.g., for rock climbing—approach to rock wall; etc.
 - ✓ Determine **directions, rules, etiquette**.
 - ✓ **Break down specific skills into essential elements/functions**, e.g., for top-rope rock climbing— independently maintain one’s position on a rock climbing wall while attempting to ascend the wall; etc.
 - ✓ Determine *basic* **physical, mental, emotional abilities needed** to participate safely in program—overall and for specific activities. Includes *basic* **strength, capabilities, skills** needed to manage risk.
 - ✓ Determine **equipment** involved/needed (if any).
 - ✓ Consider managing **self-care** and **well-being**.
 - ✓ Can a **companion** or **adaptive equipment** facilitate?
 - ✓ Use **inclusive, non-exclusionary language**, e.g., *ascend* or *move up* rather than *walk*.



ESSENTIAL ELIGIBILITY CRITERIA (EEC)

EEC EXAMPLE 1a: Rock Climbing

- *Each participant must be able to detect signals of warning when in rockfall environments.*

EEC EXAMPLE 1b: Rock Climbing

- *Each participant must be able to hear signals of warning when in rockfall environments.*



ESSENTIAL ELIGIBILITY CRITERIA (EEC)

EEC EXAMPLE 2a: Hiking

- Each participant must be capable of traveling in varied on- and off-trail wilderness terrain with a pack weighing or exceeding 40 pounds.

EEC EXAMPLE 2b: Hiking

- Each participant must be able to walk and scramble, using hands and feet, in varied on- and off-trail wilderness terrain carrying on his back a pack weighing or exceeding 40 pounds.



ESSENTIAL ELIGIBILITY CRITERIA (EEC)

EEC EXAMPLE 3a: Mountain Biking

- *Each participant must be able to pedal the bike uphill in a standing position while downshifting the gears.*

EEC EXAMPLE 3b: Mountain Biking

- *For the duration of each ride, each participant must be able to independently: mount and dismount a bike; start, move, and stop a bike; and sit and balance on a moving bike.*



ESSENTIAL ELIGIBILITY CRITERIA (EEC)

- *Example EEC: summer, half-day whitewater float trip in Maine.*
 - Each participant must have the ability to:
 - [STAGE 1]
 - ✓ **Perceive** and **comprehend** the inherent risks of whitewater rafting.
 - ✓ **Follow verbal and/or visual instructions** independently or with the assistance of a companion.



ESSENTIAL ELIGIBILITY CRITERIA (EEC)

[STAGE 2]

✓ **Enter** and **exit** a vehicle independently or with the assistance of a companion.

[STAGE 3]

✓ **Wear** all protective equipment recommended/required.



ESSENTIAL ELIGIBILITY CRITERIA (EEC)

[STAGE 4]

- ✓ **Tolerate water** between 55°F and 65°F degrees and **bright sunlight** for four hours or more.
- ✓ **Manage personal mobility** independently or with a reasonable amount of assistance from a companion.
- ✓ **Effectively communicate** to staff and fellow students independently or with the assistance of a companion.
- ✓ **Enter** and **exit** a raft independently or with the assistance of a companion.
- ✓ Remain **seated** and **balanced**, using adaptive equipment if necessary.
- ✓ Perform appropriate oar strokes in difficult whitewater.
- ✓ **Get out from under** the watercraft, **remain face up** in the water with the aid of a lifejacket, and **make progress to the shoreline** in the event the watercraft capsizes.



ALL PLAY!

1. Find your “How to draft EEC” handout and “GOAT” handout.
2. Choose an activity from the GOAT handout.
3. Follow steps on “How to draft EEC” handout for chosen activity.
4. Write down draft EEC.

We will circulate to assist and discuss your work.





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- You run GOAT: multi-day, multi-sport trips—hiking/backpacking, biking, climbing, yoga, and skiing/snowboarding.
- Mother with a child who is deaf calls to ask about Kelly participating on a trip.
- You know the ADA, Title III, applies to GOAT.
- **Time to respond to the parent!**



ACTION STEPS

1. Draft or review Essential Eligibility Criteria (EEC) for your program(s).
2. Review your public-facing presence (website, marketing materials, etc.) to ensure that what you are putting out to prospective participants includes and/or aligns with your EEC and conveys that you do not discriminate based on disabilities.
3. Design and integrate into your staff training how to communicate appropriately with prospective participants regarding disability accommodation requests.

THANK YOU!

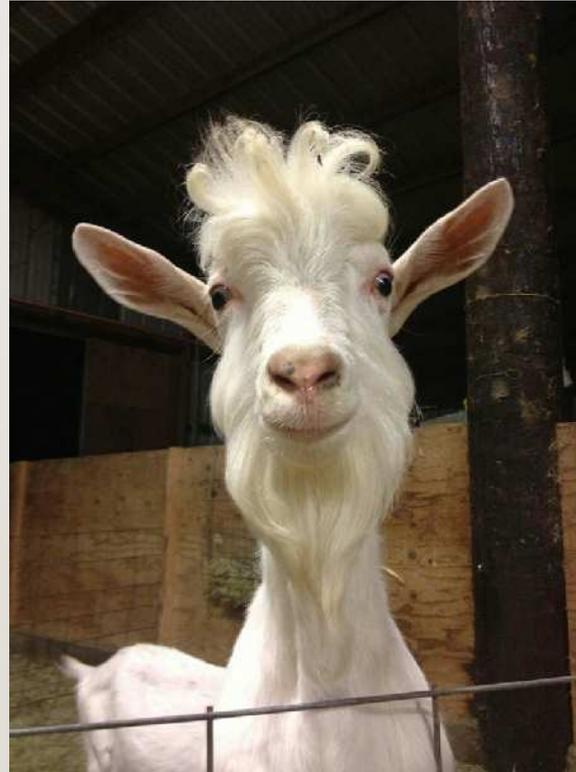
➤ Cathy Hansen Stamp

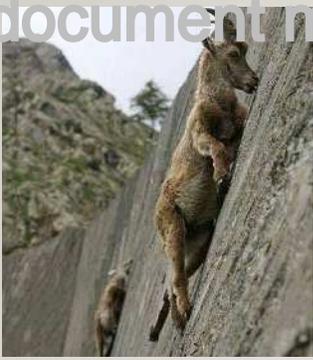
➤ Janet Zeller





QUESTIONS?





EEC STEPS

- ✓ Talk with an ADA Technical Assistance Center.
- ✓ Write down draft EEC.
- ✓ Run by others in org.
- ✓ Run by legal counsel.
- ✓ Revise.
- ✓ Post on your website and other marketing materials, including a non-discrimination statement.
- ✓ Develop health/medical forms.
- ✓ Train staff how to talk with prospective participants [what can and cannot ask].
- ✓ Apply **equally** to **every** prospective participant.
- ✓ Determine if person can participate in your program with or without modifications (*Fundamentally alter? Undue burden (for aids/services)? Direct threat?*).
- ✓ Document.
- ✓ Get feedback.
- ✓ Evaluate.
- ✓ And then . . . **review, revise, revisit, repeat** . . . for simplicity, comprehension, efficacy.