

September 18, 2018

Notice of Proposed Rule

DEPARTMENT OF CORRECTIONS

RULE NO.: RULE TITLE:

33-210.201 ADA PROVISIONS FOR INMATES

PURPOSE AND EFFECT: To clarify definitions and procedures to insure compliance with the Americans with Disabilities Act (ADA).

SUMMARY: The amendment to the rule updates definitions and employs the language used by applicable federal statutes to insure continuity and consistency in application. The amendment clarifies the procedural process of submission, review, approval or denial of reasonable modification request.

SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS AND LEGISLATIVE RATIFICATION: The Agency has determined that this will not have an adverse impact on small business or likely increase directly or indirectly regulatory costs in excess of \$200,000 in the aggregate within one year after the implementation of the rule. A SERC has not been prepared by the Agency.

The Agency has determined that the proposed rule is not expected to require legislative ratification based on the statement of estimated regulatory costs or if no SERC is required, the information expressly relied upon and described herein: The Department used an itemized checklist to conduct an economic analysis and determine if there is an adverse impact or regulatory cost associated with this rule that exceeds the criteria. Upon review of the proposed changes to the rule, the Department has determined that the amendments will not exceed any one of the economic analysis criteria in a SERC as set forth in s. 120.541(2)(a), FS. Any person who wishes to provide information regarding the statement of estimated regulatory costs, or provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

RULEMAKING AUTHORITY: 944.09, FS.

LAW IMPLEMENTED: 944.09, FS.

IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS NOTICE, A PUBLIC HEARING WILL BE SCHEDULED AND THE DATE, TIME AND LOCATION WILL BE ANNOUNCED IN THE FAR.

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS: Paul Vazquez, Assistant General Counsel, 501 South Calhoun Street, Tallahassee, Florida 32399-2500.

THE FULL TEXT OF THE PROPOSED RULE IS:

33-210.201 ADA Provisions for Inmates.

(1) Policy. In accordance with the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et. seq., the Department of Corrections does not discriminate, on the basis of a disability, against any inmate with regard to its programs, services, or activities for which the inmate is otherwise qualified. Inmates shall be provided the opportunity to identify the nature of any disability and to request an accommodation or auxiliary aids. Additional information on the ADA is available from the ADA Coordinator or the Intake Officer of any department facility.

(2) Definitions.

(a) ADA Coordinator – the central office employee assigned to coordinate the department’s efforts to comply with and carry out its responsibilities under the provisions of Title I and Title II of the ADA and Section 504 of the 1973 Rehabilitation Act.

(b) Auxiliary aids and services include ~~are~~:

1. Qualified interpreters; notetakers; written materials; exchange of written notes; telephone handset amplifiers; telephones compatible with hearing aids; closed captioning; voice and text telecommunications products and systems, including text telephones (TTYs) or equally effective telecommunications devices; or other effective methods of making aurally delivered materials information available to individuals with hearing impairments ~~who are deaf or hard of hearing~~; and,

2. Qualified readers; taped texts; audio recordings; ~~Brailled materials~~; large print materials; or other effective methods of making visually delivered materials available to individuals with visual impairments ~~who are blind or have low vision~~.

3. Acquisition or modification of equipment or device(s); and

4. Other similar services and actions.

(c) Compelling Security Concern – exists where a reasonable accommodation, aid or device that has been provided or may be provided to an inmate with a disability, cannot be adequately searched for contraband, is contraband, has been altered, used as a weapon, can be weaponized or poses a significant likelihood of substantial harm to the inmate, another inmate or staff or can be used to facilitate an escape.

~~Direct threat~~ — refers to a health or safety risk that cannot be eliminated by a modification of policies, practices or procedures or by the provision of auxiliary aids or services in which an inmate poses a significant likelihood of substantial harm to department staff, the public, other inmates or herself or himself.

(d) Disability – refers to a physical or mental impairment that substantially limits one or more major life activities.

(e) Equally effective communication – communication with inmates with various disabilities that is equal to communication with inmates without any documented disabilities.

(f) Health care appliance – refers to devices or medical support equipment including, but not limited to, wheelchairs, canes, walkers, or hearing aids prescribed for an a-disabled inmate and approved by the Office of Health Services or its designee.

(g) Institutional ADA Coordinator ~~Intake officer~~ – refers to the staff member at an institution who is designated to respond to requests for accommodation.

(h) Major life activities – refers to activities ~~that an average person can perform with little or no difficulty~~, such as caring for one's self, walking, speaking, performing manual tasks, hearing, learning, seeing, breathing and working.

(i) Mental impairment – any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness and specific learning disabilities.

(j) Physical Impairment – refers to any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, cardiovascular, respiratory, special sense organs, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine.

(k) Qualified inmate with a disability – an inmate with a disability who, with or without reasonable modifications to rules, policies, or practices ~~reasonable accommodations~~ or the provision of auxiliary aids and services, meets the essential eligibility requirements of the department for the department program(s), service(s), or activity/activities at issue.

(l) Reasonable modification accommodation ~~accommodation~~ – refers to any reasonable modification to a rule, policy, practice, or the provision of auxiliary aids and services ~~or adjustment~~ that will allow a qualified inmate with a disability to participate in or make use of the programs, services or activities of a department institution or facility.

(m) Undue hardship – refers to an action that is excessively costly, extensive, substantial, or disruptive to the business being conducted at a facility or that would fundamentally alter the nature or operation of the facility.

(3) Accommodation Request Procedure.

(a) The determination of whether an inmate has a disability shall be made by department medical staff, either at reception or at the institution where the inmate is assigned, based upon the inmate's record of an existing physical or mental impairment or clinical qualified evaluation of the inmate.

~~1. The nature and extent of the disability will be assessed during the evaluation process.~~

~~2-~~ In determining if a person's physical or mental impairment substantially limits a major life activity, the following factors shall be considered:

- 1a. The nature and severity of the impairment;
- 2b. The length of time the impairment is expected to last; and,
- 3e. The expected, permanent, or long-term impact of the impairment.

(b) All department and privately operated facilities shall furnish to any inmate, upon request, a Reasonable Modification or Accommodation Request, Form DC2-530A. Form DC2-530A, Reasonable Modification or Accommodation Request, is hereby incorporated by reference. Copies of this form are available from the Forms Control Administrator, Office of Research, Planning and Support Services, 501 South Calhoun Street, Tallahassee, Florida 32399-2500, <http://www.flrules.org/Gateway/reference.asp?No=Ref-XXXXXX>. The effective date of this form is _____ ~~11-16~~.

(c) Inmates, who ~~have a documented disability and~~ are requesting an accommodation or modification shall submit a request in writing on the Reasonable Modification or Accommodation Request, Form DC2-530A, specifying the type of accommodation requested and the purpose for the accommodation or modification ~~why it is necessary~~.

1. The Reasonable Modification or Accommodation Request, Form DC2-530A, shall be submitted to the Institutional ADA Coordinator ~~warden or the designated intake officer~~. The designated Institutional ADA Coordinator ~~intake officer~~ shall be:

- a. The assistant warden for programs (AWP) or the assistant warden (AW) at major department institutions, in the event the institution does not have an AWP;
- b. The correctional officer major at department-operated community release centers, or
- c. The designated facility representative at private community release centers.

2. Inmates who cannot put their requests in writing shall make their verbal requests to classification, security, medical ~~the warden~~, or to the Institutional ADA Coordinator ~~intake officer~~ who shall document the request in writing on Form DC2-530A. The staff member will sign the acknowledgement section to document the inmate's verbal request for the accommodation. ~~and have the inmate sign or otherwise acknowledge it, with the writer indicating by signature she or he witnessed the inmate's verbal acknowledgement on Form DC2-530A.~~

(d) Upon receipt of Form DC2-530A, the Institutional ADA Coordinator ~~warden or intake officer~~ shall review the inmate's accommodation request. The Institutional ADA Coordinator ~~warden or intake officer~~ shall, as necessary, utilize Form DC2-530B to request additional information from the appropriate program head in order to verify the inmate's

disability or to otherwise assist with the review of the request. Form DC2-530B, Reasonable ~~Modification Accommodation~~ or Accommodation Request Institutional Evaluation/Disposition, is hereby incorporated by reference. Copies of this form are available from the Forms Control Administrator, Office of Research, Planning and Support Services, 501 South Calhoun Street, Tallahassee, Florida 32399-2500, <http://www.flrules.org/Gateway/reference.asp?No=Ref-07537>. The effective date of this form is 11-16.

(e) The Institutional ADA Coordinator ~~warden or intake officer~~ shall return the completed Form DC2-530A to the inmate within 10 business days of receipt. If, the complexity of the issue requires an extension of time beyond the 10 business days, the inmate shall be notified in writing of such action and the reason for the extension documented on Form DC2-530A. The completed DC2-530A shall reflect the Institutional ADA Coordinator's recommendation to ~~whether the accommodation request is either~~ approve approved, deny denied, modify modified/partially approved the accommodation request, or returned without action, ~~as well as the reason(s) for such disposition.~~ If the request is deemed not to be an ADA issue, DC2-530A will be returned to the inmate without action and shall include the reason(s) for the recommendation. The completed DC2-530A shall also reflect the anticipated completion date, if necessary, of the accommodation.

(f) The Institutional ADA Coordinator ~~warden or intake officer~~ shall forward both the completed Form DC2-530A and the completed Form DC2-530B, and any supporting documents, to the Central Office ADA Coordinator within 10 business days of completion of Forms DC2-530A and DC2-530B.

(g) The Central Office ADA Ceordinator shall review the request received and notify the Institutional ADA Coordinator ~~intake officer~~ in writing of whether s/he concurs or disagrees with the Institutional ADA Coordinator's recommendation ~~warden or intake officer's decision.~~

1. ~~If~~ The Central Office ADA Ceordinator may consult with program areas within the Department for input, when appropriate, before making a final decision ~~disagrees with the warden or intake officer's recommendation, s/he will consult with the central office program area in which the accommodation is requested to obtain input.~~

2. If, the Central Office ADA Coordinator's decision after consulting with the appropriate central office program area in which the accommodation is requested, the recommendation of the ADA coordinator is a reversal of the Institutional ADA Coordinator's ~~warden's or intake officer's decision,~~ Forms DC2-530A and DC2-530B shall be returned to the Institutional ADA Coordinator ~~warden or intake officer~~ with written notification stating the reason(s) for this action.

(h) Upon receipt, the Institutional ADA Coordinator ~~Once the institution receives this information,~~ it will take steps to comply with the decision of the Central Office ADA Ceordinator and provide written notification to the inmate of the

actions to be taken. The Institutional ADA Coordinator will provide and the Central Office ADA Ceordinator written notification when the action has been completed.

(i) Copies of the requests and all other documentation shall be placed in the inmate's medical record file and in the department's confidential ADA file located in central office.

(4) Justification for Denial of Requests for Accommodation. A request for a particular accommodation shall be denied for any of the following reasons:

(a) A legitimate penological interest:

1. A request for a particular accommodation shall be denied when it would pose a significant risk of substantial harm to the health or safety risk to the safety or security of the institution, staff, or others which cannot be eliminated or reduced by a reasonable modification the public, or when the request would adversely impact other penological interests, including deterring crime and maintaining inmate discipline.

2. ~~In all determinations of reasonable accommodation,~~ Public safety and the health, safety, and security of all inmates and staff shall remain the overriding considerations in determining what constitutes a reasonable modification accommodation.

(b) The department, taking into consideration all of the available resources and giving consideration to the expressed preference, if any, of the inmate, need not take an action to provide accessibility to a service, program or activity if the action would impose or require:

1. An undue financial burden on the agency where, in a cost benefit analysis, its costs would be an unjustifiable expenditure use of public funds.

2. An undue administrative burden on the agency, or

3. A fundamental alteration of the nature of the service, program, or activity.

(c) An institution cannot deny a request for accommodation using the undue burden defense without contacting the Central Office ADA Coordinator. The Central Office ADA Ceordinator shall consult with the appropriate central office program area in which a particular accommodation is requested and any necessary department staff before making a determination that a requested accommodation would constitute an undue financial or administrative burden on the agency or a fundamental alteration to the nature of a service, program, or activity. The final decision that compliance with the requested accommodation would result in an undue financial or administrative burden or a fundamental alteration of the nature of a service, program, or activity shall be made by the Secretary or his or her designee after consideration of all resources

available for use in the funding and operation of the service, program or activity. The final decision must be accompanied by a written statement of the reasons for reaching the conclusion. The decision and the statement will be retained by the Central Office ADA Coordinator ~~in the confidential ADA file.~~

(d) Compelling Security Concern ~~Direct Threat~~. The ADA coordinator, who is notified or otherwise becomes aware of a compelling security concern ~~direct threat~~ relating to a reasonable modification, will consult with the warden, the appropriate central office program area in which the particular modification ~~accommodation~~ is requested, and any other necessary departmental staff prior to determining whether a requested modification ~~accommodation~~ poses a compelling security concern ~~direct threat~~.

(e) Equally Effective Means. A request for a particular accommodation, after considering all available resources and the express preference, if any, by the inmate, shall be denied if an equally effective reasonable modification or access to a program, service, or activity can be afforded through an alternate method which is less burdensome ~~costly~~ or intrusive. ~~Alternative methods that are less costly or intrusive to the existing operation or program shall be utilized to provide reasonable access in lieu of modifications requested by the inmate so long as they are equally effective.~~

(f) A request that does not present a violation of Title II of the ADA does not qualify as an ADA issue and will be returned without action ~~denied as not qualifying as an ADA issue.~~

(5) Complaints and Accommodation Appeals. Inmates who have a complaint alleging a violation of the Americans with Disabilities Act or who want to appeal the denial of a request for reasonable accommodation shall follow the guidelines set forth in Chapter 33-103, F.A.C.

(6) Auxiliary Aids and Services. The Department will provide inmates with auxiliary aids and services whenever necessary to ensure equal access to programs, services, or activities offered by the Department. When an auxiliary aid or service is deemed necessary to provide an inmate with an equal opportunity to participate in a program, service or activity, it shall be provided at the expense of the department.

(7) ~~Health Care Appliances.~~

~~(a) Prescription and approval.~~

~~1. A physician or clinical associate shall prescribe and approve health care appliances for eligible inmates if these devices meet medical necessity, safety, and security requirements. Health care appliances include orthopedic prostheses, orthopedic braces or shoes, crutches, canes, walkers, wheelchairs, hearing aids, and other items which are necessary to accommodate the inmate's needs.~~

~~2. If security staff denies a health care appliance to an inmate for safety or security reasons, the Chief of Security, or his or her designee, shall immediately consult with the Chief Health Officer, or his or her designee, to determine necessary action to accommodate the inmate's needs.~~

~~3. Accommodations shall include modifying the appliance or substituting a different appliance, at the department's expense, as long as its function is equivalent or superior. Such modification or substitution shall instead be the responsibility of the department's Comprehensive Health Care Contractor (CHCC) if the contract between the department and its CHCC so provides.~~

~~(b) Possession of Health Care Appliances.~~

~~(a) 4. Health care staff shall identify health care appliances as property of the inmate and appropriately document them as such in accordance with Rule 33-602.201, F.A.C.~~

~~(b) 2. Any health care appliance the disabled inmate has properly obtained while in the department's custody shall not be removed unless there are legitimate and documented safety or security reasons.~~

~~(c) 3. Health care appliances shall be removed if a physician or dentist determines that the appliance is no longer medically necessary or appropriate.~~

~~(e) Maintenance of Health Care Appliances. It is the joint responsibility of the department, or, if provided in contract, its CHCC, and the inmate to maintain all health care appliances in good repair and operation. When an appliance is in need of repair or replacement, the inmate shall notify staff of his or her needs by a medical call out or a request to see a doctor.~~

~~1. Department staff, or, if provided in contract, its CHCC's staff, shall schedule the inmate for an appointment and evaluate the condition of the appliance.~~

~~2. Once the need for repair or replacement is verified, the inmate shall be issued an appropriate appliance or accommodation.~~

(8) Educational and work programs. Inmates with disabilities shall have the opportunity to participate in educational and work programs.

(a) Inmates shall be evaluated to participate in an educational or work program on a case-by-case basis.

(b) Eligibility to participate in any program is dependent on the inmate's ability to perform the essential functions of the program with, or without, reasonable modification to rules, policies, or practices ~~accommodation~~ and on meeting the department's requirement for the program.

(9) Visiting. Inmates with disabilities will be provided reasonable modifications ~~accommodations~~ for purposes of

visitation.

Rulemaking Authority 944.09 FS. Law Implemented 944.09 FS. History—New 8-19-01, Amended 2-8-06, 11-22-06, 1-23-13, 9-30-13, 11-20-16, _____.

NAME OF PERSON ORIGINATING PROPOSED RULE: Darren Fancher, Facilities Management Director

NAME OF AGENCY HEAD WHO APPROVED THE PROPOSED RULE: Julie L. Jones, Secretary

DATE PROPOSED RULE APPROVED BY AGENCY HEAD: September 5, 2018

DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAR: June 19, 2018