IMLS ADVISORY: E-BOOK READER LENDING PROGRAMS

The purpose of this advisory is to provide information to help ensure that electronic book readers, and other emerging technologies, are used in library settings in a manner that is permissible under Federal law.

Because of the increasing availability and use of e-books, many library systems are implementing e-book reader lending programs for their users. Some e-book readers, however, are inaccessible to individuals who are blind or have low vision because they lack text- to-speech functions, as well as audio or tactile feedback for navigational controls. ***Establishing or maintaining a program of lending technological devices when the technology is inaccessible to an entire population of individuals with disabilities is discrimination*** prohibited by Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act of 1990 (ADA), ***unless those individuals*** are provided accommodations or modifications that permit them to ***receive all the benefits provided by the technology in an equally effective and equally integrated manner***.

As officials of agencies with important responsibilities for the implementation and enforcement of the Federal disability laws, we ask that you review and use the information below to help ensure that your programs and those of your grantees comply with the law.

THE FEDERAL DISABILITY LAWS:

The Rehabilitation Act of 1973 is a Federal law that prohibits discrimination on the basis of disability in all programs or activities that receive Federal financial assistance. Section 504 of the Act provides:

> No otherwise qualified person with a disability "shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794.

The Institute of Museum and Library Services (IMLS) enforces Section 504 with respect to agencies and organizations that receive federal financial assistance from IMLS. IMLS's implementing regulations can be found at 45 C.F.R. § 1180.44(b) and 45 C.F.R. Part 1170. State Library Administrative Agencies are responsible for communicating the requirements of Section 504 to their sub-grantees and ensuring their compliance with the law and IMLS's regulations.

The Americans with Disabilities Act of 1990 (ADA) is a Federal civil rights law prohibiting discrimination on the basis of disability.

Title II of the ADA covers interactions with "public entities," including any department, agency, or instrumentality of a State or local government. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefit of services, programs or activities of a public entity, or be subjected to discrimination by any such entity." *See* 42 U.S.C. § 12132. State agencies and public libraries must comply with this title.

Title III of the ADA applies to places of public accommodation, including private libraries and academic institutions. Under this title, individuals with visual impairment may not be discriminated against in the full and equal enjoyment of all of the goods and services of places of public accommodation; they must receive an equal opportunity to participate in and benefit from these goods and services; and they must not be provided different or separate goods or services unless doing so is necessary to ensure that their access to the goods and services is equally as effective as that provided to others. *See* 42 U.S.C. § 12182.

The U.S. Department of Justice (DOJ) is responsible for enforcement and implementation of the ADA. *See* 42 U.S.C. § 12131 *et seq*.

The general requirements of Section 504 and the ADA reach equipment and technological devices when they are used by public entities or places of public accommodation as part of their programs, services, activities, goods, advantages, privileges, or accommodations.

RECENT EXPERIENCES:

Two libraries recently considered the accessibility of their e-book lending programs and procedures when they received complaints for lack of accessibility from library users with visual impairments. While both situations involved a "settlement," the libraries' experiences provide insight on the application of the disability laws to e-book reader programs.

In the settlement of an administrative complaint filed by the National Federation for the Blind (NFB) against the Sacramento Public Library Authority, **the U.S. Department of Justice determined that the Library's lending of Barnes & Noble NOOK e-book readers that are inaccessible to persons who are blind or others who need accessibility features violates title II of the American with Disabilities Act**. DOJ explained that, by providing e-readers that (1) do not allow access to menus and controls through means other than a touch screen interface (without audio and tactile feedback); and (2) lack a text-to-voice engine that renders e-content aurally, the Library was violating title II of the ADA by excluding both current and future patrons with disabilities from participating in, and denying them the benefits of, its services, programs, or activities. The fact that Sacramento's lending program was only in its pilot stage and not permanent did not affect the outcome. DOJ concluded that the program, even if only a pilot, was still a service, program, or activity of a public entity, and subject to the ADA.

To resolve the complaint, the Library agreed to purchase a number (18) of accessible e-

readers using a population-based formula. (The Library divided the population of Sacramento County by the number of NOOKs in circulation to come up with a "Population to NOOK ratio." It then multiplied this ratio by the number of individuals in the County are legally blind, require special equipment because of visual impairment, or who have a health problem that requires special equipment to arrive at the number of accessible NOOKs it needed to serve individuals with visual impairment. The Library used data from the California Health Interview Survey to estimate the effected population.)

The Library also agreed to pilot a lending program to prepare for the rollout of accessible readers for patrons who are blind or need accessibility features; deploy accessible readers loaded with content substantially equivalent to that on the inaccessible readers already in circulation, and provide training to staff members. The Library agreed that, until all titles loaded on the accessible e-readers were the same as those on the inaccessible devices (unless not commercially available for the accessible devices), no additional content would be loaded on any of the inaccessible devices. New content could only be added if equally available on all e-readers. While the Library agreed to reserve the accessible e-readers for those who are blind or need accessibility features, the Library agreed not to require proof of a disability (e.g., a doctor's note) before loaning an e-reader, but could require a user to attest in writing that the e-reader was being borrowed by or for an eligible individual. **Finally, the Library agreed that it would acquire only digital technology that does not exclude persons who are blind or others who need e-reader accessibility features, "with the goal that the technologies offered by the Library in connection with its services, programs, or activities offer equal access to the Library's patrons with disabilities."** The settlement agreement, which is available at http://www.ada.gov/sacramento_ca_settle.htm, is in effect from August 29, 2012 through August 28, 2015.

The NFB brought a lawsuit against the Free Library of Philadelphia for its alleged failure to comply with Section 504 and title II of the ADA when four blind library users were unable to borrow accessible e-book readers through its lending program. Like Sacramento, the Free Library lent NOOK e-book readers (the NOOK Simple Touch). The Free Library preloaded the e-readers with 25 books, but would add additional e-book titles upon request prior to checkout. In its complaint, the NFB noted that the Library had received $25,000 of Library Services and Technology Act funding to initiate its program. The plaintiffs alleged that, in addition to not complying with Section 504 and title II of the ADA, the Library did not comply with IMLS's Section 504 regulations, which prohibit recipients of funding to "[p]rovide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless . . . necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others." 45 C.F.R. § 1170.12(a)(4). Citing DOJ's ADA regulations, the plaintiffs noted that the Library was required to administer its services, programs, and/or activities in the most integrated setting appropriate to the needs of disabled and non-disabled users alike. 28 C.F.R.
§ 35.130(d).

In settling the case, the NFB and Free Library recognized their "common goal of creating a single, integrated e-book reader lending program that uses only e-book reading devices that are accessible to both blind and non-disabled library patrons." To this end, the Free Library agreed to "purchase only mainstream e-reading devices that are fully accessible to both patrons who are blind and patrons who do not have such disabilities." To address immediate needs, the Free Library agreed to purchase ten fully accessible e-readers, so that two could be made available at each of its five branches that currently lend NOOK devices for patrons with visual impairments or other print disabilities, and to retire all inaccessible e-book readers within four years of the effective date of the settlement agreement. In order to "effectuate full and equal access by the blind to the Library's technology-based programs or services, including its digital collections," the Free Library agreed that all new contracts with its vendors would include an "accessibility clause requiring that information technology products and services sold to the Library [would] not cause the Library to be in violation of its obligations under the Rehabilitation Act or title II of the ADA." In addition to providing training to its staff and noticing the availability of the accessible e-book readers, the Library agreed that it would not require proof of a disability to borrow an accessible device, although it could require borrowers to attest in writing that the device was being borrowed on behalf of someone eligible for the device. The settlement agreement, which is available at http://docs.justia.com/cases/federal/district-courts/pennsylvania/paedce/2:2012cv02373/461996/14/1.html, is in effect from October 22, 2012 through October 21, 2016.

THE OPPORTUNITY:

Ensuring equal access to emerging technology in libraries is a means to the goal of full integration and equal opportunity for library users with disabilities. Technology is the hallmark of the future, and technological competency is essential to preparing individuals for future success. Emerging technologies are a resource that enhances access to information and learning for everyone, and perhaps especially for individuals with disabilities. Technological innovations have opened a virtual world of commerce, information, and education to many individuals with disabilities for whom access to parts of the physical world may remain challenging.

We encourage libraries to incorporate the following technology "best practices" into their programs:

- Build an accessible program from the outset:
    - Make accessibility a key program criterion.
    - Ask (or require sub-grantees to ask) specific questions of vendors, and have vendors demonstrate and document their responses.
- Periodically assess community needs, including through surveys and outreach.
- Provide all library users (including individuals with disabilities) with the opportunity to access the same information, engage in the same interactions, and enjoy the same services with substantially equivalent ease of use.

We appreciate your consideration of this essential access issue and look forward to working with you to ensure that technological advances are used for the benefit of all library users. The Department of Justice operates a toll-free, technical assistance line to answer questions with regard to the requirements of federal laws protecting the rights of individuals with disabilities. For technical assistance, please call (800) 514-0301 (voice) or (800) 514-0383 (TTY). Specialists are available Monday through Friday from 9:30 AM until 5:30 PM (ET) except for Thursday, when the hours are 12:30 PM until 5:30 PM. These specialists have been trained specifically to address questions regarding accessible electronic book readers. Additional guidance from the U.S. Department of Education is available at http://www2.ed.gov/about/offices/list/ocr/docs/dcl-ebook-faq-201105.pdf