

# THE CAMPLINE

Providing Camp-Specific Knowledge on Legal, Legislative, and Risk Management Issues

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Photo courtesy of Camp Millhouse, South Bend, IN, Leah Tribbett

## THE AMERICANS WITH DISABILITIES ACT REVISITED

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### I. Introduction



On the 25<sup>th</sup> Anniversary of the enactment of the Americans with Disabilities Act (the ADA or the Act), we have been asked to refresh our latest article for *The Campline* on this topic ("ADA Title III: Access to Recreation Programs for people With Disabilities," January 2006, [www.ACACamps.org/resource-library/articles/ada-title-iii-access-recreation-programs-people-disabilities%E2%80%9494-what-does-it-mean-me-update](http://www.ACACamps.org/resource-library/articles/ada-title-iii-access-recreation-programs-people-disabilities%E2%80%9494-what-does-it-mean-me-update).) In the intervening nine years, much has happened in this area of the law, including amendments to the Act and its regulations and a growing body of reported case law and administrative proceedings. First, we will summarize and update the main points of our 2006 article. We will then provide examples of case law and settlements reflecting current ADA discrimination claims and settlements and offer some key take-aways. Lastly, we offer a selection of resources for camps as they go forward in addressing these important issues.

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We restrict our coverage of ADA Title III to access to programs and services, versus access to and design for “buildings and other structures.” Title III does cover this latter set of issues, and there have been important changes to those portions of the law as well. See, for example, a recent 2013 *The Campline* article discussing these issues: [www.ACAcamps.org/resource-library/articles/utilizing-civil-rights-law-betterinclude-participants-disabilities](http://www.ACAcamps.org/resource-library/articles/utilizing-civil-rights-law-betterinclude-participants-disabilities).

ADA Title I deals with access to employment requirements for “covered entities” and Title II with access requirements for “public entities.”<sup>1</sup> Our article does not address these sections of the Act. That being said, Title II addresses access to program issues for camps run by public entities (for example, a camp run at a city recreation center). Fortunately, the ADA Title III

requirements we discuss in this article are similar under both titles. Also, keep in mind that a camp governed by Title III may be subject to Title II or other federal access law<sup>2</sup> requirements if it is operating in conjunction with entities governed by those other laws.<sup>3</sup>

Another point important for camps to understand — an aggrieved individual claiming he or she has been discriminated against on the basis of a disability will likely be relying on both state and federal anti-discrimination laws. That is, most states have companion state anti-discrimination laws. These laws may provide equal or greater protections than the ADA, and camps should understand the compliance requirements (if different than federal law) for those laws as well.<sup>4</sup>

Most privately run camps will likely fall within these categories. However, note that Title III articulates the need for a “place” of public accommodation. If a camp is a tripping camp, for example, and does not have a facility or own, lease, or operate a physical “place,” does Title III apply? Cases have gone various directions on this qualifier, and it is worth careful study by your legal counsel if you believe your camp may not be required to comply.<sup>6</sup> Title III also contains an exemption for, among other organizations, “religious organizations or organizations controlled by religious organizations,” and this exemption would extend to a qualifying camp. Affected camps should have their legal counsel study the scope of the exemption to determine its applicability, particularly considering state anti-discrimination laws that may not contain the exemption.<sup>7</sup>

Ultimately, camps that question Title III’s application to their organization on whatever basis may determine that it is practical, ethical and appropriate to comply with the spirit of the Act, despite an exemption or qualifier. Some state child care licensing laws (licensing required in some states for certain types of camps) require federal ADA compliance and ACA Standards for Accredited Camps requires appropriate compliance with The Act as well.<sup>8</sup> Again, check with your legal counsel if you have any question about coverage.

### The Act, as originally drawn in 1990 (and as it remains today) defines an individual with a disability as one who:

1) has a physical or mental impairment that substantially limits one or more major life activities (for example, caring for one’s self, walking, seeing, hearing, speaking, breathing, learning, concentrating, communicating); 2) has a record of such an impairment<sup>9</sup>; or 3) is regarded as having such an impairment<sup>9</sup>. Such individuals would include, for example, those who are blind or deaf, have HIV, diabetes or cerebral palsy, suffer from a psychological or mental condition, or (as we will discuss below) suffer significantly from a digestive condition or food allergy. Federal regulations that accompany the law provide examples of what are and are not considered disabilities under the ADA.<sup>10</sup> The list is not exclusive, primarily because the law is intended to be inclusive rather than restrictive.

Since our 2006 article, the Act underwent significant amendments in 2008 with subsequent amendments to its governing regulations in 2010. The expressed intent of these changes was to clarify the (intended) broad and liberal interpretation of the Act, strike down court (including U.S. Supreme Court) decisions that had issued rulings shrinking coverage of (or erroneously construing) the Act, and amending the Act to, in most cases, further expand its application.<sup>11</sup> The goal was to bring more persons, more easily, under the Act’s protection.



Photo courtesy of Victory Junction, Randleman, NC

one relevant area, declaring that being only “regarded” as having a disability does not justify providing accommodation or modifications (for obvious reasons).<sup>12</sup> Regulation expansion include that PPA’s shall appropriately permit individuals with disabilities to use service animals (a revised definition) and “other power-driven mobility devices.” (see regulations for specific language).<sup>13</sup> These are only examples of the sweeping changes.

Under Title III, qualifying organizations are required to consider reasonable modifications to their “policies, practices and procedures” to provide access to those with disabilities, including by providing “auxiliary aides and services.”<sup>14</sup> This can include, for example provision of interpreters or adaptive equipment for someone who is hearing impaired or allowance of other power-driven mobility devices. However, organizations are not required to provide personal devices or attendants (to address the individual’s personal needs).<sup>15</sup> Importantly, an organization is entitled to limit modifications in light of legitimate safety requirements<sup>16</sup> (ideally addressed in the organization’s essential eligibility criteria (EEC) — see below) or, in light of any other (legally) legitimate issues (also see below).

### For example, the amendments greatly expand the definition of “disability,” and emphasize that terms such as “substantially limits” and “major life activities” should be broadly, rather than narrowly, construed.

The amendments also provide an expanded list of “major life activities” to include (among other additions) the operation of a “major bodily function” and identify that the determination of whether an impairment substantially limits a major life activity shall be made without regard to mitigating measures (other than eye glasses or contact lens). The amendments did tighten the Act in

## II. ADA TITLE III COMPLIANCE REQUIREMENTS

Title III of the ADA requires that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”

Quite simply, qualifying organizations providing services may not discriminate against an individual with a disability — on the basis of that disability — as outlined in the Act.

Private entities are required to comply with the ADA if, among other criteria, they own, lease, lease to, or operate a place of public accommodation (PPA) that “affects commerce.” The Act (and accompanying regulations) defines a variety of PPAs. Under the regulations, a PPA is defined as a “facility” operated by a private entity, whose operations affect commerce, and fall within one of the categories listed. Qualifying PPAs include inns, hotels, zoos, parks, schools, gymnasiums, health spas and other places of exercise or recreation. Organizations that fall within a broad interpretation of these categories are subject to The Act.<sup>5</sup>

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Photo courtesy of Skyline Camp and Retreat Center, Almont, MI

### Icon Key

The icons below correspond to article topic areas. Use them to find the articles that best match your interests!

-  EDUCATION
-  POSITION STATEMENT
-  ISSUES
-  PUBLIC POLICY AGENDA DEVELOPMENT
-  LEGISLATIVE
-  REGULATORY ADVOCACY
-  MOBILIZATION
-  RELATIONSHIPS

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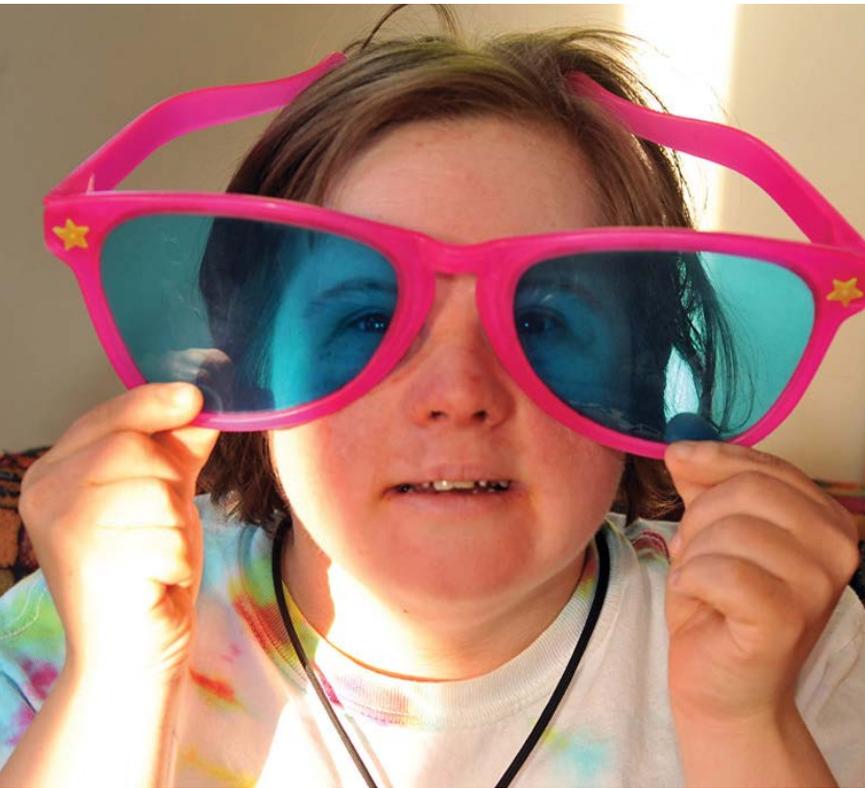


Photo courtesy of Skyline Camp and Retreat Center, Almont, MI

Organizations may ask program applicants questions about their ability to participate in the program. Questions about an applicant's health or medical conditions (medical screening) allow the organization to understand and prepare for health issues or limitations and alert the camp to possible risk management issues for all campers.<sup>17</sup> In addition, this screening is consistent with the organization's effort to align with its own non-discriminatory safety/risk management focused EEC (if those exist), and with its need to determine whether or not it can implement modifications to allow access.

As mentioned above, an organization is permitted (not required) by Article III to develop essential eligibility criteria (EEC) for its activities.<sup>18</sup> These are, generally, the cognitive ("thinking", "processing") and physical criteria the camp determines necessary for participation in a given activity, and are based largely on risk management considerations. EEC allow an applicant to identify suitability issues in the earliest stages of considering

a program. EEC should be simple and straightforward and should apply equally to all applicants, regardless of a disability. EEC may range from the quite general "ability to understand and follow instructions" to the more specific "can detect signals of warning when in rockfall environments." An organization's EEC may be posted at its website, or in other readily accessible materials.<sup>19</sup>

EEC and medical screening inquiries will assist interested persons in deciding if participation is wise, or even possible, and if so, with what modifications. It also encourages dialogue and information

exchange between applicants and the organization early on in the process. Developing these criteria and collecting health information is important not only in planning for those with disabilities. These strategies provide valuable information for all applicants.

Organizations are not allowed to impose EEC or other eligibility criteria that screen out, or tend to screen out an individual with a disability, unless such criteria are necessary for the provision of those services. An organization may impose legitimate safety requirements that are "necessary for safe operation," which can logically be incorporated into any EEC. However, any safety criteria must be based upon "actual risks" and not on speculation, stereotypes, or assumptions about people with disabilities.<sup>20</sup> Ultimately, an organization must allow people with disabilities access to programs in the most integrated setting "appropriate to the needs of the individual" (Title III law and regulations provide that separate programs may be appropriate in limited circumstances).<sup>21</sup> Access (including proposed modifications) is not required, however, if it would, in appropriate circumstances: 1) result in an undue financial or operational burden on the entity; 2) fundamentally alter the nature of the program or activity (for the individual and others); or 3) pose a "direct threat" to the safety of others attending the program. Regulations and case law reflect that these three limiting criteria involve a particularized inquiry, to avoid assumptions or generalizations.<sup>22</sup>

**In summary, qualifying organizations, including camps, are required to allow people with disabilities integrated (that is, not separate, except in special circumstances) access to their programs — and make reasonable modifications to facilitate that access, as appropriate. An organization may be relieved of an obligation to accommodate a disability if that accommodation is "unreasonable" — in terms of cost, safety considerations, or an alteration of the fundamental nature of a program.**

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### III. ALLEGED DISCRIMINATION — LEGAL REMEDIES

What are the legal remedies for an individual claiming he or she has been discriminated against in attempting to enroll or participate in a qualifying camp's program?

First of all, the parties can — and hopefully will be — in an ongoing dialogue and information exchange about the issues, and can resolve those issues informally by either agreeing that access is appropriate with or without program modifications, or inappropriate.

However, if the parties are stuck, there are options available that DON'T involve running to the courthouse. The ADA encourages alternative dispute resolution between the parties with the goal of bringing the allegedly offending party into compliance, determining that no discrimination occurred, or other resolution. Importantly, the U.S. Department of Justice offers this opportunity at no charge to the parties.<sup>23</sup> The goal, of course, is to provide opportunities for organizations to allow appropriate and lawful access to programs for those with disabilities — not to encourage lawsuits.

Alternatively, an individual can bring a private lawsuit, asking the court for injunctive relief (typically, the right to access the program or obtain a requested modification). If the individual is successful in proving the alleged discrimination, the individual can also receive an award of attorney's fees and costs spent in pursuing the action.

The individual can also seek relief through the Department of Justice and ask that the government take action (or intervene) on the individual's behalf to address the alleged discrimination. If the Attorney General chooses to take up the individual's complaint, remedies can include an injunction requiring the party found to

have been in violation of the law to take the requested action, penalties for violation of the ADA, or money damages awarded to the discriminated individual.

The government can also take action independently, for example, if it becomes aware of a pattern of discrimination or the alleged unlawful action involves a matter of general public concern.<sup>24</sup>

Companion state laws also exist which provide varying degrees of protection from discrimination against those with disabilities. Camps should consult with local counsel regarding the scope of those laws.

### IV. REPORTED CASE LAW AND SETTLEMENTS PROVIDE TAKE-AWAYS FOR CAMPS

Challenging issues have arisen since we last wrote on this topic, producing an interesting body of case law and reports of enforcement proceedings that provide new insights into the Act and its application to camps. Importantly, because all three federal disability anti-discrimination laws are similar in their purpose, scope and requirements, courts dealing with alleged disability discrimination issues will often rely, interchangeably, on published legal opinions ruling on the Rehabilitation Act or ADA Title II or Title III cases.<sup>25</sup>

Participants (including campers) present new issues, or urge old issues with new intensity, regarding matters of health and behavior. Recent cases (not exclusively involving camps) address the following disabilities: HIV infection, Tourette's syndrome, diabetes, epilepsy, autism, Down syndrome, a susceptibility to heat stroke (alleged disability), Dwarfism, celiac disease and food allergies. Selected cases and reports involving organizations, including camps reflect:

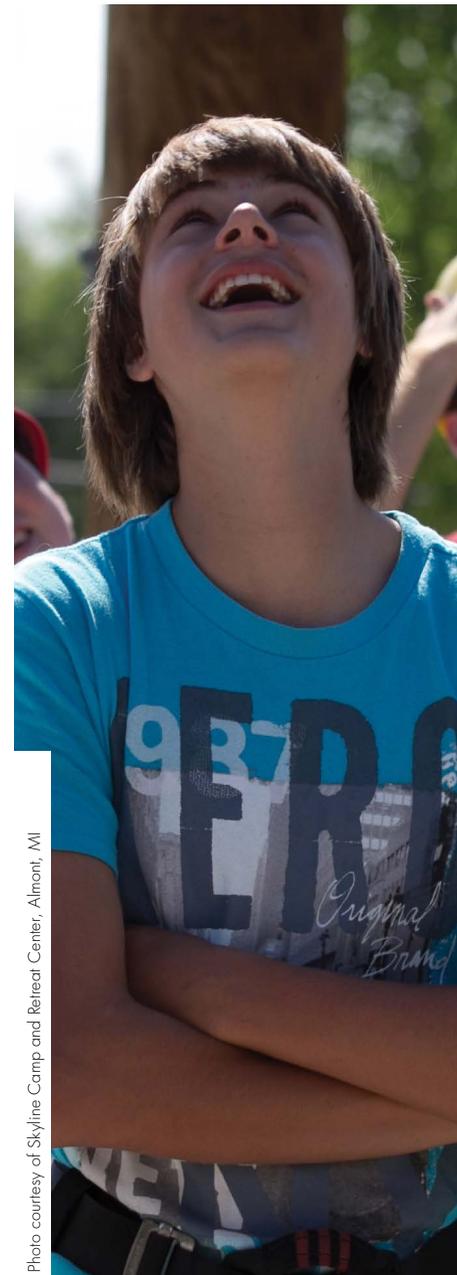


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## Selected cases and reports involving organizations, including camps reflect:

**1.** A court ordering a camp to accept the application of a nine year old child with HIV and pay penalties following the camp's discriminatory action in denying the child's participation in a week long basketball camp, claiming that the child's presence at the camp would pose a "direct threat" to the safety of other campers.

**2.** The alleged bullying of a teenaged child diagnosed with Tourette's syndrome and ADHD, who later committed suicide (the child's parents claiming that the organization essentially denied him equal access to the program by not intervening) — the federal claims were ultimately dismissed.

**3.** A camp agreeing (among other stipulations) in a Settlement Agreement entered into with the government (acting after a complaint of discrimination made by the parents), not to discriminate against children with diabetes and provide those children with equal opportunities to access its programs; to adopt and post a no discrimination policy; to institute mandatory staff training regarding its no discrimination policy and ADA compliance requirements; and to pay a penalty for its discriminatory treatment.

**4.** A camp agreeing (among other stipulations) in a Settlement Agreement entered into with the government (acting after complaint of discrimination made by parents) not to discriminate against children with epilepsy and provide those children with equal access to its programs, specifically, to allow the child discriminated against to attend camp for all future sessions; to adopt a no discrimination policy, epilepsy policies and Title III compliance policies; to institute mandatory staff training on these policies; and to pay civil damages to the offended party.

**5.** A court finding that a plaintiff presented at least a preliminary showing of discrimination (to avoid a motion to dismiss) when a camp refused to admit a child (diagnosed with Down syndrome and autism) without first reviewing his school (highly confidential) Individual Health Plan.

**6.** A youth wrestling league agreeing (among other stipulations) in a Consent Decree entered into with the government (acting after complaint of discrimination made by parents of a child with dwarfism when the league failed to allow a modification for the child to "play down" an age division) not to discriminate against individuals with disabilities; to adopt and post a no-discrimination policy; to institute mandatory training on those policies and its ADA Title III requirements; and to pay civil damages to the offended party.

**7.** A University that required students to sign up for a meal plan, agreeing (among other stipulations) in a Settlement Agreement with the government to adopt and post non-discrimination policies; modify its policies to accommodate students with celiac disease and other serious food allergies; and to pay compensatory damages to offended students<sup>26</sup>.

What can we draw from this growing body of law? Here are some valuable observations that can serve camps well, in the ongoing endeavour to comply with the ADA:

**🔍 OBSERVATION:** Individuals and the government are taking more progressive action in seeking compliance with the Act. Whether actions are initiated by an offended individual filing a civil action or notifying the Justice Department, decisions and/or settlements often include some or all of the following: requirements that the organization found to have been in violation of the law, 1) cease discrimination, 2) develop a policy for its website and other materials publicly stating that it will not discriminate against individuals with disabilities, 3) implement policies to educate and train staff on ADA access to program issues and, specifically, to understand the need to consider reasonable modifications to policies and practices, 4) allow the offended individual access to the organization's program, with designated modifications, 5) pay penalties for its non-compliance (after 4/2014, up to \$75,000 for the first violation and \$150,000 for a second), 6) pay damages to the offended individual, 7) pay the offended individual's attorneys' fees.

**★ OPPORTUNITY:** Knowing these things, what action can camps take to understand the law, endeavour to comply with it, and avoid legal action?

First of all, many camps are afraid of allowing individuals with disabilities access to their programs, knowing that many of the activities campers engage in are already infused with risks. However, the sampling of decisions noted above demonstrates that camps can't avoid the issue. It is better to prepare up front than to wait until you are faced with the issues.



### CONSIDER THE FOLLOWING SUGGESTIONS

**1.** Talk with an ADA Technical Assistance Center! There are ten centers located around the country. If you call 1-800-494-4242 or go to [www.adata.org](http://www.adata.org) you will automatically be directed to the center closest to you. These professionals are incredibly knowledgeable and can assist you in prioritizing your ADA compliance efforts.

**2.** Take a top down look at the activities you are offering to your clients. Develop (with appropriate assistance) non-discriminatory EEC for your activities and programs identifying the physical, behavioural and cognitive requirements for participation, focused on risk management and safety considerations. Post these on your website and make those available to all inquiring about your programs. EEC can assist the camp in healthy information exchange with all camper applications — in determining whether your camp is a good choice for a camper's interest and needs. Importantly, it encourages early dialogue between the camp and interested parties, allowing thoughtful discussion about appropriate program modifications, rather than difficult decisions made just before camp starts! Please see Camp Business Magazine, 2012, "Access to Programs — the Value of Developing Essential Eligibility Criteria" for a targeted look at the value of EEC.

**3.** Develop a no-discrimination statement, and include that your camp will not discriminate against individuals with disabilities. Include this statement on your website and in your camp materials.

**4.** Develop policies consistent with ADA Title III compliance and provide appropriate staff training. Importantly, staff who are speaking with interested individuals via the internet, social media or on the phone should be versed in the law, and encouraged to engage in early dialogue to determine the ability of individuals to participate, with or without modifications. Again, if your camp has developed EEC, it can encourage these conversations early on!

**5.** Review your admissions policies and criteria to assure these materials do not discriminate against individuals with disabilities, and do not inadvertently "screen out" or exclude individuals with disabilities unless you have a specific, legitimate (for example, safety/risk management) reason for doing so.

**6.** Develop questions (typically included in health/medical screening) that elicit information from participants about potential conditions or limitations, and that logically tie into your EEC (if these have been developed).

**7.** In addition to carefully listening to the affected individual's/parent's input, use outside resources (e.g., a consulting physician, interest groups, adaptive equipment manufacturers/sellers, associations for specific disabilities, the individual's physician) in making decisions about potential modifications and associated safety/risk management issues.

**8.** If you determine that an individual has a medical condition or disability, decide whether they can participate in the program, with or without modifications to the program. In considering modifications, analyse those three factors — that is, will allowing access with or without modifications 1) fundamentally alter the nature of the program; 2) result in an undue burden on the camp; or 3) create a direct threat to safety? To assist, you can refer to that break down of EEC you may already have in place.

**9.** Accurately document any screening decisions you make, whether you allow an individual to participate or not, and whether or not you believe it involves the ADA. Sometimes it can be difficult — on the front end — to determine whether an individual's "condition" is a protected disability under the ADA. Importantly, many conditions may not qualify as ADA protected disabilities but clearly present a medical or other screening concern. In close cases or gray areas (for example, is this a protected "disability" or not), consider undertaking an ADA analysis. You can address any ADA concerns as well as any medical or safety concerns. Document your analysis of the issues and the basis for the acceptance or denial.

**10.** If an individual threatens to file a complaint or take legal action against your camp after failing to negotiate a plan with you, encourage mediation via the Justice Department. This is offered at no cost to the parties, and can result in an effective plan that preserves your joint relationship, and effectively resolves the dispute. Many people (including attorneys) are unaware of this excellent option. Find information and resources at [www.ada.gov/mediate.htm](http://www.ada.gov/mediate.htm).

For all of the footnote references, please read the online version of this article at: [www.ACAcamps.org/campline/winter2016](http://www.ACAcamps.org/campline/winter2016).



Photo courtesy of Skyline Camp and Retreat Center, Almont, MI

## V. RESOURCES –IN ADDITION

### TO THOSE HIGHLIGHTED ABOVE:

- ADA U.S. Department of Justice website [www.ada.gov](http://www.ada.gov) and information hotline at 800-514-0301 (voice); 800-514-0383 (TTY)
- ADA National Network: A website identifying helpful information including the 10 national regional technical assistance centers at [www.adata.org](http://www.adata.org) and information line at 1-800-494-4242 (automatically directing you to the technical assistance center closest to your area code)
- The National Center on Accessibility: [www.ncaonline.org](http://www.ncaonline.org)
- United States Department of Justice Civil Rights Division: Government website providing access to both the text of the ADA law, as well as the current regulations: [www.ada.gov/2010\\_regs.htm](http://www.ada.gov/2010_regs.htm); [www.ada.gov/regs2010/ADAregs2010.htm](http://www.ada.gov/regs2010/ADAregs2010.htm)
- American Camp Association – All ADA-related resources: [www.ACAcamps.org/about/who-we-are/public-policy/americans-disabilities-act-ada-applicability-camps](http://www.ACAcamps.org/about/who-we-are/public-policy/americans-disabilities-act-ada-applicability-camps)

*This article contains general information only and is not intended to provide specific legal advice. Camps and related organizations should consult with a licensed attorney regarding application of relevant state and federal law as well as considerations regarding their specific business or operation.*

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<sup>1</sup> 42 U.S.C. 12111 et seq. and 42 U.S.C. 12131 et seq., respectively.

<sup>2</sup> Access requirements for federal agencies, like the U.S. Forest Service, are governed by the Rehabilitation Act, 29 U.S.C. 794. So, for example, a camp operating under a U.S. Forest Service permit may need to comply with Rehabilitation access requirements, or a camp operating on land owned by a state or local entity (a park, for example), may need to comply with ADA Title II access requirements – to the extent those requirements are different.

<sup>3</sup> See ADA Title III Technical Assistance Manual, III- 1.7000, Illustration 1.

<sup>4</sup> 42 U.S.C. 12201(b); 28 CFR 36.103(c).

<sup>5</sup> 28 CFR 36.104; 42 U.S.C. 12181(d) and (7). “Facility” means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure is located.

<sup>6</sup> In *Brown v. Tenet ParaAmerica Bicycle Challenge, et al.*, 959 F. Supp. 496 (Ill. 1997), plaintiff alleged he had been denied access to a race event, but not to an actual PPA. The Court held that the organizer was not a PPA – and that there needed to be a denial of access to a physical “place” of public accommodation; see also *Elitt v. USA Hockey, et al.*, 922 F. Supp. 217 (D.C. Mo. 1996) and discussion in *Staley v. Nat’l Capital Area Council*, 2011 U.S. Dist. LEXIS 61986. However, compare those cases with the Court’s holding in *Schultz v. Helmet Youth Pony League, et al.*, 943 F. Supp. 1222 (D.C. Ca. 1996): Title III’s definition of “place of public accommodation” is not limited to actual physical structures with definite physical boundaries. Therefore, Defendants are [owners and operators of] a “place of public accommodation” under the ADA irrespective of their link to any physical facilities.” See also: *Nathanson v. Spring Lake Park Panther Youth Football Ass’n*, 2015 U.S. Dist. LEXIS 120530.

<sup>7</sup> 42 U.S.C. 12187; 28 CFR 36.102(e); Title III ADA Technical Assistance Manual III-1.5000 to 1-5002; regarding the inter-relationship of the ADA and state law, see: 42 U.S.C. 12201(b) and 28 CFR 36.103(c).

<sup>8</sup> See, e.g. Co. Licensing Law regulations at 12 CCR 2509-8 (section 7.701.14); ACA Accreditation Process Guide, 2012 Ed., (e.g.) SF- 1, SF-12 and HR-6.

<sup>9</sup> 42 USC 12102(i); 28 CFR 36.104.

<sup>10</sup> 28 CFR 36.104.

<sup>11</sup> 42 U.S.C. 12101 notes discussing ADA Amendments Act of 2008 findings and purpose.

<sup>12</sup> *Id.*; see also 42 U.S.C. 12102 and 12201(h). The ‘major life activities’ ‘examples listed in the regulations were expanded in the actual law, rather than the regulations, to add (as additional examples) eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, communicating. Operation of major bodily functions (that are now considered ‘major life activities’) include those of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

<sup>13</sup> 28 CFR 36.302 and 36.311.

<sup>14</sup> 42 U.S.C. 12182(b)(2)(A)(ii) and (iii); 28 CFR 36.302 and 303; the organization cannot impose a surcharge on the individual to pay for these modifications. 28 CFR 36.301(c).

<sup>15</sup> 28 CFR 36.303 and 306. For example, organization is not required to provide a wheelchair or hearing aid, or a personal attendant to address the individual’s eating, toileting or dressing needs.

<sup>16</sup> E.g.) 28 CFR 301, 302 and 311.

<sup>17</sup> See illustrations: Title III Technical Assistance Manual, sections III-4.1200 and 4.1300.

<sup>18</sup> 28 CFR 36.301(a) and official comments. Developing EEC is not required under ADA Title III (although referenced in 42 U.S.C. 12184(b) and permitted). As mentioned above, EEC are effectively required under Title II and the Rehabilitation Act, as ‘meeting EEC’ measures the individual’s ability to participate.

<sup>19</sup> A camp’s EEC should consider a statement or ‘disclaimer’ that clarifies the limits of the EEC. For example, prospective applicants should understand that EEC are not the only criteria for admission (they must pay, clear any required medical screening, etc.), that EEC may not contain ALL criteria for participation, and that meeting EEC does not equate to a guarantee of participants’ safety (impossible to guarantee in any case).

<sup>20</sup> 42 U.S.C. 12182(b)(2)(A)(i); 28 CFR 36.301 and official comments; Title III Technical Assistance Manual, sections III-4.1200 and 4.1300.

<sup>21</sup> 42 U.S.C. 12182(b)(1)(A), (B) & (C); 28 CFR 36.202 and 203. 42 U.S.C. 12182(b)(1)(A)(iii) states: “It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability...with a good, service...that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service...that is as effective as that provided to others.”

<sup>22</sup> 42 U.S.C. 12182(b)(2)(A)(ii) and (iii) and (b) (3); 28 CFR 36.104, 36.208 and 36.302. In cases involving an alleged “direct threat to safety,” for example: “a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: The nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.”

<sup>23</sup> 42 U.S.C. 12212; 28 CFR 36.506; go to [www.ada.gov/mediate.htm](http://www.ada.gov/mediate.htm)

<sup>24</sup> 42 U.S.C. 12188; 28 CFR 36.501-505.

<sup>25</sup> See, for example, *Starego v. New Jersey State Interscholastic Athletic Assoc., et al.*, 2013 U.S. Dist. Lexis 128406.

<sup>26</sup> In order of reference: *Doe v. Deer Mountain Day Camp, Inc., et al.*, 2010 U.S. Dist. LEXIS 3265 (NY); *Spring v. Allegany-Limestone Century School Dist.*, 2015 U.S. Dist. LEXIS 134845 (NY); Settlement Agreement between USA and Winnewald Day Camp, DJ #202-48-279, NJ 6/2015; Settlement Agreement between USA and Camp Bravo, DJ # 202-35-304 MD 6/2015; *Koester v. YMCA of Greater St. Lewis*, 2015 U.S. Dist. Lexis 90372 (MO); *USA v. Pikes Peak Youth Sports Association, LLC, Consent Decree, C.A. #1:15-cv-02405 (D.C. CO 12/2015)*; Settlement Agreement between USA and Lesley University, DJ # 202-36-231 MA 12/2012.



Photo courtesy of Cheley Colorado Camps, Estes Park, CO

## The Nitty Gritty of a Camp Risk Committee

By Melanie Lockwood Herman

**“Let’s form a committee!” is the frequent battle cry of camp leaders facing a complex problem for which there are no obvious, immediate, or cheap solutions. When more than one brain is needed to ponder a perplexing problem, forming a committee seems to be a good first step. But are risk committees worth the time and nurturing they require? Yes! To make sure your camp risk committee stays focused and productive, consider the tips that follow.**

**STEER CLEAR OF TRAPS:** The most common traps ensnaring risk committees include:

**Unrealistic Goals —** If you’re forming a risk management committee to eliminate risk in your camp, you might as well “call the whole thing off.” No camp can hope to provide a wonderful, life-changing experience for campers without taking risk. And if you’re planning to close your doors, you need a winding down plan, not a risk management committee!

**Tip Service —** If you’re forming a risk management committee so that you can “tic the box” on an insurance application or please the ACA-Accreditation site visit team, think again. You’d be better off identifying a few practical steps to take to improve risk awareness, enforce existing risk policies, and finally tackle that long overdue risk management plan. (If you need help with the latter, try [www.MyRiskManagementPlan.org](http://www.MyRiskManagementPlan.org).)

**Lack of Vision —** I recently read that the focus of a school board should be on policies and activities that will provide the best possible educational experience for the students’ children. That’s right, the future (not current) students at the school! Although an effective

risk management committee should consider how the camp learns from mistakes and prior losses, the bulk of its energy should be spent thinking about risk taking and risk management on the future horizon: what risks will your camp embrace to better serve the future offspring of today’s campers?

**Groupthink —** There’s nothing like being a member of a group of people with similar backgrounds and worldviews. And that may be great when it’s time to decide what TV show you’ll be watching at home tonight, but it’s a recipe for disaster in a risk management committee. Risk is lurking behind every good idea and every harebrained scheme at your camp. A risk management committee that brings a shared worldview and similar backgrounds (e.g., finance, insurance-buying, adventure activity safety) is more likely to overlook some of the diverse risks that could ensnare your mission.

### RISK COMMITTEE SUCCESS FORMULA

**Determine the process and approach for appointing or recruiting members —** One of the common misconceptions many leaders have about risk management committees is that very few people will be crazy enough to want to

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participate. While it's always possible to round up the usual suspects for a risk committee — representatives from most operational departments, someone from the executive team, etc. — it is far better to take a risk and invite volunteers. Sometimes a committee formed somewhat organically winds up being more diverse and effective than a hand-picked team. Remember that your risk committee needs and deserves an effective leader.

**Draft a committee charter** — A committee charter is a tool for helping those who appoint the committee and those who serve on and support it to develop a shared understanding of the purpose, scope, goals, and authority of the committee. An effective charter has the following characteristics:

✦ **Statement of overarching purpose** — The charter should begin with a clear statement of purpose. For example: "The purpose of the risk management committee is to provide oversight across the organization for all categories of risk in order to ensure that proper practices are in place to surface, understand, and manage priority risks." Or, "The risk management committee exercises shared responsibility for surfacing and managing the operational risks facing the organization. Staff throughout the organization are invited to participate in the committee."

✦ **Frequency of meetings** — The charter might indicate that the committee will meet four, six, or more times per year for 90-120 minutes per meeting, depending on the agenda. Ideally, the committee will meet on a consistent date and time (e.g., second Thursday of the month at 10 a.m.). Don't meet too often or unless there is something to do or discuss.

✦ **Specific goals and responsibilities** — Outline the committee's specific goals and responsibilities.

✦ **Committee composition** — Indicate who is eligible to participate, and how long members are expected or asked to serve.

✦ **Committee authority** — Note the committee's authority, such as: "The committee makes recommendations to the CEO or the Board of Directors." Or "The Committee is authorized to adopt new internal policies related to risk management."

**Develop realistic goals and a practical plan** — Nothing kills good intentions faster than unrealistic plans. One way to give a boost and a protective vaccine against failure to a risk committee — or any committee — is to develop a set of clear goals or projects for the group's first year. Brainstorming those reasonable goals and an accompanying timetable can be a key outcome for the kick-off meeting. Throughout the life of the committee it's vital to show where you are headed, what you've accomplished, and what remains to be done. There's nothing better than seeing on paper at the midyear point that half of the projects or tasks have been accomplished and there is a reasonable workload remaining. Keep the momentum going with a plan that goes beyond the start-up or "honeymoon" phase.

**Plan a dynamic kick-off meeting and stick to your schedule** — Never start any committee meeting by apologizing for having to meet or blaming someone for the existence of the committee. The discipline of risk management has a bad rap as it is; don't contribute to that by making excuses, blaming your insurers or accrediting bodies, or worse, insinuating that anticipating future events is unrelated to the mission of your camp. The sidebars offer two sample agendas for a kick-off or orientation meeting of the risk committee. Note that neither sample includes a dreary, hours-long review of an insurance policy.

**Resolve to involve** — In Start with Why, author Simon Sinek writes, "The single greatest challenge any organization will face is . . . success." Sinek is referring to the fact that as organizations grow, decision-making necessarily becomes dispersed. CEOs of large organizations can't personally

screen every applicant or approve every purchase. The same holds true in risk management. As your camp grows and succeeds, many different people need to make risk-informed decisions, sometimes every day. The risk takers in a growing, vibrant camp fill auditoriums, not a small conference room. Which means an effective risk management program can't be "owned" by a small group of staff who meet monthly. Critical questions the committee should visit on a regular basis include:

WHO else should be involved in our risk assessment and risk management work?

WHO needs training in this area but hasn't received it?

WHAT points of view are missing on the committee, but are critical to being as risk aware and risk savvy as we aspire to be?

HOW can we effectively communicate the "WHY" as well as the "WHAT" and "HOW" in our risk management program to every staff member and volunteer who needs to know?

ARE we hitting the mark with our meeting agendas and background material? Are pre- and post-meeting materials being shared on a timely basis?

Risk committees should be celebrated examples of mission-focused collaboration rather than punch-lines in office jokes about endless meetings and depressing topics. A high energy, well-run, and goal-orientated committee can set the tone and pace for other collaborative efforts in a camp. The keys to success aren't that hard to understand: avoid the traps that suffocate the best intentions, and embrace a reasonable plan and approach for emphasizing the great mission-advancing work to be done.

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**SAMPLE #2 — RISK MANAGEMENT COMMITTEE AGENDA**



**Welcome and Introductions:** We will begin by going around the table and introducing ourselves. Tell us what you're looking forward to learning and contributing during your service on the risk management committee.



**Draft Committee Charter Review:** What makes sense? What doesn't? What changes do we want to propose?



**Our Goals for This Year:** We will continue by brainstorming mission-advancing goals for our committee for the year ahead. What projects and activities might we undertake to advance our shared vision of fortifying the risk management function? After blue-sky brainstorming, we'll jointly agree on five or six specific goals or projects.



**Committee Calendar:** We'll review our proposed calendar for the year, including meeting dates, times and locations. Do we need to make any adjustments? Next, we will review our goals and decide which topics and priorities will take center-stage at each of the meetings on our annual calendar.



**Committee Norms:** We will close by discussing meeting norms and preferences. Cell phones turned off? Meetings open to staff or volunteers who want to sit in and join our conversation? Rotating responsibility for follow-up, action-oriented notes and reminders?

**SAMPLE #2 — RISK MANAGEMENT COMMITTEE AGENDA**



**Meeting Overview:** Overview of meeting agenda and work product goals for our inaugural meeting, including reports to Board of Directors at its next meeting.



**Risk Management Lessons and Insights:** During this segment we will briefly review our recent risk management journey. We will then ask each member to share something about their hopes for the committee, such as: What I hope to learn while serving on the committee. What I hope I'll be able to contribute while serving on the committee. How I'll know we have been successful or made a difference.



**Critical Risks Discussion:** Our role and responsibilities will evolve as we work together, but it's important to acknowledge that we are NOT responsible for unearthing and documenting every possible action or event that could impair our mission, strategies and objectives. There is an expectation, however, that we will be talking about and learning as much as we can about critical risks. With that in mind, during this segment we will discuss top risks identified in last year's risk assessment. What have we learned from trying to better understand and manage these risks? What has changed? Have any of these risks been addressed effectively, such that they are no longer priorities?



**Risk Accountability:** How should we report and share our discussions, proposed actions and recommendations? What can we do to more effectively communicate with people throughout the camp?



**Action Steps and Assignments:** During this wrap-up segment we will review what we discussed, decided and identified as action steps for the committee. We will invite each member to identify how they propose to move one or more components of our agenda forward in the weeks ahead.

Melanie Lockwood Herman is the executive director of the Nonprofit Risk Management Center. The Center provides training, technical assistance and informational resources to help nonprofits take a practical approach to managing risk so that they can fulfill their missions and stay out of trouble. In August 2015, Melanie was named to The NonProfit Times Power & Influence Top 50, recognizing "50 of the sector's leaders for their innovation, influence on the broader sector, and for developing organizational models that can be replicated." She is a former member of the ACA Board of Directors. She welcomes your feedback and questions about the topic of risk management committees at [Melanie@nonprofitrisk.org](mailto:Melanie@nonprofitrisk.org) or 703.777.3504. For more information about the Center and Ms. Lockwood Herman, visit: [www.nonprofitrisk.org](http://www.nonprofitrisk.org).

## Challenges Course and Zip Line Safety

Recently, serious accidents and fatalities in North Carolina, South Carolina, Tennessee, Utah, and other states have prompted government in these and several other states to review and/or discuss how and if zip lines (and challenge courses in some places) are regulated. While many states do not currently have regulations specific to zip lines/challenge courses, there are industry standards as well as American Camp Association standards specific to adventure/challenge activities that provide camps with useful guidelines. Key ACA standards specific to adventure/challenge activities state the following (while there are several other ACA standards that are applicable to adventure/challenge activities, we have listed only those specific to adventure/challenge): **If your camp operates a challenge course/zip lines consider the following tips for your 2016 season:**

**STAFF TRAINING:** Invest in appropriate staff training. Yes, the training of staff can be expensive. However, do potential monetary savings really help if you have a serious injury occur because of inappropriately trained staff?

Trainer qualifications. Who conducts the training of your staff? Do they have the knowledge and skill to train staff appropriately? Are they currently certified by a recognized organization — such as the Association for Challenge Course Technology or the Professional Ropes Course Association?

Supervisor knowledge. Is your challenge course supervisor familiar with your type of course? Challenge courses use a variety of “systems” and each one is unique. Being familiar and comfortable with your system is critical

**EQUIPMENT MAINTENANCE:** Is your equipment routinely checked and removed from service if damaged or beyond its “life date?”

### PROGRAM EQUIPMENT (PD.8):

Does the camp have written procedures for all program equipment that require:

- PD.8.1 Equipment is checked on a regular basis for safety, maintained in good repair, and stored in a manner to safeguard effectiveness? YES/NO
- PD.8.2 Equipment is removed from service if not in good repair? In addition, is equipment that is used for specialized activities (includes adventure/challenge):
- PD.8.3 Appropriate to the size and ability of the user?
- PD.8.4 Safety checked prior to each use? AND, for adventure/challenge course equipment:
- PD.8.5 Are written records maintained of regular inspection and maintenance of all equipment and elements used?

### SUPERVISOR QUALIFICATIONS (PD.13):

- Are adventure/challenge activities under the overall supervision of an adult staff member who meets the following qualifications?
- PD.13.1 Certification obtained within the past three (3) years from a recognized organization or certifying body for the type of activities offered or documented training AND recent experience leading/facilitating the type of activities offered?
- PD.13.2 Experience—has at least six (6) weeks of experience in a management or supervisory capacity in similar type(s) of program(s) within the past five (5) years?

### ANNUAL INSPECTION (PD.24)

Do qualified personnel annually inspect course elements for integrity of hardware, materials, and equipment and provide the camp with a written report that includes recommendations for repairs, replacement, and potential closure of an element?

- The Contextual Education for standard PD.24 further defines: “Qualified personnel” have current and documented experience in construction and evaluation of the type of course they are inspecting and are following authoritative sources and peer accepted practices in construction and inspection. It is the expectation that the recommendations concerning the safety of the course and potential closure of an element will be addressed.
- Why are these three areas so important? Most fatalities or serious injuries related to adventure/challenge activities have been attributed to human error (participant or supervisor) or equipment failure. These ACA standards specifically address those two common causes of serious accidents.

**INSPECTIONS:** Who inspects your course? Is the individual really “qualified?” (See the contextual education in PD.24 definition of qualified personnel).

While meeting ACA standards (or those of the industry) and implementing the above tips are no guarantee of a safe, accident-free season, they provide guidelines to help the camp personnel control critical risks associated with adventure/challenge activities.

### KEY RESOURCES (FOR TRAINING, INSPECTION, ETC.):

- American Mountain Guide Association: <http://amga.com>
- Association for Challenge Course Technology: [www.acctinfo.org](http://www.acctinfo.org)
- Climbing Wall Association: [www.climbingwallindustry.org](http://www.climbingwallindustry.org)
- Professional Ropes Course Association: [www.prcainfo.org](http://www.prcainfo.org)

Photo courtesy of Chelley Colorado Camps, Estes Park, CO

## Federal Public Policy Call to Action and Updates

### EDUCATION REFORM

On December 10, 2015, President Barack Obama signed into law the Every Student Succeeds Act (ESSA), a bipartisan bill to revise and replace No Child Left Behind and overhaul K-12 education. The American Camp Association and many partners in the out-of-school time community have been advocating for change to the country's K-12 education policy so that it recognizes the critical role out-of-school time programs play in the year-round education of the whole child. We are pleased to report that the new law contains a number of exciting opportunities for camps and other out-of-school time providers to be welcomed and recognized as active participants in K-12 education — including the potential to receive grant funding. Both grant and partnership opportunities are detailed in the new law. Read about the potential impact on camps at: [www.ACacamps.org/news-publications/news/every-student-succeeds-act-essa-new-law-provides-new-opportunities-camps](http://www.ACacamps.org/news-publications/news/every-student-succeeds-act-essa-new-law-provides-new-opportunities-camps).

### TRANSPORTATION OF PASSENGERS AND INTERSTATE COMMERCE LAW CHANGED

After almost two years of proactive advocacy, ACA is thrilled to report that on December 18, 2015, Congress signed into law a change to the commercial transportation regulations impacting camps. Previously, in some states, the Federal Motor Carrier Safety Administration was enforcing

commercial interstate carrier regulations on camp programs. The new law provides an exemption from the United States Code, Title 49, Interstate Transportation. Specifically, regarding Section § 13506, “exempting the transportation of passengers by 9-15 passenger motor vehicles operated by youth or family camps that provide recreational or educational activities” from certain commercial regulations. For more details visit: [www.ACacamps.org/news-publications/news/new-law-exempts-camps-certain-commercial-transportation-regulations](http://www.ACacamps.org/news-publications/news/new-law-exempts-camps-certain-commercial-transportation-regulations).

### FEDERAL LANDS PERMIT HOLDERS — IMPORTANT UPDATE

On December 18, 2015, President Barack Obama signed the Omnibus federal spending bill — HR 2029 containing a provision to defund the implementation and enforcement of the President's 2014 Executive Order 13658. The Executive Order established a minimum wage for contractors of \$10.10 for workers on Federal construction and service contracts. This new provision serves as a stop gap to implementation and enforcement until such time as a permanent change in law is made to bring clarity to the issue. Camps can expect that in 2016, new contracts will not include the language contained in the Executive Order. For more details visit: [www.ACacamps.org/news-publications/news/federal-hands-permits-minimum-wage-issues-important-update](http://www.ACacamps.org/news-publications/news/federal-hands-permits-minimum-wage-issues-important-update).

## CRIMINAL BACKGROUND CHECKS



ACA's criminal background check bill — a bill to close the gaping hole in federal law regarding youth-serving organization's access to FBI background checks — is back in Congress! ACA, the FBI, and many youth-serving organizations are calling their communities to action to ensure the passage of this important bi-partisan bill. The bill has no impact on the federal budget, but an enormous impact on protecting the safety of kids. Learn more and advocate at:

[www.ACacamps.org/news-publications/news/child-protection-improvements-act-reintroduced-advocate-today](http://www.ACacamps.org/news-publications/news/child-protection-improvements-act-reintroduced-advocate-today).

## THE CAMPLINE

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