IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN COUNCIL OF THE BLIND et.al., Plaintiffs,	
v.	CIVIL ACTION NO. 1:02CV00864 JR
PAUL H. O'NEILL Secretary of the Treasury, et.al., Defendants.	

REPLY MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Pursuant to the schedule established by the Court, Plaintiff submits its memorandum in reply to the Summary Judgment Memorandum of Defendant. For the reasons stated below, Plaintiff asserts that Defendant's Motion for Summary Judgment should be denied.

I. THE DESIGN OF PAPER CURRENCY IS NOT COMMITTED TO THE SOLE DISCRETION OF THE DEFENDANT

The Defendant's motion for summary judgment is largely based upon its assertion that the design of paper currency "is statutorily committed to the sole discretion of the Secretary…" Def. Mem. at 2. As will be shown below, this is an argument which is simply not supported by the applicable legal authority.

Defendant refers to 12 U.S.C §418 in support of the proposition that the Secretary has unfettered discretion with respect to the design of paper currency. This statute authorizes the Secretary to print banknotes "in the form and tenor as directed by the Secretary of the Treasury…"

However, Section 504 of the Rehabilitation Act itself very clearly applies to all the operations of each executive agency. Thus, the statute states that

> "No otherwise qualified individual with a disability in the United States, as defined in section 7(20), 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service."
>
> (b) "Program or activity" defined. For the purposes of this section, the term "program or activity" means all of the operations of-- (1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government;…. (Emphasis added). See 29 U.S.C. § 794.

Accordingly, the statute by its terms applies to "all of the operations" of the Department of the Treasury, without exception.

Equally significant, Treasury Department regulations implementing the Rehabilitation Act specifically state that the Act applies to all activities conducted by the Department, with the sole exception of activities conducted outside of the United States. Thus, 31 CFR §17.102 states as follows: *"This part applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States."* (Emphasis added).

As such, government counsel is now taking a position in this litigation which is directly contrary to the Department's own regulations. Such a position on the part of the Defendant is simply untenable. See Alexander v. Choate, 469 U.S. 287, 304, n. 24 (1985) (regulations implementing Section 504 constitute an important source of guidance).

Moreover, the argument that the design of paper currency is committed solely to the discretion of the agency would preclude any meaningful judicial review of actions taken by the Defendant. This is contrary to the general rule that, absent a clear Congressional mandate to the contrary, agency action taken in violation of law is subject to meaningful judicial review.

For example, in Traynor v. Turnage, 485 U.S. 535, 99 L. Ed. 2d 618, 108 S. Ct. 1372 (1988), the Supreme Court was asked to decide whether a VA regulation stating that disability benefits would not be paid for alcoholism constituted a violation of the Rehabilitation Act. The government asserted that its determination was not subject to judicial review under the terms of 38 U. S. C. § 211(a), which bars judicial review of "the

decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans."

The Supreme Court noted a "strong presumption that Congress intends judicial review of administrative action," which presumption may be overcome only upon a showing of "clear and convincing evidence of a contrary legislative intent", citing to *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), and *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967). Id. at 542.

In the instant case, nothing in either the statutory or regulatory framework cited by Defendant evinces clear and convincing evidence that Congress intended to preclude judicial review under Section 504 of the design of paper currency. Indeed, the opposite appears to be the case. The statute and implementing regulations specifically and unequivocally apply to all activities of the Department of Treasury, except those occurring outside of the United States. As such, any argument that the design of paper currency is unreviewable under Section 504 is completely without merit.

Finally, Defendant argues that even if the Secretary's design of paper currency is reviewable under the Rehabilitation Act, the specifics of any such re-design should be within the sole decision of the Secretary. Def. Mem. at 17. Thus, Defendant objects to allowing this Court to participate in any re-design decisions to be made by the Secretary.

Defendant's argument in this regard is without merit. Assuming that this Court has authority to review the Secretary's design of paper currency under the Rehabilitation Act, the Court necessarily also has the authority to review the specifics of any such re-design to determine whether it complies with the statute.

Moreover, Plaintiff's have not requested that this Court impose upon the Secretary one fixed design for all paper money. Rather, Plaintiff's are merely seeking an order that the Secretary comply with Section 504 in the redesign process, a process which is in any event ongoing even without regard to the changes sought by the Plaintiff. See Ferguson Declaration at ¶ 33 (redesign to be implemented by 2003 for anti-counterfeiting purposes). Clearly, this Court clearly has jurisdiction to order such appropriate relief as may be required to ensure that there are no more continuing violations of Section 504 of the Rehabilitation Act.

II. DEFENDANT'S UNDUE BURDEN ARGUMENT ADDRESSES ONLY ONE FORM OF THE RELIEF REQUESTED BY PLAINTIFF

Defendant asserts that the changes sought by Plaintiff in the design of currency would constitute an undue financial and administrative burden, and would not therefore be reasonable. Def. Mem. at 5-16. In support of this assertion, Defendant submits a Declaration from Mr. Thomas Ferguson, Director of the Bureau of Engraving and Printing. However, Mr. Ferguson's Declaration is directed almost exclusively to Plaintiff's request that the denomination of paper currency be differentiated by size. The Ferguson Declaration virtually ignores the several alternative forms of relief requested by Plaintiff, include placement of a single high contrast denomination numeral on the back of bills, use of colors to differentiate between denominations, placement of tactile cues on currency, etc.[1]

[1] Mr. Ferguson refers to the possibility of placing tactile cues on currency in a highly conclusory form at the end of his Declaration. Thus, Mr. Ferguson "estimates" that the inclusion of a tactile feature would cost an additional 92-109 million dollars per year. Ferguson Declaration at ¶ 51. However, Mr. Ferguson readily concedes that the Bureau has never really examined this issue in a meaningful way. Indeed, Mr. Ferguson admits

As such, Mr. Ferguson's assertions go only to the issue of changing the size of currency. Mr. Ferguson's Declaration offers no support for the Defendant's assertion that any of the other forms of relief requested by Plaintiff would impose an undue burden on the government

III. CHANGING THE SIZE OR OTHER FEATURES OF PAPER CURRENCY WOULD NOT RESULT IN AN UNDUE BURDEN TO THE GOVERNMENT

Defendant's argument that changing the size of paper currency would result in an undue cost burden is based upon the data furnished by Mr. Ferguson. However, Mr. Ferguson's Declaration rests primarily upon a series of unsupported assumptions. Mr. Ferguson offers numerous cost estimates without providing any indication as to the source of those estimates. Indeed, Mr. Ferguson concedes that many of the costs referred to in his Declaration are "difficult to estimate." See Ferguson Declaration, ¶ 18.

Moreover, the cost estimates contained in Mr. Ferguson's Declaration are based upon the assumption that the newly designed bills would be larger than existing currency. See Ferguson Declaration, ¶ 31 ("increased cost of purchasing and installing equipment results from the fact that fewer of the larger bills would fit on each printing plate"); ¶ 45 ("producing notes of larger size would require more use of specialized inks and purchasing more paper"); ¶ 54 ("additional costs to be incurred by the Federal Reserve if the largest redesigned bill exceeded the parameters of existing equipment"). However, it is altogether feasible that any re-design could result in significantly smaller sized bills,

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that "Without testing, it is difficult to know the precise degree…" by which the costs of producing currency would be increased as a result of adding a tactile feature. Ferguson Declaration at ¶. 50. Paragraph 47 of the Ferguson Declaration also states that the expenses involved in placing tactile features on bills "are too uncertain at this time to estimate the resulting costs." The vagueness of Mr. Ferguson's Declaration deprives it of any validity in supporting the Defendant's motion for summary judgment.

thereby avoiding the additional costs cited in Mr. Ferguson's Declaration.[2]

Indeed, BEP may actually achieve significant cost savings by reducing the size of paper currency. Thus, BEP would use less paper, less ink, and would be able to produce more of the higher denomination notes in the same area of paper, thereby improving operating efficiency. Additionally, most other countries have different size notes, and these countries do not appear to have experienced any substantial problems. See Currency Features for Visually Impaired People, National Research Council, 1995. [3]

Defendant argues that because it is statutorily precluded from redesigning the $1.00 note, any redesigned higher denomination notes would necessarily be larger than the existing $1.00 note. However, there is no reason that higher denomination notes could not be smaller than lower denomination notes, thereby resulting in paper and ink cost savings to the government. This is the case in coinage as a dime is smaller than a nickel. Defendant's statement that an unscrupulous vendor could fold a $1.00 bill so as to shape it to the dimensions of a higher denomination note is absurd. A blind person could easily detect that a note had been folded, thereby defeating the design of such an unscrupulous vendor. In any event, Defendant concedes that the possibility of such a fraud occurring is remote. See Ferguson Declaration at ¶20.

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[2] Ironically, Defendant argues that Plaintiff's should not be permitted to argue the issue of whether the benefits of re-designing the currency outweigh its supposed costs. Defendant argues that the Supreme Court has never engaged in any such comparison in deciding cases under the Rehabilitation Act. Def. Mem at 15-16. This is a particularly anomalous argument given that Defendant's position rests upon its assertion that the costs involved in re-designing currency would impose an undue burden.

[3] This study, commissioned by the Department of the Treasury, may be read in its entirety at http://www.nap.edu/catalog/4828.html?se_side.

Defendant reliance upon the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979) is completely misplaced. See Def Mem at pp. 6-8. In Southeastern Community College v. Davis, supra, the Supreme Court held that requiring admission of a deaf student into the institution's nursing program would have lowered the school's standards, and would potentially result in adverse consequences to patient safety. There is no such analogy in this case. Plaintiffs are not seeking to lower the standards by which currency is produced. Rather, all that is being sought is a reasonable accommodation to the needs of blind and low vision individuals.

Similarly, Defendants reliance upon Alexander v. Choate, 469 U.S. 287 (1985) is also misplaced. In Alexander v. Choate, supra, the Supreme Court held that imposition of equal medical benefits for both disabled and non-disabled individuals had no exclusionary impact on disabled individuals. However, this is not the case in the instant litigation. Defendant's design of paper money completely excludes individuals with certain categories of disabilities from participating in the benefits of the U.S. currency program.

Finally, as noted by Defendant, any costs associated with changing the size of paper currency would be borne by third parties, and not by the government. See Ferguson Declaration at ¶¶ 7, 22. Costs associated with currency production are paid by commercial banks through an account with the Federal Reserve. See Ferguson Declaration at ¶ 7. As such, Defendant can not properly assert an undue burden defense when in fact the government is not responsible for paying any such costs.

Additionally, any increased costs in manufacturing paper currency would be miniscule when compared to the overall size of the U.S. commercial banking system. Defendant's argument that the richest nation in the world can not afford to modify its currency so as to be useable by persons with visual disabilities is simply ludicrous, and should not be seriously considered by this Court. This is particularly true when considering that the majority of countries in the world issue different sized notes. See Currency Features for Visually Impaired People, 1995**.** Table D-1, Summary of Currency Features for Visually Disabled People Used in Currency from 171 Issuing Authorities around the World.[4]

It must further be emphasized that the redesign sought by Plaintiff is in the context of the Treasury's overall plan to re-design the currency by 2003. See Ferguson Declaration at ¶ 33. Therefore, many of the redesign costs concerning which Defendant so vociferously complains are likely to be incurred in any event.

IV. DEFENDANT IS NOT PRECLUDED FROM RE-DESIGNING THE $1.00 BILL

Defendant asserts that Congress has precluded it from redesigning the $1 note. However, the Congressional purpose was exactly the opposite. Thus, the Conference Report on H.R. 4104, Treasury and General Government Appropriations Act, 1999, makes explicit the Congressional intent with respect to the $1 banknote. The Conference Report states as follows:

> *The conferees remain concerned about the cost associated with producing special anti-counterfeiting properties for the*

[4] This study may be read in its entirety at http://www.nap.edu/catalog/4828.html?se_side

> *estimated 6 billion circulating $1 Federal Reserve Notes. As a result, the conferees do not believe the Bureau of Engraving and Printing should undertake cost prohibitive anti-counterfeiting changes to the $1 note. However, the conferees do believe it is important to update the currency, such as making minor modifications to assist the visually impaired.*
> *Therefore, the conferees direct the Department of the Treasury and the Bureau of Engraving and Printing not to pursue redesign of the $1 Federal Reserve Note to combat international counterfeiting threats, but to only make minor design enhancements to the $1 note for the visually impaired and elderly population, provided it has no effect on the use of $1 Federal Reserve Notes with existing bill accepting machinery.*

See Conference Report on H.R. 4104, Treasury and General Government Appropriations Act, 1999, 144 Cong. Rec, H 9870, October 7, 1998.

It is evident from the language of the Conference Report that Congress did not want the $1.00 note to be re-designed for anti-counterfeiting purposes. However, it is equally clear that Congress encouraged the Treasury to modify the $1.00 note for purposes of assisting the visually disabled.

The language of the Conference Report further undermines the notion that the Secretary has no obligation to modify paper currency for purposes of assisting the visually impaired. Indeed, the Congressional intent makes explicit that which the Secretary denies, i.e., the Secretary's obligation to consider the interest of the disabled community in designing U.S. paper money.

V. THE COURT SHOULD DEFER ITS RULING ON DEFENDANT'S MOTION UNTIL AFTER PLAINTIFF HAS HAD AN OPPORTUNITY TO CONDUCT REASONABLE DISCOVERY

Defendant's undue burden defense is based primarily on statements contained in Mr. Ferguson's Declaration concerning the costs of changing the size of paper currency.

As noted above, Mr. Ferguson fails to provide any documentation supporting the costs cited in his Declaration. Rather, Mr. Ferguson's Declaration is largely conclusory. Absent further discovery, Plaintiff has no means to ascertain the reliability of the "cost estimates" contained in the Declaration submitted by Mr. Ferguson.

It should further be noted that there is little expertise outside of the Bureau of Engraving and Printing in connection with the cost of printing money. As such, the cost estimates cited by Mr. Ferguson lie exclusively within the knowledge of the BEP. Absent outside expertise, the only means for Plaintiff to examine the validity of Mr. Ferguson's estimates is through conducting discovery. For this reason, Plaintiff believes that the Court should defer any ruling on Defendant's motion until after Plaintiff has had an opportunity to cross-examine the Defendant's assertions, and to conduct such discovery as may be required.

CONCLUSION

For the reasons stated above, Defendant's Motion for Summary Judgment should be denied. In the alternative, this Court should defer ruling on Defendant's Motion for Summary Judgment until such time as Plaintiff has had an opportunity to conduct such discovery as may be required.

DATED: October 31, 2002

Respectfully submitted,

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PLAINTIFF'S RESPONSE TO DEFENDANT'S RULE 7.1 STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to LCvR 7.1(h) of the local rules of United States District Court for the District of Columbia, Plaintiff hereby responds to Defendant's Rule 7.1 Statement of Material Facts Not In Dispute ("Defendant's Statement"), in accordance with Rule 56 of the Federal Rules of Civil Procedure. Responding specifically to the numbered paragraphs of Defendant's Statement and using the same paragraph numbering, Plaintiff responds to the following specific assertions in Defendant's Statement.

1. Denies Defendant's suggestion that the BEP is solely responsible for the production of currency to the extent that Defendant suggests that it is not subject to the requirements of Section 504 of the Rehabilitation Act in performing this function.

19. Denies that implementing the changes sought by Defendant would constitute an undue burden

24. Denies that changing the size of currency would significantly complicate the process or render it more expensive. Indeed, BEP may actually achieve

significant cost savings by re-designing currency to be smaller than the existing notes. Thus, BEP would use less paper, less ink, and would be able to produce more notes in the same area of paper, thereby improving operating efficiency. Additionally, most other countries have different size notes, and these countries do not appear to have experienced any substantial problems.

26. Denies that implementing redesign of currency would take 3-6 years. A National Academy of Sciences study commissioned by the Department of the Treasury found that dimensional changes, large numerals, and appropriate use of color, could be implemented within 1-3 years. See Currency Features for Visually Impaired People, National Research Council, 1995, Chapter 6, Implementation Strategies. Further denies the cost estimates citied by Defendant. No supporting documentation for the cost estimates presented by Defendant are contained in the Ferguson Declaration. Rather, the Ferguson Declaration is conclusory in nature, and is based on highly speculative estimates of future costs. Additionally, the estimates contained in the Ferguson Declaration are premised upon the assumption that any redesign would necessarily result in the product of larger than existing banknotes, thus rendering obsolete existing manufacturing and inspection equipment. However, the accommodations sought by Plaintiff could just as easily result in the production of smaller banknotes, thereby avoiding the additional costs cited by Mr. Ferguson. Additionally, the production of smaller banknotes would actually result in a net cost savings to the government due to the use of lesser quantities of key materials used in the production process, such as ink and paper.

28-30. Denies for the reasons states in ¶ 26.

33-35. Denies for the reasons states in ¶ 26.

37-38. Denies for the reasons states in ¶ 26.

40-42. Denies for the reasons states in ¶ 26.

44-55. Denies for the reasons states in ¶ 26.

56. Denies for the reason that Defendant's estimate of the cost of placing tactile cues on currency is highly speculative. Defendant admits that it has never conducted any testing to determine what steps would be involved in the placing of a tactile cue on currency. Defendant further concedes that the cost of inclusion of such features on bills is too uncertain at this time to estimate.

59 Denies for the reason that Defendant provides no basis for its cost estimate of a public education campaign, and further that Defendant would be required to furnish such a public education campaign in any event upon the occasion of its upcoming redesign.

60 Denies for the reason stated in ¶ 56.

63-64 Denies for the reason stated in ¶ 56.

65-67 Denies for the reasons stated in ¶¶ 26 and 56.

69. Denies for the reasons stated in ¶¶ 26 and 56.

70. Denies to the extent that the redesign sought by Plaintiff would not require larger bills than currently being produced.

71. Denies as the one-dollar note need not be smaller in size than higher denomination notes.

72. Denies for the reasons stated in ¶ 56.

74-76 Denies for the reasons stated in ¶¶ 26 and 56.

DATED: October 31, 2002

Respectfully submitted,

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