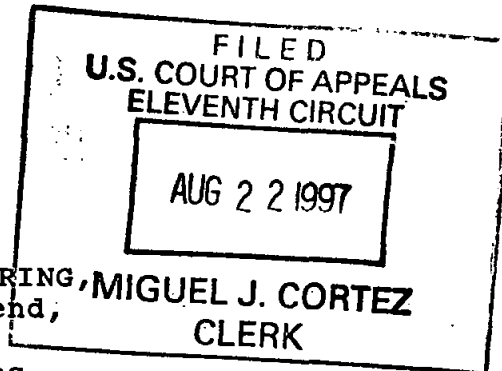


97-8538

EXPEDITED

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 97-8538



L.C. and E.W., each by JONATHAN ZIMRING,
as guardian ad litem and next friend,

Plaintiff and Intervenor-Appellees,

v.

TOMMY OLMSTEAD, Commissioner of the
Department of Human Resources;
RICHARD FIELDS, Superintendent of
Georgia Regional Hospital/Atlanta;
and EARNESTINE PITTMAN,
Executive Director of the
Fulton County Regional Board,
all in their official capacities,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
CASE NO. 1:95-CV-1210-MHS

BRIEF OF APPELLEES

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CLOSED

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for the Appellees, in accordance with Eleventh Circuit Rule 26.1, certifies that the following listed persons have an interest in the outcome of this case:

Advocacy Center for Persons with Disabilities, Inc.

Alabama Disability Advocacy Program

American Association on Mental Retardation

American Disabled for Attendant Programs Today (ADAPT)

American Network of Community Options and Resources

Amideo, William F.: Former counsel for Defendants-
Appellants

Baker, Thurbert E.: Counsel for Defendants-Appellants

Bliss, Charles R.: Counsel for Plaintiffs-Appellees

Bowers, Michael J.: Former counsel for Defendants-
Appellants

Brain Injury Association

Caley, Steven D.: Counsel for Plaintiffs-Appellees

Caley, Sylvia B.: Counsel for Plaintiffs-Appellees

Davis, Jefferson James: Counsel for Defendants-Appellants

Downing, Patricia: Counsel for Defendants-Appellants

E.W.: Plaintiff and Intervenor-Appellee

Fields, Richard: Defendant-Appellant

Georgia Advocacy Office, Inc.

Independent Living Council of Georgia, Inc.

L.C. v. OLMSTEAD, 97-8538

Jamieson, Susan C.: Counsel for Plaintiffs-Appellees

Jones, John C.: Counsel for Defendants-Appellants

Joseph P. Kennedy Foundation

L.C.: Plaintiff-Appellee

Mental Health Association of Georgia

Mental Health Association of Metropolitan Atlanta

National Alliance for the Mentally Ill

National Association of Protection and Advocacy Systems

National Council on Independent Living

National Mental Health Association

Northeast Georgia Coalition of Disability Advocates (CODA)

Olmstead, Tommy: Defendant-Appellant

Pacious, Kathleen M.: Counsel for Defendants-Appellants

Pittman, Earnestine: Defendant-Appellant

Shingler, George P.: Counsel for Defendants-Appellants

Shoob, Marvin H.: United States Senior District Judge

The Association for Retarded Citizens (ARC)

Zimring, Jonathan: Guardian ad litem and next friend for
Plaintiffs-Appellees

Steven D. Caley
STEVEN D. CALEY

STATEMENT REGARDING ORAL ARGUMENT

The parties have been informed that oral argument will be held during the week of October 6, 1997. Appellee and Appellee-Intervenor believe that the issues presented to the Court, regarding whether unnecessary segregation of persons with disabilities is discrimination under the Americans With Disabilities Act and whether the Attorney General's construction of the Act (equating such segregation with discrimination) is entitled to deference, are issues of first impression in this Circuit. Appellees therefore agree that oral argument should be held.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief has been typed in Courier 12 at ten characters per inch.

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STATEMENT REGARDING ADOPTION OF OTHER BRIEFS

Appellees adopt the amici briefs filed on behalf of the following organizations:

Advocacy Center for Persons with Disabilities, Inc.
Alabama Disability Advocacy Program
American Association on Mental Retardation
American Disabled for Attendant Programs Today (ADAPT)
American Network of Community Options and Resources
Brain Injury Association
Georgia Advocacy Office, Inc.
Independent Living Council of Georgia, Inc.
Joseph P. Kennedy Foundation
Mental Health Association of Georgia
Mental Health Association of Metropolitan Atlanta
National Alliance for the Mentally Ill
National Association of Protection and Advocacy Systems
National Council on Independent Living
National Mental Health Association
Northeast Georgia Coalition of Disability Advocates (CODA)
The Association for Retarded Citizens (ARC).

STATEMENT OF JURISDICTION

This case is an appeal from a final judgment of the district court. Therefore, this Court has jurisdiction over this case pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

(1) Whether the district court was correct in finding that unnecessary segregation is a form of discrimination under the Americans With Disabilities Act (ADA).

(2) Whether the district court was correct in finding that the defendants violated the ADA when they forced two individuals with disabilities to receive disability services in an institution when those two individuals qualified for the same services in an existing community-based program.

(3) Whether the Attorney General's interpretation of the ADA and her own implementing regulation, which requires that services be provided in the most integrated setting appropriate to plaintiffs' needs, is entitled to deference.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On May 11, 1995, L.C. filed this action seeking placement in the most integrated setting appropriate to her needs as required by the ADA and its implementing regulations. R1-1-1. At the time that the case was filed, L.C. was confined at Georgia Regional Hospital at Atlanta (GRH-A), a psychiatric hospital where persons with mental disabilities are segregated from the rest of society. Because L.C.'s treatment staff had concluded for over two years that the most integrated setting appropriate to L.C.'s needs was placement in the community, L.C. sought such a placement. L.C. did not assert a statutory or constitutional per se right to deinstitutionalization. She sought disability services in the broader community of disabled and nondisabled persons because the qualified professionals had determined that such a placement was

appropriate based upon the facts of her individual case.¹

Eight days after filing her case, defendants placed L.C. at her mother's home on a "trial basis" with the intent of fully discharging her. Defendants did so without training the mother for L.C.'s care and needs, without supportive services in place, and with full knowledge that such placements had failed in the past.

Consequently, on May 30, 1995, L.C. filed a motion for a temporary restraining order and preliminary injunction. R1-5-1. A consent decree resolved L.C.'s motion. Defendants agreed not to discharge L.C., to provide notice of any future proposed discharge, and to provide L.C. with all documents related to the development of integrated services for her in the community. R1-6-1.

On July 27, 1995, L.C. filed a second motion for a temporary restraining order and preliminary injunction seeking essentially the same relief sought in the first motion because, once again, defendants planned to discharge L.C. to her mother without appropriate assessments of L.C.'s needs, without training, and without appropriate supportive services. R2-17-1. A consent order also resolved that motion. Defendants agreed to perform appropriate assessments to determine L.C.'s needs, to withdraw the proposed discharge, and to transfer L.C. temporarily to Brook Run, an intermediate care facility for the mentally retarded, while Defendants developed a plan for integrated services. R2-19-1.

In the meantime, on June 16, 1995, E.W. filed a motion and complaint to intervene as a plaintiff. R1-11-1. In her complaint,

¹L.C. also raised two other claims, but pursued only one of those at the summary judgment stage, a Fourteenth Amendment right to minimally adequate treatment and freedom from undue restraint.

E.W. asserted the same claims and sought the same relief as L.C., i.e., disability services in an integrated setting, the setting that GRH-A staff had determined was appropriate based upon the facts of her individual case. The district court granted E.W.'s motion on January 29, 1996. (R3-27-1).

In July 1996, E.W. moved for a preliminary injunction seeking integrated services in the community in accordance with her needs. R4-50-1. In their response, the defendants agreed that E.W. was disabled under the ADA and that she "may be able to show that she would meet eligibility requirements and be qualified for certain services or programs in the community." R5-62-23.

In August 1996, plaintiffs and defendants filed motions for summary judgment. At this point, L.C. had been receiving integrated services for over six months. Defendants acknowledged in their response to plaintiffs' motion that L.C. was eligible for integrated services in the community. R6-65-3 (defendants' brief). Defendants also did not deny that E.W. was eligible for integrated services by stating once again that she "may be able to show that she is eligible for at least some of the community programs which she seeks." Id. Defendants then argued that integrated services had been denied due to lack of funding. Id.; see also R5-61-18 & 19 (defendants' brief).

Almost six months after the summary judgment motions were filed, defendants submitted additional evidence to the district court (R7-77-1) regarding E.W.'s kidney ailment that defendants had known about for over two years and that, as noted by the district court, had been resolved by surgery. R8-80-8. Plaintiffs responded to the additional evidence (R8-79-1), and the district

court proceeded to rule on the pending motions.

In its order, the district court granted plaintiffs' motion and denied defendants' motion for summary judgment on the ADA claim, denied plaintiffs' and defendants' motion on the 14th Amendment claim as moot (due to its ADA ruling), and denied plaintiffs' motion for a preliminary injunction as moot. R8-80-13. In granting plaintiffs' ADA claim, the district court held that "unnecessary institutional segregation of the disabled constitutes discrimination per se, which cannot be justified by a lack of funding." R8-80-8. The district court reasoned that the ADA states that segregation is a form of discrimination that Congress intended to eliminate; that the Attorney General's regulations implementing the ADA plainly prohibit unnecessary institutionalization and require a public entity to make reasonable modifications in its policies, practices, and procedures to avoid discrimination, unless the modifications would fundamentally alter the nature of the service, program, or activity; and that the case of Helen L. v. DiDario, 46 F.3d 325 (3rd Cir. 1995), cert. denied, 116 S. Ct. 64 (1995) had held to the same effect. R8-80-8 & 10.

In so holding, the court found that the qualified experts unanimously agreed that plaintiffs could be placed in the community (R8-80-7); that defendants conceded that plaintiffs qualified for community-based services (id.); that defendants had programs for providing community services to plaintiffs (R8-80-10); that such services were less costly (id.); and that defendants could not show that their program would be fundamentally altered. R8-80-10, 11.

As a remedy for the defendants' violation of the ADA, the district court ordered defendants to comply with the ADA by

releasing E.W. to an appropriate community-based program and by providing L.C. with all appropriate services necessary to maintain her current placement in such a program. R8-80-13 & 14.

Defendants perfected their appeal to this Court (R8-84-1) and requested a stay of the judgment (R8-85-1), which the district court denied. R9-91-1. The defendants appealed the stay denial, and this Court carried the stay motion forward with the merits.

II. STATEMENT OF FACTS

A. INTRODUCTION

When this case was filed, L.C. and E.W. were confined at GRH-A, a state psychiatric hospital. Persons confined at GRH-A are separated from the community and walled off from the mainstream of society where all of us live, work, and play. The segregated environment at GRH-A is chaotic and complex. R5-59-SMF-146.²

By comparison, community-based programs are integrated services because they are physically located in the mainstream of society and provide opportunities for persons with mental disabilities to interact with non-disabled persons in all facets of life. At the present time, L.C. and E.W. are receiving appropriate

²Document No. 59 of the record contains several documents: plaintiffs' motion for summary judgment, brief in support, statement of material facts not in dispute, and exhibits. For ease of reference, plaintiffs will hereinafter refer to the statement of material facts as "SMF" followed by the numbered fact in the statement. In this section, all references to "SMF" are references to facts that defendants admit.

integrated services in the community.³

B. L.C. FACTS

L.C. is mentally retarded and suffers from either a mood disorder or schizophrenia. SMF 80. She has been confined at GRH-A approximately 18 times. SMF 93. Her recent confinement at GRH-A lasted three years from May 1992 until May 1995. SMF 94-95. Throughout her three year confinement, no qualified mental retardation professionals designed or implemented an individual habilitation plan for L.C. SMF-144.

Eight days after this lawsuit was filed, defendants implemented an unsuccessful "trial visit" placement to L.C.'s mother (R5-59-Exh. 32), despite a lengthy history of failed placements with the mother due to the mother's mental health problems, alcoholism, violence, and general inability to care for L.C. as documented extensively in GRH-A's own records. SMF 82-92, 108-109. Dr. Amin, L.C.'s recent treating physician, never would have made such a placement while L.C. was in his care. SMF 13.

After the trial visit ended, and after L.C. filed two motions for injunctive relief, she was transferred temporarily to Brook Run on July 27, 1995, until an appropriate placement could be

³Because E.W. has been provided integrated services through the mental retardation waiver program since July 7, 1997, this fact does not appear in the record. Plaintiffs believe, however, that they should report this fact to the Court. See Tiverton Bd. v. Pastore, 469 U.S. 238, 240, 105 S. Ct. 685, 686, 83 L.Ed.2d 618 (1985). This fact is also relevant to defendants' request for a stay of the lower court's order - it shows that no stay is needed.

identified. R2-19-4; SMF 124-125. This was done, even though L.C. did not require institutional care, because defendants would not offer her any alternative. SMF 125-126.

From the outset, the material facts regarding L.C. have not been in dispute. In their answer to plaintiffs' complaint, defendants admitted that L.C. had mental disabilities (R1-7-1 at ¶ 11); that L.C. had been hospitalized at GRH-A due to her mental illness (id. at ¶ 22); that L.C.'s psychiatric symptoms had been controlled for over two years (id. at ¶ 5); that L.C. no longer required segregated services at GRH-A (id. at ¶¶ 1, 5); that L.C.'s treating physician and nurse had indicated as early as 1993 that L.C. was "stable awaiting placement," "has reached maximum level of functioning," and "placement is primary problem," (id. at ¶ 30); that defendants were aware of L.C.'s need for integrated services in the community (id. at ¶ 46); and that GRH-A staff had searched for a community placement. Id. at ¶ 32; see also SMF 152.

In their response to plaintiffs' motion for summary judgment, defendants admitted that L.C. was disabled under the ADA. R5-65-3. Defendants also admitted once again that L.C. was eligible for integrated services in the community. Id.; see also SMF 81.

On February 12, 1996, defendants provided L.C. with integrated services in the community and placed her with Nyasha Hands, a community service provider. SMF 134. L.C. now lives with two other mentally disabled individuals in a four bedroom ranch house with a large yard that is close to parks, schools, churches, shopping, and other amenities. By August, 1996, however, funding problems arose, and L.C. was not receiving appropriate integrated services. R5-59-Exhs. 47, 48. The funding problems were

eventually resolved, and, 1 1/2 years later, L.C. continues to live happily and successfully in the mainstream of society.

C. E.W. FACTS

E.W. suffers from mild mental retardation and a personality change due to meningitis. Elliott I dep., pp. 37-39. The meningitis damaged her brain as an infant. She has a chronic kidney problem that, according to her treating physician, has been resolved by surgery.⁴ R8-79-Exh. 1 at ¶ 10. She has been confined to GRH-A over 30 times in the past 20 years. SMF 4.

E.W.'s most recent confinement at GRH-A began on December 20, 1994.⁵ SMF 7. Her confinement ended on July 7, 1997 when she was released to the same community-based provider as L.C. with a

⁴According to E.W.'s treating physician, Dr. Futral, and plaintiffs' expert, Dr. Elliott, E.W.'s kidney problem does not require institutional care and does not prevent her from living in the community. R8-79-Exh. 1 at ¶¶ 14-15 and Exh. 2 at ¶¶ 7-10. Dr. Echols, defendants' pediatric doctor who has never treated E.W., filed an affidavit six months after summary judgment motions were filed which concluded that E.W.'s "future needs and an appropriate placement cannot be determined at this time." R7-77-Echols' Exh. at ¶ 18. Subsequent to his affidavit, E.W. had successful surgery and was placed in the community.

⁵Although Defendants make some ado regarding E.W.'s symptoms that led to this confinement, her symptoms were caused by the side effects of her new medication, tegretol. Parrish dep., p. 55, l. 17-18; p. 56, l. 4-9; and exh. 6 attached to deposition.

similar set of integrated services.

In their answer to E.W.'s complaint, defendants admitted that E.W. had been confined at GRH-A because of her disabilities (R3-29-1 at ¶ 18); that defendants had a program to provide disability services for mentally retarded persons in an integrated setting (id. at ¶ 25); and that generally the cost of community services is less expensive than institutional care, although the cost can vary depending upon the individual's needs. Id.

Soon after E.W. was segregated at GRH-A until her recent release into the community, all of the qualified professionals felt that E.W. was appropriate for integrated services in the community. As will be shown below, this fact is evidenced by the professionals' stated opinions and by their actions in seeking and obtaining the provision of integrated services.

Starting nine days after her confinement at GRH-A, several attempts were made to place E.W. in personal care homes. Parrish dep., p. 64, l. 3-7; p. 69, l. 7-19; p. 75, l. 1-13. Personal care homes provide little more than room and board for persons with very limited income. Defendants' own staff admit that these homes do not provide the appropriate level of trained supervision and support that E.W. needs. DeBacher dep., p. 22, l. 19-25; Parrish dep., p. 35, l. 3-5; p. 66, l. 3-5 and 11-16; p. 78, l. 13-23; p. 79, l. 2-5. Mr. Parrish, E.W.'s caseworker from October 1994 to August 1995, felt that personal care home placements would result in rehospitalizations. SMF 64. He admitted that E.W. had not been placed in appropriate programs with proper supportive services that would break the cycle of rehospitalizations, including the Stewart Avenue home where the provider "tried to pray the demons out of

her." Parrish dep., p. 65, l. 9-13; p. 69, l. 7-19; p. 75, l. 1-13; p. 78, l. 3-23; SMF 64.

E.W.'s treatment team did not place her in structured programs, such as the mental retardation waiver program, because they knew nothing about that program (used for funding integrated services), knew nothing at all about integrated services for persons with mental retardation, had never seen a community mental retardation placement, or believed that the waiver program was not an available option for patients at the treatment unit of GRH-A. SMF 42, 63, 66, 68-71, & 73, representing admissions by Dr. Patel, Dr. Amin, Mr. Parrish, Ms. Ligon, Mr. Bliss, and Ms. Thornton; Parrish dep., p. 77, l. 20-25; p. 78, l. 1-25; p. 79, l. 2-5; p. 83, l. 8-24; p. 84, l. 8-16.

Mr. Parrish admitted that E.W.'s placement problem was related to her mental retardation, yet no mental retardation program was considered for E.W. In fact, when Mr. Parrish was assigned the task of seeking mental retardation services for E.W., he did nothing. Id. at p. 79, l. 11-14.

Although E.W.'s placements lacked appropriate supportive services, they demonstrate that GRH-A staff believed that she qualified for integrated services. After the placements ended, Dr. Patel still believed that E.W. did not meet the criteria for involuntary confinement at GRH-A and that she qualified for integrated services in the community. See, e.g., Patel II dep., p. 20, l. 18-20; p. 25, l. 16-22; p. 75, l. 15-21.

Rather than search for providers who could supply appropriate integrated services, in March 1995, defendants sought to discharge E.W. to a homeless shelter. Patel II dep., p. 20, l. 25; p. 21, l.

1-3; Parrish dep., p. 94, l. 9-12.

The discharge to a homeless shelter included no provision for mental health services, mental retardation services, or medical services for E.W.'s urinary incontinence. GRH-A staff later admitted that such a placement was inappropriate and would probably result in rehospitalization. Parrish dep., p. 96, l. 11 - p. 97, l. 3; Steed dep., p. 93, l. 8-11; Bliss dep., p. 86, l. 5-9; see also Elliott I dep., p. 97, l. 25 - p. 99, l. 3; DeBacher dep., p. 24, l. 17 - p. 25, l. 6. The placement in a homeless shelter was avoided when present counsel for E.W. objected. SMF 22.

After the ill-advised attempt to discharge E.W. to a homeless shelter was stopped, GRH-A staff met in April 1995 and directed Mr. Parrish to explore other placement options that would include mental retardation services. From April 1995 to September 1995, however, Mr. Parrish made no such efforts. Parrish dep., p. 106, l. 12-14; p. 109, l. 20. Ms. Ligon, who replaced Mr. Parrish as E.W.'s caseworker in September 1995, similarly did nothing for months, failing to even speak with the appropriate person, Gloria Sheppard, of the defendant Fulton County Regional Board, until February 1996. Ligon dep., p. 10, l. 2-6; p. 28, l. 17-25; p. 29, l. 1-2; Sheppard dep., p. 29, l. 12-18.

After Ms. Ligon's contact with Ms. Sheppard in February, 1996, GRH-A's records indicated that in April 1996, E.W. was considered for a community placement with Gloria Brown and Jean Flynn, a personal care home provider. Bliss dep., p. 26, l. 1-3; p. 27, l. 16-19. According to GRH-A records, Ms. Sheppard repeatedly advised GRH-A staff on May 17, 1996, June 10, 1996, and July 17, 1996 that E.W. was on a waiting list for integrated services through the

medicaid waiver program, but that no openings were available. R6-70-Exh. 1. Those same records indicated that as of August 1, 1996, E.W. was on two waiting lists for integrated services under the medicaid waiver and the United Cerebral Palsy programs.⁶ Id.

All of the above efforts at providing E.W. integrated services were done at the direction of E.W.'s treatment staff. Dr. Patel, E.W.'s treating physician, repeatedly stated that E.W. qualified for services in the community. A good example is as follows:

Q: If you were aware of a provider who could meet her needs in the community, would you be in favor of placing her in the community?

A: Yes, why not?

Patel II dep., p. 76, l. 25 - p. 77, l. 1-4; see also id. at p. 25, l. 16-22; p. 33, l. 1-5; p. 75, l. 9-21. Defendants have admitted in their previous briefs that Dr. Patel believes that E.W. qualifies for integrated services. R5-62-4.

Similarly, Dr. DeBacher, a GRH-A psychologist, testified on March 12, 1996 that E.W. qualified for services in the community when he first evaluated her in July 1995. DeBacher dep., p. 46, l. 6 - p. 47, l. 7; see also p. 27, l. 11-16. Said Dr. DeBacher:

⁶Although Ms. Sheppard had some reservations about E.W.'s eligibility for integrated services in April 1996 due to a recent behavioral incident, she clearly indicated in her deposition that this was a temporary concern. Sheppard dep., p. 44, l. 9-18. Her concern was resolved shortly thereafter as evidenced by her active attempts to obtain a community placement for E.W., in which she cited lack of openings as the only barrier to integrated services, and by her assistance in obtaining E.W.'s current community placement.

Q: If you had a home provider who said they would be willing to take her, do you think it would be a good idea to give her a try in the community?

A: You mean a staff group home or just an individual provider?

Q: A staffed group home that can provide the things you indicated a group home should do.

A: Sure, yeah.

Q: At what point do you think it would have been good to try?

A: Well, as soon as we would have known about such a place and had about a month to prepare to, you know, based on her current situation and let her see the place; let them get to know her; talk about contingencies; trial visit there for awhile; you know, give her some encouragement for doing okay.

Id. at p. 46, l. 6-23.⁷

⁷Defendants cite one phrase out of context from a lengthy report prepared by Dr. DeBacher in October, 1995 for the proposition that E.W. did not qualify for integrated services. The report as a whole was clear, however, that except for relief of depression through a medication assessment, Dr. DeBacher did not believe E.W. required segregated services. He concluded his report as follows: "I would favor placement in a professionally supervised group home for higher level patients with mental deficiency and mental illness." R5-59-Exh. 6 at p. 7; see also id. at p. 6, ¶ 4 indicating that E.W. "has become so worn out in this environment [at GRH-A] that she would benefit from a complete change of scene to help her climb out of her depression and take a renewed interest in life." Dr. DeBacher's entire report and deposition taken after his report make clear that he believed E.W. qualified for community services from July 1995 to August 1996 when summary judgment

Joseph Steed, a member of the Fulton County Regional Board's community evaluation team, testified that E.W. could be served in the community (including a group home), listed specific services such a placement would require, and noted that persons in the medicaid waiver program sometimes obtained such placements.⁸ Steed dep., p. 61, l. 7-19; p. 62, l. 12; p. 65, l. 19-22; p. 66, l. 1-5.

Finally, Dr. Richard Elliott, a mental health and mental retardation expert retained by plaintiffs in this case, stated that E.W. could and should be placed in a more integrated setting in the community and that providers existed who could provide E.W. with the necessary integrated services. R5-59-Exh. 1 at ¶¶ 11, 15 and Exh. 2 at p. 1; Elliott I dep., p. 29, l. 6-10; p. 77, l. 14-24.

D. AVAILABILITY OF FUNDS AND SERVICES

In fiscal year 1995, the latest year for which figures were available at the close of discovery, defendants spent a total amount of \$208,860,127 on integrated community services for persons with mental retardation and mental illness. SMF 180. During that same year, defendants spent a total amount of \$212,861,698 on segregated institutional services for persons with mental retardation and mental illness. Id. When the state legislature passed H.B. 100, O.C.G.A. § 37-2-5.1(c)(3), it allowed defendants to transfer monies from state institutions to community placements so that more persons could be served in the community. SMF 170.

motions were filed.

⁸Although Mr. Steed expressed the same temporary concern expressed by Gloria Sheppard in April 1996 regarding integrated services for E.W., his concern was also resolved as evidenced by his deposition testimony and E.W.'s actual community placement.

The medicaid waiver program allows states to spend medicaid funds to provide disability services in the community to mentally retarded persons who would otherwise be eligible for segregated services in an intermediate care nursing facility for the mentally retarded (ICF-MR). The federal government has authorized matching federal dollars to fund integrated community services for 2,109 persons in Georgia under the medicaid waiver program, yet in 1996 defendants were using only 700 of those slots. SMF 171; Hopkins dep., p. 19. Dr. Patel, Dr. DeBacher, Dr. Elliott, and Mr. Ingram have all acknowledged that capable providers of integrated community services for persons such as plaintiffs exist. SMF 164, 165. While this case has been pending, community service providers have indicated that they serve persons more challenging than these plaintiffs. SMF 168. At the time of the lower court's order, L.C. had been served by such a provider for over a year, and E.W. is now being served by the same provider.

SUMMARY OF ARGUMENT

This case involves a fairly simple issue of statutory interpretation: whether the ADA's anti-discrimination mandate prohibits unnecessary segregation. The case also involves a fairly simple issue regarding the Attorney General's implementing regulation [28 C.F.R. § 35.130(d)] that requires public entities to provide services in the "most integrated setting appropriate" to a disabled person's needs: whether the regulation is a reasonable construction of the ADA.

The express language of the ADA clearly equates unnecessary segregation with discrimination. The legislative history clearly equates unnecessary institutionalization with segregation. Thus,

the ADA prohibits unnecessary institutionalization. This comports with the express finding in the ADA that discrimination persists in such critical areas as institutionalization.

The Attorney General's integration regulation is a reasonable construction of the ADA. It was issued at the specific direction of Congress. See 42 U.S.C. § 12134(a), (b). The regulation therefore has the force of law as if passed by Congress itself.

Additionally, as the person charged with implementing Title II of the ADA, the Attorney General's regulation is entitled to substantial deference and should be given controlling weight unless it is clearly contrary to the statute. The Attorney General's regulation provides that public entities discriminate when they fail to provide services in the most integrated setting appropriate to a disabled person's needs. The Attorney General's regulation is consistent with the detailed findings and purposes codified in the ADA and the legislative history that unnecessary segregation and institutionalization are forms of discrimination. Therefore, the regulation is not clearly contrary to the statute, but is entirely consonant with it.

Similarly, the Attorney General's consistent interpretation of the regulation is entitled to substantial deference. The Attorney General consistently has interpreted the integration regulation to prohibit unnecessarily segregated services, including unnecessary institutionalization. Unnecessary segregation is itself a form of discrimination, independent of the discrimination that arises when individuals with disabilities receive different services than those provided to individuals without disabilities. See Helen L. v. DiDario, 46 F.3d 325, 335 (3rd Cir. 1995), cert. denied, 116 S. Ct.

64 (1995), adopting the Attorney General's interpretation of the integration regulation.

Defendants have discriminated against plaintiffs by providing services to the plaintiffs only in a segregated manner when the undisputed facts establish that plaintiffs are eligible for integrated services. The qualified professionals agreed before this lawsuit was filed, at the time it was filed, at the time the lower court entered its order, and at the time this case is now being heard by this Court that integrated services are appropriate for plaintiffs. Indeed, over one year before the lower court issued its ruling, defendants began providing integrated services to Plaintiff L.C. And after this case was appealed to this Court, defendants began providing integrated services to Plaintiff E.W.

The undisputed facts also establish that the defendants spend over 200 million dollars per year on both segregated and integrated services. Thus, defendants cannot show that any substantial burden or fundamental alteration of their programs will be imposed if they are ordered to provide integrated services.

It is important to note that this case has nothing to do with a claim for deinstitutionalization. Such a claim presupposes a per se right to community-based services. Plaintiffs do not claim such a right. In fact, plaintiffs do not claim that defendants are required to provide them with any services at all. What plaintiffs do claim is that once defendants opt to provide them with services, defendants must provide those services in the most integrated setting appropriate to plaintiffs' needs.

The developing case law under the ADA, particularly Helen L., comports with plaintiffs' argument. Defendants' reliance on older

§ 504 cases is fundamentally flawed because those cases had nothing to do with the integration mandate of the ADA or the integration regulation. Every ADA case since Helen L., that has applied the integration regulation with the benefit of the Attorney General's interpretation to facts similar to those of this case, has agreed with the holding in Helen L. that unnecessary institutionalization is a form of discrimination and thus violates the ADA.

ARGUMENT AND CITATION OF AUTHORITY

I. DEFENDANTS HAVE VIOLATED THE ADA BY UNNECESSARILY PROVIDING SEGREGATED, RATHER THAN INTEGRATED, SERVICES TO PLAINTIFFS.

A. INTRODUCTION

Plaintiffs rely upon the following ADA provision in this case:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (emphasis added).

Plaintiffs also rely upon the Attorney General's implementing regulation issued at the specific direction of Congress:

A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

28 C.F.R. § 35.130(d) (emphasis added).

This statute and regulation were enacted after both branches of Congress concluded:

There is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life. Further, there is a need to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.

S. Rep. No. 116, 101st Cong., 1st Sess. 20 (1989) (hereinafter S. Rep. at ____); H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 50 (1990) [hereinafter H.R. Rep. 485(____) at ____] (emphasis added).

Upon signing the ADA into law, President Bush reaffirmed the historic mandate of mainstreaming persons with disabilities:

The Americans with Disabilities Act presents us all with an historic opportunity. It signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.

1990 U.S.C.C.A.N. at 602 (emphasis added).

B. THE CONGRESSIONAL FINDINGS

Unlike § 504 of the Rehabilitation Act, which was but a single sentence tacked onto a vocational rehabilitation bill, Congress went to great lengths in the ADA, a bill comprising over 50 pages, to make specific findings and to make clear the comprehensive nature of the Act in order to "ensure once and for all that no Federal agency or judge will ever misconstrue the congressional mandate to integrate people with disabilities into the mainstream."

135 Cong. Rec. S4986 (daily ed. May 9, 1989) (statement of Sen. Harkin) (emphasis added). Senator Harkin, the ADA's sponsor and floor manager in the Senate, was addressing Congress' view that the federal agencies responsible for enforcing § 504 and many courts had frustrated § 504's primary purpose of integrating persons with disabilities into society's mainstream. As the House Report noted:

Moreover, 17 years of experience with section 504 - in the development and issuance of regulations, guidelines and standards, in the implementation of those requirements, and in the interpretation of the law - have demonstrated the need for further legislative action in this area.

H.R. Rep. No. 485(IV) at 24, reprinted in 1990 U.S.C.C.A.N. 513.

Of the nine detailed findings made by the Congress, the

following are the most pertinent to this case:

- (2) Historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
- (3) Discrimination against individuals with disabilities persists in such critical areas as ... institutionalization;
- (4) ... [I]ndividuals who have experienced discrimination on the basis of disability have often had no legal recourse ...;
- (5) Individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, ... failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, [and] segregation ...;
- (8) The Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation [and] independent living....

42 U.S.C. § 12101(a)(2), (3), (4), (5), and (8) (emphasis added).

Thus, Congress left no doubt that unnecessary isolation, segregation, and institutionalization of persons with disabilities are forms of discrimination under the ADA. It also made clear that full participation in society should be assured.

C. THE LEGISLATIVE HISTORY

Prior to its passage, Congress emphasized the comprehensive nature of the ADA to end segregation of persons with disabilities:

The ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation.

1990 U.S.C.C.A.N. 449 (emphasis added).

In testifying to the need for a comprehensive law, Attorney General Thornburgh, on behalf of President Bush, stated:

Over the last 20 years, civil rights laws have been enacted in piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections.

S. Rep. at 19; H.R. Rep. No. 485(II) at 48.

The Attorney General specifically noted that the holes in the fabric included the Rehabilitation Act:

Fifteen years have gone by since the Rehabilitation Act took effect. Nevertheless, persons with disabilities are still too often shut out of the economic and social mainstream of American life.

ADA: Hearing before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st Cong., 1st Sess. 195 (1989) (hereinafter "Hearing" at ____) (emphasis added). Thus, the Attorney General stressed that it was important to bring persons with disabilities into the mainstream of society, "in other words, full participation in and access to all aspects of society." H.R. Rep. No. 485(II) at 35, reprinted in 1990 U.S.C.C.A.N. 317.

Congress clearly intended the ADA's civil rights protections to be used for ending unnecessarily segregated services in institutions. For example, Republican Senator Weicker, the original sponsor of the ADA and a former Chair of the Senate Subcommittee on the Handicapped, testified before that Committee:

For years this country has maintained a public policy of protectionism towards people with disabilities. We have created monoliths of isolated care in institutions and in segregated educational settings. It is that isolation and segregation that has become the basis of the discrimination faced by many disabled people today. Separate is not equal. It was not for blacks; it is not for the disabled.

Hearing at 215. Additional examples abound. Said Congressman Miller, a co-sponsor of the ADA in the House:

... it has been our unwillingness to see all people with

disabilities that has been the greatest barrier to full and meaningful equality. Society has made them invisible by shutting them away in segregated facilities....

136 Cong. Rec. H2447 (daily ed. May 17, 1990) (emphasis added).⁹

In a similar vein, Senator Harkin stated that the ADA:

guarantees individuals with disabilities the right to be integrated into the economic and social mainstream of society; segregation and isolation by others will no longer be tolerated.

135 Cong. Rec. S10713 (daily ed. September 7, 1989) (emphasis added). Rep. Collins, also a co-sponsor of the ADA, stated that the "basic goal which runs through this landmark civil rights legislation ... is to fully integrate disabled Americans into all aspects of life in our country." 136 Cong. Rec. H2603 (daily ed. May 22, 1990) (emphasis added).

Senator Kennedy, a co-sponsor and chair of the Senate committee that considered the ADA, declared that:

The Americans With Disabilities Act will end this American apartheid. It will roll back the unthinking and unacceptable practices by which disabled Americans today are segregated, excluded, and fenced off from fair participation in our society by mindless biased attitudes and senseless physical barriers.

135 Cong. Rec. S4993 (daily ed. May 9, 1989) (emphasis added).

The above views were in accord with the House Report that "[d]iscrimination against people with disabilities includes segregation" (H.R. Rep. No. 485(II) at 29, reprinted in 1990 U.S.C.C.A.N. 310) and the Senate Report that "one of the most debilitating forms of discrimination is segregation imposed by

⁹The legislative history contains several references to discrimination through institutionalization. See, e.g., H.R. Rep. No. 485(II) at 31, reprinted in 1990 U.S.C.C.A.N. 312; S. Rep. at 8; 135 Cong. Rec. S4985 (daily ed. May 9, 1989).

others." S. Rep. at 6. Congress could not have been clearer that institutionalization is segregation and that unnecessary segregation is discrimination.

As noted above, Senator Weicker correctly noted that just as separate is not equal for blacks, separate is not equal for the disabled. This theme recurs throughout the legislative history. For example, Congress repeatedly invoked Brown v. Board of Education and its language as a basis for prohibiting segregation based upon disability:

[A]s in the finding 35 years ago by the Supreme Court in Brown v. Board of Education, in referring to the education of black students, ... segregation for persons with disabilities 'may affect their hearts and minds in a way unlikely to ever be undone.'

H.R. Rep. No. 485(III) at 26, reprinted in 1990 U.S.C.C.A.N. 448-49; see also S. Rep. at 6; 136 Cong. Rec. H2639 (daily ed. May 22, 1990) ("We have been moved by the continuing destructive effect of segregation, and we are acting now to reverse those practices, root and branch....") (statement of Rep. Dellums); 136 Cong. Rec. H2441 (daily ed. May 17, 1990) (statement of Rep. Brooks).

The Supreme Court previously had recognized that the same bigotry that infected attitudes about race also infected attitudes towards the disabled. In analyzing much of the early twentieth century literature and "science" advocating the segregation of persons with disabilities, Justice Marshall noted that "[a] regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 462, 105 S. Ct. 3249, 3266, 87 L.Ed.2d 313 (1985) (Marshall, J., concurring and dissenting in part). The

state regime included "[m]assive custodial institutions ... built to warehouse the retarded for life." Id. (emphasis added).

A majority of the Supreme Court agreed that the above-described history was "lengthy and tragic" and was one of "unfair and often grotesque mistreatment." Id., 473 U.S. at 454, 461, 105 S. Ct. at 3262, 3266.

In this more enlightened time, no Court would even suggest that it is not discrimination to segregate or provide segregated services to black people. The same conclusion should be drawn for the mentally disabled. It is obvious that institutions segregate the mentally disabled. To require them to receive services in this setting unnecessarily is a prime example of the type of discrimination that Congress intended to prohibit when it passed the ADA.

D. THE ATTORNEY GENERAL'S INTEGRATION REGULATION PROHIBITS UNNECESSARILY SEGREGATED SERVICES, HAS THE FORCE OF LAW, AND IS ENTITLED TO DEFERENCE.

As noted above, Congress made extensive findings of pervasive discrimination still in existence 17 years after enactment of § 504. In order to eliminate this discrimination, Congress directed the Attorney General to issue regulations:

... consistent with this chapter [the ADA] and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29 [section 504 of the Rehabilitation Act of 1973].

42 U.S.C. § 12134(b).¹⁰

¹⁰Unlike the other titles of the ADA, Congress did not list all forms of prohibited discrimination in Title II. Rather, it

Significantly, Congress gave a very specific mandate. Congress could have chosen to give a general instruction to issue regulations as it normally does. It did not. Congress also could have required the issuance of regulations consistent with other existing § 504 regulations. It did not. Instead, Congress directed the issuance of regulations consistent with a particular part of existing regulations issued on a particular date.

The particular part of the § 504 regulations that Congress directed the Attorney General to adopt required covered entities to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d). Other § 504 regulations issued by the Department of HHS (the successor agency to HEW) do not contain an integration regulation at all. See 45 C.F.R. § 84.4(b). Rather than choose HHS § 504 regulations without an integrated setting requirement, Congress chose the Attorney General's § 504 coordination regulations with an integrated setting requirement.¹¹

deliberately left this task to the Attorney General. See H.R. Rep. No. 485(II) at 52, reprinted in 1990 U.S.C.C.A.N. 475; see also Helen L., 46 F.3d at 332.

¹¹Defendants argue that the ADA only applies to differences in treatment between disabled individuals and non-disabled individuals. However, Congress did not direct the Attorney General to adopt HHS regulations that imposed such a requirement. See 45 C.F.R. § 84.4(b)(2) which required integration only in the context of providing services for disabled persons that are equal to services provided to nondisabled persons. Instead, Congress directed the Attorney General to adopt a regulation in which the

The Attorney General complied with the Congressional command and issued an ADA Title II regulation which provides that:

A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

28 C.F.R. § 35.130(d) (emphasis added).

The Congressional command also required the Attorney General to promulgate Title II regulations "consistent with" the rest of the ADA. The Attorney General's regulation meets this requirement. For example, Title III prohibits discrimination in the form of failing to provide services "in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. § 12182(b)(1)(B). The Attorney General's regulation incorporates this language almost verbatim.

The Title III integration requirement is independent of other provisions in Title III proscribing discrimination only in terms of differing treatment between disabled and non-disabled persons. 42 U.S.C. § 12182(b)(1)(A)(ii), (iii). This distinction made by the Congress demonstrates that the Congress knew when it wanted to tie prohibited discrimination to differences in treatment between the disabled and the nondisabled.

In similar fashion, the Attorney General's regulations include provisions that apply only to situations where the disabled are treated differently from the nondisabled. See, e.g., 28 C.F.R. § 35.130(b)(1). If, as argued by Defendants, 28 C.F.R. § 35.130(d) applied only to services that are offered to both the disabled and the nondisabled, then 28 C.F.R. § 35.130(b)(1), which prohibits a

failure to integrate is discrimination by itself.

public entity from providing separate or different services to persons with disabilities than is provided to others, would be redundant. However, an interpretation of a regulation which results in another portion of the regulation becoming "redundant" or "pure surplusage" is disfavored. Mackey v. Lanier Collection Agency and Service, Inc., 486 U.S. 825, 837, 108 S. Ct. 2182, 2189, 100 L.Ed.2d 836 (1988); Cammarano v. U.S., 358 U.S. 498, 505, 79 S. Ct. 524, 3 L.Ed.2d 462, 467 (1959). In short, the failure to provide services in the most integrated setting appropriate to a disabled person's needs is an independent form of discrimination.

The Attorney General also has provided guidance regarding the meaning of the integration regulation that comports with the clear legislative intent discussed earlier. For example, in mandating the delivery of services "in the most integrated setting," the Attorney General has defined that setting as one "that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. pt. 35, app. A § 35.130 at 469 (1996). The Attorney General has also made clear that "an important and overarching principle of the Americans with Disabilities Act" is that:

Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.

Id. at 467. In other words, "[i]ntegration is fundamental to the purposes of the American with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status." Id. at 466.

After complying with the Congressional mandate and issuing an

integration regulation, the Attorney General consistently has offered the same interpretation of the integration regulation:

Both the Section 504 regulations and the ADA make clear that the unnecessary segregation of individuals with disabilities in the provision of public services is itself a form of discrimination within the meaning of those statutes, independent of the discrimination that arises when individuals with disabilities receive different services than those provided to individuals without disabilities.

See Brief of Attorney General filed in Helen L. v. DiDario, 46 F.3d 325 (3rd Cir. 1995), cert. denied, ____ U.S. ____, 116 S. Ct. 64 (1995) R7-71-Exh. 3 at p. 7. The Attorney General's position set forth above was quoted with complete approval by the Third Circuit in Helen L., 46 F.3d at 335.

The Attorney General consistently has taken the same position in Williams v. Wasserman, 937 F. Supp. 524 (D. Md. 1996) (R7-71-Exh. 4); Wyatt v. Hanan, CV-3195-N (M.D. Ala. 1995) (R7-71-Exh. 5); and United States v. State of Connecticut, CV-N-86-252-EBB (D. Conn. 1996). R7-71-Exh. 6.

As the person charged with implementing the ADA,¹² the

¹²The Attorney General was given numerous responsibilities under the ADA: 1) to promulgate and implement regulations [42 U.S.C. §§ 12134, 12186(b)]; 2) to provide guidance and technical assistance to covered entities [42 U.S.C. § 12206]; 3) to conduct compliance reviews [42 U.S.C. § 12188]; 4) to coordinate conflicts between agencies on their interpretations and regulations [42 U.S.C. § 12117]; and 5) to file enforcement actions in federal court [42 U.S.C. §§ 12117, 12133, and 12188]. With respect to Title II, the Attorney General has issued regulations and a Technical Assistance Manual interpreting Title II. See 28 C.F.R. part 35 (1996); The

Attorney General's interpretation of the ADA is entitled to substantial deference. See Blum v. Bacon, 457 U.S. 132, 141, 102 S. Ct. 2355, 2361, 72 L.Ed.2d 728 (1982); Paralyzed Veterans of America v. D.C. Arena L.P., 1997 WL 358173 at 6-7 (D.C. Cir. July 1, 1997). Thus, the Attorney General's interpretation should be given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984). Given the text of the ADA and the overwhelming legislative history emphasizing integration into the mainstream of society and condemning segregation, the Attorney General's integration regulation is not arbitrary, capricious, or manifestly contrary to the statute.

The law is also well established that an agency's consistent interpretation of its own regulation is entitled to substantial deference. Thomas Jefferson University v. Shalala, 512 U.S. 504, 114 S. Ct. 2381, 2386, 129 L.Ed.2d 405 (1994). The Court's

... task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'

Id. Given the text of the ADA and the legislative history equating unnecessary institutionalization with segregation and discrimination and repudiating "monoliths of isolated care in institutions," the Attorney General's interpretation of her own regulation, far from being plainly erroneous, is the only reasonable interpretation of it.

Americans With Disabilities Act Title II Technical Assistance Manual (1993).

Finally, it should be noted that because the Attorney General's integration regulation comports with a specific statutory directive from Congress, Congress essentially voiced its approval of the integration regulation. The regulation therefore has the same effect as if passed by Congress. See United States v. Board of Comm'rs of Sheffield, Alabama, 435 U.S. 110, 134, 98 S. Ct. 965, 980-81, 55 L.Ed.2d 148 (1978); Helen L., 46 F.3d at 332.¹³

Defendants argue strenuously, with barely a word about the Attorney General's integration regulation, that plaintiffs have not been discriminated against "because of" their disabilities. Defendants fail to recognize that unnecessary segregation is discrimination and this discrimination occurs only because of disability. More importantly, defendants ignore the fact that the integration regulation definitively provides that unnecessary segregation is discrimination because of disability and that the Attorney General consistently has advanced this interpretation. Since defendants make no argument that the regulation is an abuse of the Attorney General's discretion, they do not even advance an argument on which the Court could strike down this interpretation.

Plaintiffs emphasize that they do not claim a right to services at all, only a right to receive services, once defendants opt to provide them, in the most integrated setting appropriate to

¹³HHS, through HCFA, has recently adopted the same interpretation as the Attorney General of the ADA and the integration regulation:

Under the ADA and regulations written at 28 CFR 130(d) (sic), a State must not place or keep in an institutional facility any person who could be served more appropriately in a community-based setting.

Exh. 1 at p. 2 attached hereto.

their needs. Defendants refuse to recognize plaintiffs' claim that defendants institutionalized L.C. and E.W. for the provision of disability services and then failed to administer those services in the most integrated setting appropriate to their needs when institutional care no longer was needed (a claim within the four corners of an explicit ADA regulation).

There is a significant difference between a per se right to an integrated service (which plaintiffs do not claim) and a right to receive a service, which a public entity chooses to provide, in a setting that is the most integrated setting appropriate to the individual's needs. Thus, if defendants did not provide segregated services in an institution or if plaintiffs required segregated services through institutional care, plaintiffs would have no claim under 28 C.F.R. § 35.130(d) to receive services in a more integrated setting. Because neither of those scenarios is present in this case, defendants have violated 28 C.F.R. § 35.130(d).¹⁴

II. THE DISTRICT COURT'S DECISION IS CONSISTENT WITH THE DEVELOPING CASELAW ON THE ADA AND THE CONGRESSIONAL INTENT THAT PERSONS WITH DISABILITIES BE MAINSTREAMED.

The district court correctly held that unnecessary institutional segregation of a disabled individual constitutes

¹⁴Although not directly on point, this Court has held, in the employment context of the ADA, that the "because of" standard for determining liability under the ADA "conveys the idea of a factor that made a difference in the outcome." McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1077 (11th Cir. 1996). Certainly, plaintiffs' disabilities in this case were a factor that made a difference in how they were treated.

discrimination per se, which cannot be justified by a lack of funding. R8-80-8. That holding is consistent with virtually all of the recent caselaw construing the ADA and the integration regulation. The leading case on this issue, which was relied upon by the district court, is Helen L. v. DiDario, 46 F. 3d 325 (3rd Cir. 1995), cert. denied, ___ U.S. ___, 116 S. Ct. 64 (1995).

In Helen L., the Pennsylvania Department of Public Welfare ("DPW") had designed an attendant care program to provide services that would enable persons to live in their homes and communities rather than in institutions. Id. at 327. Despite the existence of this program, DPW required Idell S. to receive necessary care services in the segregated setting of a nursing home rather than in her own home. The parties agreed that Idell S. qualified for the receipt of services in her home, but DPW refused to provide those services due to alleged lack of funding. Id. at 329.

After carefully examining the legislative history, the Congressional findings in the ADA, the Attorney General's integration regulation, and Supreme Court case law that requires deference to agency regulations, the Third Circuit held:

Thus, the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled. Accordingly, the district court erred in holding that the applicable provisions of the ADA 'may not be invoked unless there is first a finding of discrimination.'

Id. at 333.

In so holding, the Court adopted the Attorney General's interpretation of her own regulation in finding that this particular prohibition is not tied to disparate treatment of the disabled and the nondisabled:

The 504 coordination regulations, and the ADA 'make clear

that the unnecessary segregation of individuals with disabilities in the provision of public services is itself a form of discrimination within the meaning of those statutes, independent of the discrimination that arises when individuals with disabilities receive different services than those provided to individuals without disabilities.'

Id. at 335, quoting the Attorney General's brief.

Defendants' ADA argument hinges on their contention that to prove a violation of the ADA, a disabled plaintiff must show a difference in treatment to someone who is not disabled. But as the Third Circuit reasoned, this argument does not make any sense in the context of institutions because we do not institutionalize the nondisabled. Congress stated unequivocally that discrimination persisted in the area of institutionalization. 42 U.S.C. § 12101(a)(3). As noted in Helen L.:

If Congress were only concerned about disparate treatment of the disabled as compared to their nondisabled counterparts, this statement would be a non sequitur as only disabled persons are institutionalized.

Id. at 336.

Under the Defendants' argument, a disabled plaintiff who is unnecessarily provided segregated services in an institution could never prove an ADA violation. Such a result would defeat the statutory language regarding segregation and institutionalization and the legislative history condemning segregated services and mandating the integration of persons with disabilities into the mainstream of society.

Since the Third Circuit issued its decision in Helen L., every federal court in the country, when confronted with alleged violations of the ADA and the integration regulation, has followed Helen L.

For example, in Charles O. v. Houstoun, 15 ADD 691, 1996 WL

447549 (M.D. Penn. 1996), the court granted summary judgment to two individual plaintiffs who, just like the plaintiffs in this case, showed that the state discriminated against them under the ADA by confining them to a state psychiatric hospital when the plaintiffs qualified for community-based services. Id. at 703.

In Williams v. Wasserman, the court cited Helen L. favorably in holding that unnecessarily confining persons with mental disabilities violated the ADA and the integration regulation. 937 F. Supp. at 530-31. The court rejected the argument that the ADA only protects persons with disabilities from discrimination in relation to non-disabled persons. Id. Finally, the court agreed with Helen L. that an ADA claim "... does not require a showing of discrimination between different groups or subgroups of disabled individuals." Id.

In Messier v. Southbury Training School, 916 F. Supp. 133 (D. Conn. 1996), the named plaintiffs sued on behalf of a class of mentally retarded individuals confined to a state institution seeking an order requiring the state to evaluate all residents for possible community placements regardless of the severity or nature of their disabilities. Id. at 136-137. In denying the defendants' motion to dismiss, the court cited Helen L. favorably, held that the integration regulation is entitled to deference, and found that under the ADA, the defendants were "... prohibited from refusing to consider certain residents for possible community placement, merely based upon the degree of their disabilities." Id. at 141-142.

Other decisions interpreting the ADA and its predecessor, § 504 of the Rehabilitation Act, have reached the same conclusion that unnecessarily segregated services are prohibited and that

integrated services aimed at bringing the disabled into the mainstream of society are required. These and other cases illustrate that the § 504 case law (which includes the cases cited by defendants discussed further below) is not monolithic as defendants suggest. See, e.g., Halderman v. Pennhurst State Sch. and Hosp., 784 F. Supp. 215, 224 (E.D. Pa. 1992), aff'd, 977 F.2d 568 (3rd Cir. 1992) (§ 504 prohibits unnecessary segregation and requires reasonable accommodations to provide opportunities for integration); Coleman v. Zatechka, 824 F. Supp. 1360, 1373 (D. Neb. 1993) (in enacting the ADA, Congress "aimed to bring people with disabilities into society's mainstream, to cause the kinds of interaction which may facilitate recognition of the true equality of human worth as between individuals - regardless of disabilities."); Jackson v. Ft. Stanton Hosp. and Training Sch., 757 F. Supp. 1243, 1299 (D. N.M. 1990), aff'd in part, rev'd in part on other grounds, 964 F.2d 980 (10th Cir. 1992) ("Where reasonable accommodations in community programs can be made, defendants' failure to integrate severely handicapped residents into community programs ... violates § 504."); Martin v. Voinovich, 840 F. Supp. 1175, 1191-92 (S.D. Ohio 1993); Homeward Bound, Inc. v. Hissom Memorial Center, 1987 WL 27104 at 20 (N.D. Okla. 1987).

In non-institutional cases, both federal and state courts cite Helen L. favorably in finding that the ADA is intended to usher in a new day for the disabled and to provide protection where § 504 of the Rehabilitation Act had failed. Heather K. by Anita K. v. City of Mallard, Iowa, 887 F. Supp. 1249, 1263-1266 (N.D. Iowa 1995); Fink v. Kitzman, 881 F. Supp. 1347, 1368-1371 (N.D. Iowa 1995); City of Moorpark v. Superior Court of the County of Ventura, 43

Cal. App. 4th 728, 736-37, 50 Cal. Rptr. 2d 816, 821-22 (1996); Fell v. Spokane Transit Authority, 128 Wash.2d 618, 628, 911 P.2d 1319, 1324 (1996).

In sum, the developing ADA case law is on track with the Congressional mandate that unnecessary segregation of the disabled is discrimination. Helen L. is the definitive case on this issue. This case is on all fours with Helen L., a thoughtful and well-considered opinion that this Court should follow.

Defendants' fallback argument is that a disabled person must show discrimination based upon the severity of a disability. Plaintiffs disagree. See Helen L., 46 F.3d at 335; Wasserman, 937 F. Supp. at 530-31. Assuming for the sake of argument that Defendants are correct, it ought to be obvious that only the more severely disabled are subjected to institutionalization, the most segregated setting for disability services. In any event, defendants have admitted to such discrimination.

L.C. was first placed at GRH-A because of her psychiatric illness, but she remained there because staff were unfamiliar with mental retardation community services and because her multiple disabilities made placement difficult. Bliss dep., p. 54, l. 11-21. For example, GRH-A staff contended that it was "impossible" for L.C. to be eligible for the medicaid waiver program that eventually provided her with a community placement. SMF 100; R5-59-Exh. 29. By contrast, professionals who have a background and experience in mental retardation placements deal with the program on a regular basis. Ingram dep., p. 17, l. 1 - p. 19, l. 2.

Similarly, E.W. was not integrated into the community, in part, because she suffers from mental retardation, mental illness

and a kidney ailment. The deposition testimony of E.W.'s treatment team is replete with references to the Defendants' failure to integrate persons into the community who suffer from a combination of disabilities. Bliss dep., p. 54, l. 11-21; Patel II dep., p. 32, l. 21 - p. 33, l. 12; DeBacher dep., p. 26, l. 14-25, p. 27, l. 1-5; Ingram dep., p. 15, l. 13 - p. 16, l. 16; Parrish dep., p. 25, l. 17 - p. 27, l. 3, p. 34, l. 14-18, p. 35, l. 16 - p. 36, l. 3; Steed dep., p. 61, l. 20 - p. 62, l. 2.

A good example of defendants' admission that they discriminate based upon the severity of one's disability is the report of DHR's Dual Disabilities Task Force issued in June, 1991. R5-59-Exh. 63. That report recommends that community placements, particularly group homes, need to be created for persons who suffer from both mental retardation and mental illness because they "... are probably 'the most in need.'" *Id.* at p. 15. Providing group homes in the community "... would counteract the void in services for mildly retarded individuals created during the last 15 years." *Id.* This is a clear admission that persons with a combination of certain disabilities are not provided community services.

In sum, Defendants delayed integrating L.C. and E.W. into the community for months, if not years, based upon the combination and severity of their disabilities.

III. DEFENDANTS' RELIANCE ON § 504 CASES THAT ADOPT THE WRONG § 504 STANDARD IS FUNDAMENTALLY FLAWED.

Defendants cite several cases, primarily older § 504 cases, in support of their argument that the ADA does not prohibit discrimination against the disabled, unless they are treated differently from the nondisabled. Before discussing the cases upon

which Defendants rely, it is important to note the major fallacy in Defendants' argument.

The crux of Defendants' argument is that when Congress passed Title II of the ADA, all it intended to do was extend § 504 to public entities. In doing so, Defendants argue, Congress extended § 504 standards to the ADA. Defendants then make the leap that Congress also intended to adopt all of the case law construing § 504. Defendants therefore cite, as binding authority under the ADA, several § 504 cases which they believe support their position.

The basic premise in defendant's argument, however, is factually incorrect. It is true that Congress, in enacting the ADA, intended to extend the non-discrimination principles of § 504 to public entities. That extension, however, was a means to an end. The legislative history and explicit Congressional findings in the ADA itself, which were discussed earlier, make abundantly clear that the end that Congress sought was "to provide a clear and comprehensive national mandate for ... the integration of persons with disabilities into the economic and social mainstream of American life." S. Rep. at 20; H.R. Rep. No. 485(II) at 50. Integrated services are the real end to Title II of the ADA. If all that Congress intended to do was extend § 504 to public entities, Congress could simply have amended § 504 by adding two words, "public entities."

As already noted, the legislative history also reveals Congress' and the Attorney General's belief that "17 years of experience with section 504 ... and in the interpretation of the law have demonstrated the need for further legislative action in this area," and that despite § 504, "persons with disabilities are

still too often shut out of the economic and social mainstream of American life."¹⁵ Congress would not have expressed such dissatisfaction with § 504 and the case law under that section if all it intended by enacting the ADA was to extend § 504 to public entities.

Defendants' erroneous factual premise, even if accepted for the sake of argument, does not support the conclusion. Just because Congress intended to extend the principles of § 504 to the ADA does not mean that Congress intended to adopt all of the case law construing § 504. Both plaintiffs and defendants have cited to different § 504 cases that support their positions in this case. Given the wide array of conflicting and confusing § 504 case law, Congress could not possibly have intended to adopt all of it.

However, one of the principal court opinions Congress did cite with approval in the legislative history on Title II of the ADA was Judge Mansmann's opinion in ADAPT v. Skinner, 881 F.2d 1184 (3rd Cir. 1989):

As with Section 504 of the Rehabilitation Act, integrated services are essential to accomplishing the purposes of title II. As stated by Judge Mansmann in ADAPT v. Skinner, "the goal [is to] eradicat[e] the 'invisibility of the handicapped.'"

H.R. Rep. No. 485(IV) at 50, reprinted in 1990 U.S.C.C.A.N. 473.

This passage was not an isolated reference to Judge Mansmann's opinion. The legislative history contains numerous statements to the effect that Congress was adopting Judge Mansmann's standard in the ADAPT case. For example, Senator Harkin avowed that:

In other words, mainstreaming of people with disabilities

¹⁵H.R. Rep. No. 485(IV) at 24, reprinted in 1990 U.S.C.C.A.N. 513; Hearing at 195 (emphasis added).

is one of the essential principles of section 504. Thus, the majority opinion of the three judge panel of the Third Circuit Court of Appeals in Adapt versus Burnley was correct when it said that section 504 was designed to emancipate people with disabilities and that mainstreaming is required....

135 Cong. Rec. S4986 (daily ed. May 9, 1989). Senator Cranston, a co-sponsor of the ADA and the principal author of § 504, stated that "[o]ur bill would codify the reasoning of the recent decision of the U.S. Court of Appeals for the Third Circuit in Americans Disabled for Accessible Public Transportation v. Burnley, 867 F.2d 1471 (1989)."¹⁶ 135 Cong. Rec. S4997 (daily ed. May 9, 1989).

Since the Congress intended to codify the reasoning of Judge Mansmann, it is important to look more closely at his opinion. One of the main issues in ADAPT was whether newly purchased buses had to be equipped with wheelchair lifts. The majority opinion held that the Department of Transportation's decision not to implement mainstreaming, i.e., not to require all buses to be accessible, but rather to allow local transit authorities to use separate paratransit buses for disabled persons, did not violate § 504. In

¹⁶The Senators' citations to Burnley refer to the advance sheets edition of the Federal Reporter. Judge Mansmann's panel opinion in ADAPT v. Burnley was vacated by the Third Circuit en banc in ADAPT v. Skinner (case renamed on appeal) and was not included in the bound edition of the Federal Reporter. Judge Mansmann then dissented from the Skinner en banc decision. Judge Mansmann adopted the same § 504 standard in both his Burnley decision and in his Skinner dissenting opinion which Congress clearly adopted. Interestingly, Judge Mansmann was also one of the Third Circuit judges who decided Helen L.

dissenting from the majority opinion, Judge Mansmann wrote that § 504 did require mainstreaming such that disabled persons could ride buses with nondisabled persons. ADAPT, 881 F.2d at 1204. Judge Mansmann relied, in part, on the requirement that services must be "provided in the most integrated setting appropriate to the needs of participating handicapped persons." Id. at 1204, n. 1.

The passage quoted above demonstrates Congress' fundamental understanding, contrary to the § 504 cases cited by defendants in this case, that the § 504 standard that Congress was adopting was one of integrated services. According to Judge Mansmann, it was not enough that separate paratransit services were provided for the disabled. Section 504 required mainstreaming in the form of integrated services. Id. at 1204. Similarly, it is not enough in this case to provide separate services in an institution.

In sum, even assuming that only § 504 standards apply to the ADA, defendants have argued for a § 504 standard completely contrary to the Congressional mandate expressed in the ADA and that Judge Mansmann correctly noted did not apply to § 504. The correct standard requires the defendants, once they undertake to provide services, to provide integrated services when the evidence shows that persons qualify for such services. Here, the evidence is undisputed that plaintiffs qualify for integrated services.

Once the proper standard adopted by the Congress is understood, it becomes clear that defendants' reliance on several cases that completely failed to follow that standard is fundamentally flawed.

Defendants rely heavily on this Circuit's decision in S.H. v. Edwards, 860 F.2d 1045 (11th Cir. 1988), as well as the lower

court's decision in that case. S.H. had nothing to do with the ADA or the integration regulation under either the ADA or § 504. On appeal, this Court engaged in no analysis of the § 504 claim but merely adopted the lower court's decision. The lower court decision dealt extensively with the Fourteenth Amendment claim and devoted a mere two paragraphs to the § 504 claim.

With regard to the § 504 claim, the plaintiffs in S.H. alleged a procedural violation, i.e., that they had illegally been denied habilitation reviews. The lower court made very clear that it was denying procedural relief (as opposed to substantive relief) "because the facts of this case do not support the contention that plaintiffs were denied O.C.G.A. § 37-4-42 habilitation reviews 'solely by reason of [their] handicap,' as the statute requires." Id. at 1052. The court went on to find that the state legislature properly acted within its prerogative in establishing a bright line rule for when habilitation reviews would be provided. Thus, plaintiffs were not denied habilitation reviews solely by reason of their handicap. Id. Of course, Congress deleted the "solely" requirement in the ADA, so that the lower court's ruling in S.H. has no bearing on this case.¹⁷ Finally, the plaintiffs in S.H., unlike the plaintiffs here, did not seek existing services.

Since the Court's decision in S.H., this Court has recognized that Congress deliberately made the ADA more expansive than § 504

¹⁷The lower court in S.H. also noted that it was not adopting the Magistrate's recommendation that § 504 does not apply to differences in treatment based upon the nature and severity of the disability. Id. Plaintiffs here have been treated differently based upon the nature and severity of their disabilities.

by refusing to limit Title II to discrimination "solely on the basis of disability." McNely, 99 F.3d at 1074-75. Congress recognized that if it so limited the ADA, the ADA would not reach all discriminatory conduct that Congress intended to reach. Thus, as noted previously, this Court held in McNely that a violation of the ADA is shown simply when a person's disability is a factor that made a difference in how the person was treated. Id. at 1077.

Similarly, P.C. v. McLaughlin, 913 F.2d. 1033 (2d. Cir. 1990) had nothing to do to with the ADA or the integration regulation. Instead, P.C. was a § 504 case for damages in which the primary issue was whether defendants were protected by qualified immunity. Because plaintiffs could not show that prior case law "clearly establish[ed]" § 504 liability, as one must do in the face of a qualified immunity defense, the court dismissed plaintiffs' claim. As with S.H., the court in P.C. denied a § 504 claim because plaintiff could not prove that he was denied benefits "solely because of handicap," a requirement that does not exist in the ADA. Finally, the P.C. court also based its holding on the "fundamental deficiency" in plaintiffs' position that there was no evidence of "discriminatory animus" even though the Supreme Court had already held five years earlier that § 504 does not require proof of intentional discrimination. See Alexander v. Choate, 469 U.S. 287, 296-97, 105 S. Ct. 712, 718, 83 L.Ed.2d 712 (1985).

Phillips v. Thompson, 715 F.2d. 365 (7th Cir. 1983) is an older § 504 case and did not involve the ADA or the integration regulation. The plaintiffs in that case argued that the state had an affirmative duty to create services. Id. at 368. Here, by contrast, plaintiffs argued only for the provision of existing

services for which they qualify and for which no modifications are necessary. Finally, the Phillips court relied principally on Southeastern Community College v. Davis, 442 U.S. 397, 99 S. Ct. 2369, 60 L.Ed.2d 980 (1979), a decision rejected by the Congress in passing the ADA.¹⁸

Another case relied upon by defendants, Jackson v. Ft. Stanton Hosp. and Training Sch., 757 F. Supp. 1243 (D.N.M. 1990), aff'd in part, rev'd in part on other grounds, 964 F.2d. 980 (10th Cir. 1992), actually required the integration of persons with severe disabilities into community programs under § 504. The case did not consider in any way the integration regulation at issue here.

Perhaps most amazingly, defendants rely upon Clark v. Cohen, 794 F.2d. 79 (3rd Cir. 1986), the Third Circuit case decided prior to Helen L. and expressly distinguished by Helen L. As noted in Helen L., Clark was a § 504 case that had nothing to do with the ADA or the integration regulation. Helen L., 46 F.3d. at 333-34. Instead, the plaintiffs in Clark relied upon § 504 regulations that required a comparison between the disabled and the non-disabled. Id. Thus, Clark involved a completely different regulation with a completely different standard. Moreover, the Third Circuit in Clark barely discussed the § 504 claim relegating it to a footnote and affirming the lower court's decision on the § 504 claim under the clearly erroneous standard. Clark, 794 F.2d at 84-85, n. 3.

¹⁸In Davis, the Supreme Court held that no affirmative duty existed to accommodate persons with disabilities. 442 U.S. at 411-13, 99 S. Ct. at 2369-71. As a result, Congress made clear in the ADA that accommodation is required. See 42 U.S.C. § 12131(2); see also 28 C.F.R. § 35.130(b)(7).

The Third Circuit's construction of its own caselaw in its own circuit should be respected by this court.

Defendants cite only two cases in their favor that had anything to do with the ADA and the integration regulation. Neither of those two cases had the benefit of the Attorney General's interpretation of its own integration regulation, and both were decided before Helen L.

The first case, Williams v. Secretary of the Executive Office, 609 N.E.2d 447 (Mass. 1993), relied almost exclusively on Clark v. Cohen, a § 504 decision rejected by Helen L. under the ADA. Helen L. also rejected Williams. 46 F.3d at 333-34.

Perhaps more importantly, the plaintiffs in Williams presented no evidence "that any particular client's placement was inappropriate, or that they themselves were inappropriately placed in a segregated setting...." Williams, 609 N.E.2d at 453. Instead, plaintiffs relied upon a global statistical analysis that disabled persons in general were more likely to be adversely affected by the state's policy than non-disabled persons. Id. Also, the state in Williams had not undertaken to provide any services to the plaintiffs who were homeless persons.

By contrast, in this case, the state already was providing services to these plaintiffs, albeit segregated services. Second, unlike Williams, defendants have admitted that these individual plaintiffs qualify for integrated services in the community. To the extent that Williams requires differences in treatment of the disabled compared to the non-disabled, it is non-sensical because, as noted in Helen L., only the disabled are institutionalized.

The second case, Conner v. Branstad, 839 F. Supp. 1346 (S.D.

Iowa 1993), relied upon § 504 caselaw that had nothing to do with the ADA or the integration regulation. Second, Conner involved a claim that the state has an affirmative duty to create integrated services, a claim not made in this case. Id. at 1356, 1358. Third, Conner was a class action alleging that § 504 and the ADA mandate deinstitutionalization. Id. at 1356-57. This case, by contrast, involves two individual plaintiffs who merely allege that under their individual facts, the services being provided to them can be provided appropriately in a more integrated setting. Fourth, even the Conner court accepted the notion that the ADA applies to discrimination based on the severity of one's disability. Id. at 1358, n. 20. The Conner Plaintiffs did not assert this claim as plaintiffs do here. As already shown, even assuming the ADA imposes such a requirement, plaintiffs meet it in this case. Last, Conner is unpersuasive because it contains no analysis of the ADA integration regulation, the Attorney General's interpretation of that regulation, or the deference that is owed to the Attorney General's interpretation.

IV. THE DEFENSE OF LACK OF FUNDING IS FACTUALLY AND LEGALLY INSUPPORTABLE IN THIS CASE.

Defendants have argued from the outset that they refused to provide integrated services to plaintiffs due to lack of funds and that lack of funds is a defense to an ADA violation. This argument is factually and legally insupportable.

First, as a factual matter, defendants' argument is belied entirely by the provision of integrated services to L.C. shortly after this case was filed, by the more recent provision of integrated services to E.W., and as the district court noted, by

the undisputed evidence which establishes that the average cost for providing integrated services is less than one-half the cost of providing segregated services.

Second, the undisputed evidence shows that available integrated services existed for months prior to defendants actually providing those services to plaintiffs. Defendants admitted in depositions that they were using only 700 out of 2100 medicaid waiver slots that were available for providing integrated services. And as recently as February 1997, HCFA cited the defendants for moving only 237 persons from institutions into the community rather than 1,000 persons (200 per year) from 1992 - 1996, as required by defendants' HCFA-approved state plan. R8-79-Exh. 11 at pp. 2-4.

Third, to the extent that some costs may be imposed in providing integrated services, the ADA requires it. Congress was clear when it passed the ADA that it expected compliance costs to be substantial but that such costs were not a defense:

The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 of the Rehabilitation Act, or under this title [title II].... [T]he existence of such programs can never be used as a basis to exclude a person with a disability from a program that is offered to persons without disabilities, or to refuse to provide an accommodation in a regular setting.

H.R. Rep. No. 485(II) at 50, reprinted in 1990 U.S.C.C.A.N. 473.¹⁹

¹⁹Given the existence of integrated services and funds for those services, Plaintiffs do not believe that any modification of defendants' programs or services is required in order to comply with the ADA in this case. To the extent, however, that reasonable modifications are necessary, the implementing regulations require

Senator Hatch acknowledged that integration would:

impose a lot of expenses and rightly so. It is time we did these things. It is time we brought persons with disabilities into full freedom, economic and otherwise, with other citizens in our society. This bill will do that. In doing so, we should be aware that it is going to be costly and difficult and that there will be some complaints.

135 Cong. Rec. 19835 (1989). Senator Harkin echoed this sentiment:

[F]ocusing on the costs of compliance by covered entities was totally inappropriate given the economic benefits to society of reducing the deficit by getting people off of welfare, out of institutions, and on to the tax rolls.

135 Cong. Rec. 8508 (1989) (emphasis added).

On the other hand, Congress strongly believed that discrimination had its own costs. As stated in the Congressional findings incorporated into the ADA:

the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

42 U.S.C. § 12101(a)(9) (emphasis added).

The courts have construed the ADA in accordance with the Congressional intent. Helen L., 46 F.3d at 338-39; Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, 846 F. Supp. 986, 993 (S.D. Fla. 1994); Kroll v. St. Charles County,

such modifications so long as they do not fundamentally alter the nature of the programs or services. 28 C.F.R. § 35.130(b)(7). Plaintiffs have not demanded any fundamental alterations, and in a similar context other courts have ruled that no fundamental alterations were required. Helen L., 46 F.3d at 337-38; see also Martin v. Voinovich, 840 F. Supp. at 1190-91.

766 F. Supp. 744, 753 (E.D. Mo. 1991); accord (costs not a defense in other civil rights cases), International Union, UAW v. Johnson Controls, 499 U.S. 187, 210, 111 S. Ct. 1196, 1209, 113 L.Ed.2d 158 (1991); Wyatt v. Aderholt, 503 F.2d 1305, 1315 (5th Cir. 1974).²⁰

V. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR FOURTEENTH AMENDMENT CLAIM

Plaintiffs believe that they are entitled to summary judgment on their Fourteenth Amendment claim principally because the undisputed evidence from the qualified professionals establishes that plaintiffs' treatment and habilitation at GRH-A was not minimally adequate. Elliott II dep., p. 66, l. 19 - p. 73, l. 14; R5-59-Exh. 14 at p. 4; R5-59-Exh. 8 at ¶¶ 19, 21, 39-40; R5-59-Exh. 9 at ¶¶ 8-11; Elliott I dep., 96, l. 4-21.

Plaintiffs agree that Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452 (1982) requires courts to defer to qualified professional judgment. The undisputed facts in this case, however, show that the professionals upon whom the defendants rely never exercised qualified professional judgment because they had no mental retardation qualifications. Patel I dep., p. 36, l. 17-24; p. 37., l. 6-9; Amin dep., p. 18, l. 23-25; p. 28, l. 18-21; Thornton dep., p. 35, l. 4-7; Bliss dep., p. 38, l. 24 - p. 39, l. 2; Parrish dep., p. 15, l. 3-23. Defendants admitted that no qualified mental retardation professionals ever designed or implemented any

²⁰Although regulations implementing other parts of the ADA contain an exception to the accommodation requirements of the ADA based upon "undue financial and administrative burdens," the applicable regulation here does not have such an exception. Cf. 28 C.F.R. § 35.164 with 28 C.F.R. § 35.130(b)(7).

individual habilitation plans for these plaintiffs. SMF 144. They also admitted that their decisions to keep these plaintiffs at GRH-A were not motivated by medical judgment (appropriate under Youngberg) but by their uninformed belief that no other alternatives existed (inappropriate under Youngberg; see also Jackson v. Ft. Stanton, 757 F. Supp. at 1312). SMF 42, 66, 68-71, 73, 152, 154, 159-162. In fact, the mental retardation waiver program that the professionals had contended could not be used for community services was ultimately used for these plaintiffs. SMF 159-61, 132.

Suffice it to say that the parties extensively briefed the Fourteenth Amendment issue in the district court, but that court denied the claim as moot. If this Court believes that this issue should be considered, it should remand it to the district court for its consideration in the first instance. See Youakim v. Miller, 425 U.S., 231, 234, 96 S. Ct. 1399, 1401, 47 L.Ed.2d 701 (1976).

CONCLUSION

For all of the foregoing reasons, this Court should affirm the district court's decision granting Plaintiffs' Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment.

Respectfully submitted this 15th day of August, 1997.

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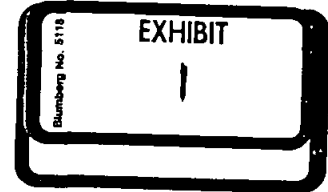
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August 8, 1996

Ira Burnim
Bazelon Center for Mental Health Law
1101 15th St. N.W.
Suite 1212
Washington, DC 20005



Re: Managed care waiver in Montana

Dear Ira:

Enclosed please find MAP's comments to HCFA dated June 13th, and their response directly to the state, which I believe were sent on June 20th. As our letter to HCFA suggests, over the course of months we sent numerous items to them for review.

Best regards,

A handwritten signature in cursive script, appearing to read "Lonnie J. Olson".
Lonnie J. Olson
Staff Attorney

LJO/no
enclosures

Questions for Montana Regarding
The Mental Health Access Plan
1915(b) Waiver Application

Waivers Needed

1. Because the state proposes to use a Prepaid Health Plan to be the sole provider of mental health services under this waiver program, we have been advised by legal counsel that the State needs a waiver of the regulations at 42 CFR 434.25(a)(2) regarding voluntary enrollment. HCFA will provide such a waiver should the State's application be approved.

Medicare Dual Eligibles

2. As explained in the March 18, 1996, letter to Randy Poulsen from Beth Sullivan, HCFA policy precludes States from holding Medicare dual eligibles responsible for coinsurance or deductibles in cases where a beneficiary chooses to use out-of-network providers for Medicare covered services. In section 313.1 of the draft RFP submitted with the State's waiver application, the State continues to say that the MCO will be required to educate Medicare dual eligibles to their copayment responsibilities and collect these payments from them. This 1915(b) waiver application will not be approved if Medicare dual eligibles are made to pay cost sharing. Section 313.1 and the referenced section regarding the MCO's filing of Medicare claims (Section 386--not yet written) will need to be rewritten to reflect the prohibition of Medicare beneficiaries' cost sharing. The RFP will also need to reflect the need for coordination of care between the MCO and out-of-network providers who serve Medicare dual eligibles.

Civil Rights

3. As explained below, HCFA cannot approve this 1915(b) waiver as long as it contains the current proposal to require the MCO to purchase a set number of bed days from the Montana State Hospital or the Montana Mental Health Nursing Care Center. Such financial arrangements would violate the Americans with Disabilities Act (ADA). Even if they applied to all Medicaid beneficiaries, these arrangements would draw into question the clinical necessity of any MCO placements in these facilities. Given that current admission criteria do not appear to prevent placements to these facilities of persons requiring only community-based care, the State's continuance of these admission criteria under the waiver would not provide an adequate protection against the incentive posed by the bed days requirement.

Under the ADA and regulations written at 28 CFR 130(d), a State must not place or keep in an institutional facility any person who could be served more appropriately in a community-based setting. The State is further obligated to create the community-based services to serve these individuals. The court cases of *Helen L. Vs. DiDario* (1995) and *Charles Q. Vs. Houston* (April 1996) have determined that a State's argument that no community-based services currently exist is not a permissible argument for keeping individuals in institutional settings when they would more appropriately be treated in a community setting.

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A central tenet of Montana's 1915(b) waiver proposal is to use a managed care organization (MCO) in order to achieve efficiencies and voluntary investments from the entity which can be used to develop community-based alternatives for care. This goal is in line with the requirements of the ADA. However, the State's proposal to require the MCO to purchase a set number of bed days from Montana State Hospital and the Montana Mental Health Nursing Care Center puts the State in a position to violate the Americans with Disabilities Act. By requiring the MCO to purchase a set number of bed days from institutional providers, the MCO is incented to place or keep individuals in these facilities regardless of the medical necessity for institutional level care.

HCFA raised this issue in Beth Sullivan's letter to Randy Poulsen dated May 7, 1996. In a response letter from Mr. Poulsen dated May 22, Montana argued that the admission criteria currently used by these facilities would be the same admission criteria used under the proposed waiver program. This criteria, it was implied, only permit persons to be admitted to these institutions if institutional level care is required for their proper treatment. Therefore, the State argued, the admission criteria offer protection against the financial incentive given to the MCO toward institutionalization of enrollees. The State's argument fails to acknowledge the fact that, given the chronic nature of severe mental illness, plans to reduce bed occupancy in the State Hospital by nearly half amount to an admission that nearly half of those persons currently served at an institutional level of care could be served by community-based alternatives. The State cannot reasonably argue that nearly half of those currently served by the Hospital will either die, move out of the State, or experience a spontaneous remission from severe mental illness in the next few years. Therefore, the admission criteria currently used by both the Montana State Hospital and the Mental Health Nursing Care Center does not provide any protection against the financial incentive of the required bed days purchase by the MCO.

The State further argued that the required bed day purchase would be substantially less than the current occupancy rate for these facilities and, therefore, could not effectively incent the MCO toward inappropriate institutionalization of enrollees. These proposed financial arrangements, regardless of the percentage of current bed days represented by the required bed day purchase, would still taint any placement decision made by the MCO. Until the purchased bed days were accounted for with actual placements, the MCO would be calculating both the clinical as well as financial benefit to be achieved from an institutional Vs community-based placement of each individual. Access to quality care would be brought into question for any Medicaid beneficiary whose placement decisions were affected by such financial incentives. But the ADA specifically prohibits disabled persons from having their treatment decisions affected in this way when other providers serving the Medicaid population would not face such incentives. HCFA cannot approve this waiver as long as the required bed day purchase provision remains a part of the waiver proposal.

Fiscal Issues/Cost-Effectiveness

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4. In Beth Sullivan's May 7, 1996, letter to Randy Poulsen, it was noted that federal matching funds were available for debt service related to Montana State Hospital renovations in accordance with regulations at 42 CFR 413.130. In the State's May 22 response to Ms. Sullivan, it was said that federal funds would not be used to retire the renovation debt. Instead, a portion of money paid to the MCO from State general funds would be required to be deposited into a special account pledged to debt service.

It is HCFA's understanding that State legislation (House Bill 594) and proposals made to the Montana Health Facility Authority suggest that federal money will be among the revenues used to finance the Hospital's renovation. Despite the contradiction between the State's communications with HCFA and its proposals within the State of Montana, HCFA would like to reiterate that federal matching funds are available for these debt service costs. We are troubled by the State's proposal that a portion of funds normally allocated to patient care be used to retire the debt. We also understand that the State's protection and advocacy program, Montana Advocacy Program (MAP) Inc., is prepared to file a complaint with the U.S. District Court over this bonding issue. In addition to sharing HCFA's concerns over potential civil rights violations, MAP also contends that the State proposes to use federal funds received for care at the Montana Mental Health Nursing Care Center to help retire the bond at the State Hospital. While HCFA has no authority to prevent a State's intergovernmental transfer of funds, we would remind the State of HCFA's authority to apply intermediate sanctions or to terminate the waiver program should serious quality of care issues arise at either facility as the result of the redirection of patient care dollars to the retirement of debt.

We encourage the State to reconsider the means by which it intends to retire the State Hospital bond. We believe federal dollars should be used to assist Montana in meeting its bond retirement obligation while not endangering the quality of patient care. Appropriate debt service costs can be included in the Medicaid capitation rate paid to the MCO. These costs would be in addition to the expected patient care costs normally figured into an actuarially sound rate. The portion of the total debt service matchable by federal Medicaid dollars is equal to the portion of Montana State Hospital's costs which are attributable to patients whose services are Medicaid matchable. (This would appear to be residents in the Hospital's Long Term Care Unit who are either under 21 or over 64 years of age.) In order to attain this federal match for debt service, please provide HCFA with details demonstrating the portion of Montana State Hospital's costs attributable to Medicaid matchable patients.

5. On pages 5-7 of Appendix C.1, trend rates used for the calculation of the UPL are detailed. Please explain how these trend rates were used to get the cumulative trends in Attachment II, step 4. How do the rates described on pages 5-7 compare to the UPL rates used in Appendix C.2?
6. On page 6 of the waiver application, the State notes it will enroll all Medicaid

Page 4

beneficiaries into the waiver program and projects total unduplicated enrollment in year two of the waiver to be 142,400 individuals. However, the State uses very different eligibility numbers in its cost effectiveness section of the application. Here, capitation rates are based on average numbers of eligibles ranging from approximately 77-79,000 individuals, depending on whether the data is for the SFY95 base year or one of the two waiver years. Please explain.

7. Throughout the State's cost effectiveness section, "Other Institutional" costs and ensuing capitation rates are included in rate cells for 45+ SSI and under 65 age dual eligible beneficiaries. Please demonstrate that the Lewin analysis selected out claims for residential treatment centers with more than 16 beds as well as any claims from Montana State Hospital or the Montana Mental Health Nursing Care Center which are attributable to individuals aged 21-64 whose costs cannot be federally matched while in institutions for the mentally disabled.
8. Are disproportionate share hospital costs included in the UPL for inpatient costs? If so, please explain how the State plans to pay out DSH funds under the waiver.
9. The State's cost effectiveness calculations will need to reflect the fact that cost sharing for Medicare dual eligibles will need to be paid by the State (or by the MCO, if the State wishes to incorporate cost sharing into the capitation rate) for any beneficiaries choosing to go out-of-network for Medicare covered services. Should the State decide not to capitate the MCO for cost-sharing expenses, the waiver application at sections C.3.c. and C.6.d.1. and h.1. will need to be modified to account for these fee-for-service costs.
10. On page 6 of the waiver application, the State notes that the medically needy population will be included under the waiver program. Yet throughout the cost effectiveness calculations, no data reflect costs or trends related to the medically needy. Are these individuals somehow folded into the AFDC, SSI or Medicare dual eligible data? Please clarify.
11. In sections C.6.d. and h., the State has added in costs for "QA Contractor" and "Consulting" under an "Other Costs" category. Please explain what is meant by QA Contractor. What would be done under a QA contract that is not currently being done without the waiver? Are QA costs included somewhere in the "without waiver" side of the cost effectiveness calculations? This may be an allowable administrative expense, but we cannot be sure of this without further information from the State. Regarding the "Consulting" costs, HCFA does not match consulting costs related to development of waiver programs. These State costs should not be included in the cost effectiveness calculation for the waiver.
12. Page 4 of Appendix C.1. notes that baseline data were adjusted for SFY1994-95 overpayments totaling \$316,528 made to one large mental health provider. HCFA

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assumes this is Mental Health Services Inc. of Helena which is undergoing a federal whistle blower investigation. The State should note that its UPL calculation and ensuing capitation rates may need to be adjusted at a later time should the federal investigation reveal overpayments grossly in excess of the State's estimate of overpayments.

13. The State will need to submit replacement pages for any pages of the waiver to which changes are made, as the result of these questions and comments. Please submit a new page also for item C.5.e. which reflects that programmatic/policy changes were reflected in adjustments made to the "without waiver" baseline data.

Issues Related to Center for Mental Health Services Funding

14. It is unclear from the list of representatives mentioned on page 2 of the waiver whether the State Mental Health Planning and Advisory Council took part in the development of the MHAP. Did the Planning Council determine that the MHAP was consistent with the State Plan as reviewed by the Council? As this is a waiver for mental health services and the Planning Council is mandated to review the State's mental health plan prior to review or award of the CMHS Block Grant, these questions require a response before CMHS dollars can be used under the waiver. A letter from the State Mental Health Planning Council with their comments on the waiver proposal needs to be submitted by the State.
15. RFP Section 333.8 notes that the Mental Health Planning and Advisory Council will review the annual Block Grant Plan prepared by Montana's DPHHS. What will the relationship of the Planning Council be to the MCO under the MHAP waiver? How will the development of the State Plan and application for the CMHS Block Grant be linked to the MHAP and the MCO?
16. The State's approved CMHS Block Grant Plan contains information for services to SED children which include, but are not limited to, Sex Offender Evaluation, Wraparound Services, Therapeutic Aides, Sex Offender Treatment, Chemical Dependency Treatment. These are services which are not expressly noted in the waiver or RFP Section 332. Does the State intend to use some of its CMHS dollars to offer these services to SED children served under the waiver?
17. RFP Section 333.3, Case Management specifies that the Service Plan must delineate any differences in type or level of case management and the criteria to be used in determining who will receive these services. Currently, the CMHS Block Grant Plan from the State includes the objective "Maintain case management services for all CMHC clients with a severe and disabling mental illness at or above FY 95 levels." The State now has both intensive and supportive case management services. The current standard and level of services should not decline due to a change to an MCO. How will the current use of case management be assured and enhanced?

Services/Providers

18. On page 9 of the waiver, the State affirms its commitment to an orderly transition to the MHAP program. HCFA strongly urges the State to plan for a phased-in transition to MHAP in order to protect the quality and continuity of treatment for persons already receiving mental health services under the Passport to Health and HMO programs.

We remind the State that it will need to modify its Passport to Health 1915(b) waiver and amend its "Families Achieving Independence in Montana" 1115 waiver to reflect the carve out of mental health services and costs from these waiver programs.

19. Page 14, item d, the waiver request states that the MCO will be required to include all Montana FQHCs which currently provide mental health services in their provider network. However, the state has modified the language in its RFP at section 342.1 (Existing Provider Array) and the revision does not make this intent clear. The previous RFP stated that, "The State will not require that the MCO include in its network all providers of a specified category, except FQHCs." In the new RFP, the exception for FQHCs has been removed. The waiver language is very clear that the MCO must contract with all FQHCs that currently provide mental health services; the RFP no longer gives the same impression. We recommend that the State's choice of whether the MCO must contract with all FQHC mental health providers or only those needed to assure access be clearly stated in both the waiver application and the RFP.

In addition, by limiting the requirement at section 342.1 to FQHCs that "currently provide mental health services," certain providers (such as many urban Indian clinics who have not yet developed mental health services) are potentially excluded from participation for the life of the contract. Unless this is what the State intended, we recommend the State remove the word "currently" to simply note that FQHCs providing mental health services are part of the existing provider array.

20. In Appendix C.1, page 8, a statement is made that there are only 3 mid-level practitioners in the State. The State Plan Amendment for Montana shows many mid-level practitioners in the State. Is there a certain type of mid-level practitioner that the State is referencing in Appendix C.1.?

Quality and Access

21. We appreciate the types of access standards proposed by the State for the MHAP program. (Referenced on page 7 of the application and section 335.2 of the RFP). By measuring and acting upon deficiencies in areas such as waiting times for crisis, urgent, and non-urgent visits, States and HCFA may demonstrate to managed care skeptics that access can actually be broadened under waiver programs. However, in order to know whether access is likely to be equal to or better than the current Medicaid program, baseline information is needed. Please inform us of the access standards that are currently in place for Montana's Medicaid beneficiaries now receiving mental health

Page 7

services.

22. The State wishes to involve consumers, family members and advocates as 'early warning mechanisms' for the State's monitoring of access and quality problems. The State's openness to use of community input will add to the other important oversight activities described by the State in its application and RFP. Please clarify whether representatives of any of these groups will be included on the State's MHAP Appeals Panel.
23. HICFA would like to suggest Montana use two additional methods of State monitoring for potential quality and access problems which are frequently used by other States. The first is periodic unscheduled and random checks on providers to verify that stated after-hours arrangements for care are actually functioning. The second would be for the State to track denials of referral requests in order to identify and act upon outliers or other unusual patterns. This example would fit under the State outcome reporting envisioned in RFP section 363.3.
24. On pages 20-21 of the waiver application, the State notes that it expects to conduct a baseline survey of consumer satisfaction before the MHAP and annually thereafter. We recommend the State refer to the Consumer-Oriented Mental Health Report Card released by the Mental Health Statistics and Improvement Program of CMHS for helpful ideas regarding mental health survey development. Another resource we would recommend is the National Committee for Quality Assurance's Medicaid HEDIS document, released in December 1995. This publication has a very useful appendix devoted to Medicaid enrollee surveys.

MONTANA ADVOCACY PROGRAM, Inc.

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June 13, 1996

Ms. Beth Sullivan
Office of Managed Care
Health Care Financing Administration
7500 Security Blvd., S-3-02-01
Baltimore, MD 21244-1850

SENT BY FAX
HARD COPY TO FOLLOW

RE: Montana's 1915(b) waiver application

Dear Ms. Sullivan:

The following represents Montana Advocacy's response to the Montana Mental Health Access Plan (MMHAP). In addition we ask your reference to all materials previously sent to your offices, and to the offices of Nancy Goetschius.

1. The plan discriminates against persons institutionalized at the Montana State Hospital (MSH) and the Montana Mental Health Nursing Care Center (MMHNCC) in violation of Title II of the American's With Disabilities Act (ADA). Pursuant to Sections 333.6, 333.7, 346 and 347 of the state's Request for Proposal (RFP) these persons are not to be accorded the rights of other person's under the plan, nor are they to be accorded the rights afforded them under the ADA.

The ADA requires that a state not discriminate against qualified persons with a disability in the provision of services. 42 USC 12132. Services provided by the state, including mental health treatment services, are required by regulations written by the Department of Justice to be provided in the most integrated setting appropriate to the needs of the individual. 28 CFR 35.130 (d). Recently, this requirement has been interpreted by case law to mean that persons who can be treated in the community, must be treated in the community. See: Helen L. v. Didano and Charles O. v. Houstoun.

Montana proposes that funding for treatment services at MSH and MMHNCC may not be discontinued by the Managed Care Organization (MCO). Every other person in the system, and medicaid itself, will be protected from unnecessary or inappropriate medical treatment services by the oversight of the MCO, except these individuals who are institutionalized. The state suggests that these persons are involuntarily committed, and that is the reason this disparate treatment is necessary. They do not inform you however, that persons in the state are involuntarily committed to institutions other than MSH or MMHNCC, including community commitments. It is only the placement of persons at state institutions that distinguishes them from others.

Beth Sullivan
June 14, 1996
Page 2

The state, as you know, is planning to rebuild MSH. They plan to have bonds issued by a the Montana Health Facility Authority (MHFA), borrow from these proceeds, and pay the cost of servicing this loan by pledging revenues generated from MSH and MMHNCC. This plan will invariably require the institutionalization of patients that could be served in the community. Patients must be confined at these institutions in order to generate the revenues that will pay the cost of the debt service. Without an adequate patient base, the project will fail.

The state has written into its RFP a number of insurance clauses, guaranteeing that funds will be available for paying this debt service. The MCO will be required to purchase a certain number of bed-days, regardless of medical necessity, from MSH and MMHNCC. Sections 346 & 347 RFP. The MCO will not be able to decertify funding of unnecessary services at MSH or MMHNCC, although it may do so anywhere else in the system. Sections 333.6 & 333.7 RFP. The MCO will be required to pay an amount equal to the cost of debt service on the reconstruction project, regardless of patient needs or hospital utilization, to the state every quarter to guarantee payment of the reconstruction project. Section 346 RFP.

All of the above will create powerful incentives for continuing the institutional care of patients. The MCO will be paying for bed-days regardless of need, thereby taking money from community services. There will consequently be less money available for community services, and the MCO will be required to utilize the institutions lest they pay twice for patient services. Having committed so many resources to a new state hospital, the state will be required to use it in order to justify the expenditure, and the expenditure requires that patients be confined at these institutions.

It is necessary to point out that the state has not requested a wavier of the IMD rule. That means that a substantial portion of revenues generated by these institutions will be from charges for persons over the age of 64 (the predominant population at MMHNCC) and Native Americans through the Indian Health Service contract. They, more than the general population of patients will be impacted by the needs of the state to fund debt service. Thus age and ethnicity will bring with it a risk of confinement even greater than for other patients. This is, arguably, discriminatory as a matter of law.

The state has suggested that the involuntary commitment statute will protect these patients from needless institutionalization. By reference to the Charles O. case, and the transcripts of commitment hearing previously sent you, this is obviously not true. People are institutionalized in Montana because there is no place for them to go. I enclose a letter, dated June 10, 1996, from MSH Unit Supervisor Dave Sturm, (Attached hereto as Exhibit A, and fully incorporated by reference). The letter clearly states that a substantial number of patients could be treated in the community, if services were available. As they are not, the patients are involuntarily recommitted. This illustrates conclusively, that people are not only committed on the basis of mental illness, but also on the basis of available treatment alternatives.

Beth Sullivan
June 14, 1996
Page 3

The state has illegally failed to provide community services to patients within its institutions in violation of the requirement that services be provided in the most integrated setting appropriate to the needs of the qualified individuals with disabilities. 42 USC 12132 and 28 CFR 35.130 (d).

The state has failed to modify its programs to provide community services in violation of the requirement of law that reasonable modifications in policies, practices, or procedures are required when the modifications are necessary to avoid discrimination on the basis of disability. 28 CFR 35.130 (b)(7).

The state intends to treat institutionalized patients differently than any other persons under the RFP and MMHAP in violation of the requirement that the state not provide different or separate services to an individual unless such action is "necessary" to provide services that are as effective as those provided to others. 28 CFR 35.130 (b)(1)(iv).

The state, knowing that institutional treatment services are not as effective as community treatment services for treatment of the mentally ill, refuses to provide community treatment, thereby violating the provisions of law that prohibit a state, on the basis of a disability, from providing a qualified individual with a service that is not as effective as that provided to others. 28 CFR 35.130 (b)(1)(iii).

The state is asking HCFA to approve a system that will have at its core powerful incentives to institutionalize persons with disabilities. Such a system would be violative of the ADA, and the Department of Justice's interpretive regulations. The proposed MMHAP perpetuates violations of law, and in fact creates new violations. It must not be approved.

2. The state is proposing to rebuild its state hospital by pledging revenues generated at the MMHNCC and MSH to pay the cost of reconstruction. I have previously sent you a copy of the enabling legislation indicating this is the plan. Pledging revenues from the MMHNCC to payment of reconstruction of MSH is violative of 42 CFR 4132.130.

3. Requiring the MCO to pay sums equivalent to the amount needed to pay the cost of debt service for the reconstructing of MSH, Section 346 RFP, is an illegal provider tax, prohibited by 42 USC 1396 (w)(1)(A)(ii). This is a kick-back scheme. The state may argue that they will only utilize state funds for this debt. However, reference to the enabling legislation indicates pledging of all revenues. Further, all moneys will be put into a common pool under the proposed system. The claim that state moneys can be segregated from the common pools is sophistry. The federal government will be providing funds that will be covering expenditures under the system, the state will simply allocate those federal dollars to programs the state would otherwise fund. It will be those federal dollars that fund this scheme.

4. The MMHAP is largely silent as to the grievance process. It suggests that a process will be developed by the MCO without clear elaboration as to standards or protocol. Section IV. A. MMHAP. In addition, the process does not contain a commitment to allowing medicaid recipients to continue to receive services during the pendency of an appeal of a denial of services, as required under Goldberg v. Kelly. The state has publicly, during its public hearing process, announced it will not mandate the rights afforded by Goldberg to be implemented under the MMHAP.

5. The MMHAP is largely silent as to how monitoring of access and quality will take place. Section IV. B. MMHAP. The state asserts that it will "rely upon consumer and advocacy groups as 'early warning' mechanisms in monitoring adequacy of services". This is inadequate, entirely anecdotal, and lacking in validity. There exists no baseline of services to measure if there is a decline in services. The number and success of consumer complaints cannot be the Roseta stone of quality control.

6. The cost effectiveness of the program is based almost entirely on the 5% reduction in budget under the system. Section IV. C. MMHAP. This type of savings is illusory. Of course there will be less spent, if less is budgeted.

7. The MMHAP will diminish the level of services provided int Montana. The reasons are that the following cost will be added to the system, with a 5% reduction in budget to pay for them:

- a. MCO cost of administration;
- b. Capital cost of MSH reconstruction;
- c. Requirement that the MCO provide chemical dependency treatment to dually diagnosed patients without addition funding;
- d. An expanded eligibility group to 200% of Federal Poverty Level; and
- e. The cost of developing a system to measure outcomes, as required to assure compliance with the contract and HCFA requirements.

8. The MMHAP, Section 330. RFP, will require the MCO to rely upon existing Montana providers for the "preponderance" of all services provided under the MMHAP. This is, arguably, in violation of the Commerce Clause of the United States Constitution, federal statutes and regulations, and Montana's own Unfair Trade Practice Act. Section 30-14-101, et seq.

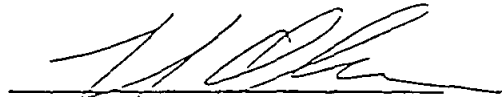
9. The state has provided interested parties with it's MMHAP and RFP, however at numerous places within the RFP reference is made to "Attachments" that are not provided. As a result, these comments are limited by that omission.

Beth Sullivan
June 14, 1996
Page 5

10. Section 504 of the Rehabilitation Act applies to federal agencies, and under Beno v. Shalala, HCFA has a duty under the Administrative Procedures Act to evaluate the merits of Montana's waiver request, including its scope and its potential impact on recipients, including persons with disabilities. If HCFA grants Montana's waiver request without considering evidence that the state's proposed action violates the ADA, HCFA's decision will itself violate the Administrative Procedures Act.

Thank you for your consideration of the foregoing comments. By this letter I inform HCFA that Montana Advocacy is in the process of filing a formal complaint with the Department of Health and Human Services, Office of Civil Rights (OCR), against the state of Montana for violation of the ADA in its current practices, and in its proposed managed care plan. This is a non-exclusive remedy, and we retain the capacity to file a federal district court complaint if necessary. The Denver office of OCR has already been contacted and they are forwarding to me the documents that will commence this action. I expect the filing to be complete within days.

Respectfully Submitted,



Lonnie J. Olson
Staff Attorney/PAIMI Coordinator
Montana Advocacy Program

DEPARTMENT OF
PUBLIC HEALTH AND HUMAN SERVICES



MARC RACICOT
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Montana State Hospital
Warm Springs, Montana 59756-0300

June 10, 1996

Lonnie Olson
Montana Advocacy Program
P.O. Box 1680
Helena, Montana 59624



Dear Lonnie:

In response to your request as to the need of Montana State Hospital for community group homes for the patients we serve, I can tell you, from my personal point of view, there is a great need. Our treatment team on the Xanthopoulos Treatment Facility often discuss the fact that if more group homes were available, we would be recommending more patients for discharge.

While I don't have precise facts as to how many patients might be referred, I can tell you there would be a significant number. This, of course, would be tempered by what type of group homes were available. Some of our patients need more structure than others and some have special needs; i.e., polydipsia patients.

The support for more community group homes is not universally shared by mental health professionals, but if the goal is to reduce the census of Montana State Hospital, I don't see another way.

Sincerely,

A handwritten signature in ink, appearing to read "Dave Sturm".

Dave Sturm, Unit Supervisor
Xanthopoulos Treatment Facility

DS/lr

EXHIBIT A

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Tab 4	28 C.F.R. part 35, App. A, § 35.130
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Tab 7	O.C.G.A. § 37-2-5.1(c)(3)

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CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 20 section 1142; title 26 section 44; title 29 sections 720, 721, 743, 761a, 762, 781, 793, 795g, 797a; title 38 section 4307; title 49 App. sections 1607a, 1608, 1622, 1623, 2202.

§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities,

and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, over-protective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

(Pub. L. 101-336, § 2, July 26, 1990, 104 Stat. 328.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b), was in the original "this Act", meaning Pub. L. 101-336, July 26, 1990, 104 Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out below and Tables.

SHORT TITLE

Section 1(a) of Pub. L. 101-336 provided that: "This Act (enacting this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, amending section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47, and enacting provisions set out as notes under sections 12111, 12131, 12141, 12161, and 12181 of this title) may be cited as the 'Americans with Disabilities Act of 1990'."

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(Pub. L. 101-336, § 3, July 26, 1990, 104 Stat. 329.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 12211, 12581, 12594 of this title; title 20 sections 1141, 2471.

partment of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

(Pub. L. 101-336, title I, § 104, July 26, 1990, 104 Stat. 334.)

REFERENCES IN TEXT

The Drug-Free Workplace Act of 1988, referred to in subsec. (c)(3), is subtitle D (§§ 5151-5160) of title V of Pub. L. 100-690, Nov. 18, 1988, 102 Stat. 4304, which is classified generally to chapter 10 (§ 701 et seq.) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Short Title note set out under section 701 of Title 41 and Tables.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 2 section 1202.

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

(Pub. L. 101-336, title I, § 105, July 26, 1990, 104 Stat. 336.)

§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.

(Pub. L. 101-336, title I, § 106, July 26, 1990, 104 Stat. 336.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 12117 of this title.

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

(Pub. L. 101-336, title I, § 107, July 26, 1990, 104 Stat. 336.)

REFERENCES IN TEXT

The Rehabilitation Act of 1973, referred to in subsec. (b), is Pub. L. 93-112, Sept. 26, 1973, 87 Stat. 355, as amended, which is classified generally to chapter 16 (§ 701 et seq.) of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 701 of Title 29 and Tables.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1981a, 12203 of this title.

SUBCHAPTER II—PUBLIC SERVICES

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 12201, 12203, 12204, 12206 of this title; title 29 section 792.

**PART A—PROHIBITION AGAINST DISCRIMINATION
AND OTHER GENERALLY APPLICABLE PROVISIONS**

PART REFERRED TO IN OTHER SECTIONS

This part is referred to in section 12206 of this title.

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

- (A) any State or local government;
- (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
- (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of title 45).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

(Pub. L. 101-336, title II, § 201, July 26, 1990, 104 Stat. 337.)

EFFECTIVE DATE

Section 205 of Pub. L. 101-336 provided that:

"(a) **GENERAL RULE.**—Except as provided in subsection (b), this subtitle (subtitle A (§§ 201-205) of title II of Pub. L. 101-336, enacting this part) shall become effective 18 months after the date of enactment of this Act [July 26, 1990].

"(b) **EXCEPTION.**—Section 204 [section 12134 of this title] shall become effective on the date of enactment of this Act."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 12181 of this title.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

(Pub. L. 101-336, title II, § 202, July 26, 1990, 104 Stat. 337.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 12133, 12142, 12143, 12144, 12146, 12147, 12148, 12162 of this title.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

(Pub. L. 101-336, title II, § 203, July 26, 1990, 104 Stat. 337.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 12203 of this title.

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

(Pub. L. 101-336, title II, § 204, July 26, 1990, 104 Stat. 337.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b), was in the original "this Act", meaning Pub. L. 101-336, July 26, 1990, 104 Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of this title and Tables.

EFFECTIVE DATE

Section effective July 26, 1990, see section 205(b) of Pub. L. 101-336, set out as a note under section 12131 of this title.

**PART B—ACTIONS APPLICABLE TO PUBLIC
TRANSPORTATION PROVIDED BY PUBLIC ENTITIES
CONSIDERED DISCRIMINATORY**

PART REFERRED TO IN OTHER SECTIONS

This part is referred to in sections 12134, 12206 of this title.

§ 12182. Prohibition of discrimination by public accommodations

(a) General rule

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.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of participation

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit

It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit

It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation 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, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals

For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings

Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate

Notwithstanding the existence of separate or different programs or activities provided

in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such program or activities that are not separate or different.

(D) Administrative methods

An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration—

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association

It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions

(A) Discrimination

For purposes of subsection (a) of this section, discrimination includes—

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting indi-

any policy options for legislative action, shall be submitted to the President and Congress within 36 months after July 26, 1990. If the President determines that compliance with the regulations issued pursuant to section 12186(a)(2)(B) of this title on or before the applicable deadlines specified in section 12186(a)(2)(B) of this title will result in a significant reduction in intercity over-the-road bus service, the President shall extend each such deadline by 1 year.

(e) Review

In developing the study required by subsection (a) of this section, the Office of Technology Assessment shall provide a preliminary draft of such study to the Architectural and Transportation Barriers Compliance Board established under section 792 of title 29. The Board shall have an opportunity to comment on such draft study, and any such comments by the Board made in writing within 120 days after the Board's receipt of the draft study shall be incorporated as part of the final study required to be submitted under subsection (d) of this section.

(Pub. L. 101-336, title III, § 305, July 26, 1990, 104 Stat. 360.)

EFFECTIVE DATE

Section effective July 26, 1990, see section 310(c) of Pub. L. 101-336, set out as a note under section 12181 of this title.

TERMINATION OF ADVISORY COMMITTEES

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, 776, set out in the Appendix to Title 5, Government Organization and Employees.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 12186 of this title.

§ 12186. Regulations

(a) Transportation provisions

(1) General rule

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 12182(b)(2)(B) and (C) of this title and to carry out section 12184 of this title (other than subsection (b)(4)).

(2) Special rules for providing access to over-the-road buses

(A) Interim requirements

(i) Issuance

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible

format to carry out sections 12184(b)(4) and 12182(b)(2)(D)(ii) of this title that require each private entity which uses an over-the-road bus to provide transportation of individuals to provide accessibility to such bus; except that such regulations shall not require any structural changes in over-the-road buses in order to provide access to individuals who use wheelchairs during the effective period of such regulations and shall not require the purchase of boarding assistance devices to provide access to such individuals.

(ii) Effective period

The regulations issued pursuant to this subparagraph shall be effective until the effective date of the regulations issued under subparagraph (B).

(B) Final requirement

(i) Review of study and interim requirements

The Secretary shall review the study submitted under section 12185 of this title and the regulations issued pursuant to subparagraph (A).

(ii) Issuance

Not later than 1 year after the date of the submission of the study under section 12185 of this title, the Secretary shall issue in an accessible format new regulations to carry out sections 12184(b)(4) and 12182(b)(2)(D)(ii) of this title that require, taking into account the purposes of the study under section 12185 of this title and any recommendations resulting from such study, each private entity which uses an over-the-road bus to provide transportation to individuals to provide accessibility to such bus to individuals with disabilities, including individuals who use wheelchairs.

(iii) Effective period

Subject to section 12185(d) of this title, the regulations issued pursuant to this subparagraph shall take effect—

(I) with respect to small providers of transportation (as defined by the Secretary), 7 years after July 26, 1990; and

(II) with respect to other providers of transportation, 6 years after July 26, 1990.

(C) Limitation on requiring installation of accessible restrooms

The regulations issued pursuant to this paragraph shall not require the installation of accessible restrooms in over-the-road buses if such installation would result in a loss of seating capacity.

(3) Standards

The regulations issued pursuant to this subsection shall include standards applicable to facilities and vehicles covered by sections 12182(b)(2) and 12184 of this title.

(b) Other provisions

Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an

¹ So in original. Probably should be "section".

accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

(c) Consistency with ATBCB guidelines

Standards included in regulations issued under subsections (a) and (b) of this section shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

(d) Interim accessibility standards

(1) Facilities

If final regulations have not been issued pursuant to this section, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 12183 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(2) Vehicles and rail passenger cars

If final regulations have not been issued pursuant to this section, a private entity shall be considered to have complied with the requirements of this subchapter, if any, that a vehicle or rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such vehicle or car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such vehicles or cars, to the extent that such laws and regulations are not inconsistent with this subchapter and are in effect at the time such design is substantially completed.

(Pub. L. 101-336, title III, § 306, July 26, 1990, 104 Stat. 361.)

EFFECTIVE DATE

Section effective July 26, 1990, see section 310(c) of Pub. L. 101-336, set out as a note under section 12181 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 12182, 12184, 12185 of this title.

§ 12187. Exemptions for private clubs and religious organizations

The provisions of this subchapter shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a-a(e)) (42 U.S.C. 2000a et seq.) or to religious organizations or entities controlled by religious organizations, including places of worship.

(Pub. L. 101-336, title III, § 307, July 26, 1990, 104 Stat. 363.)

REFERENCES IN TEXT

The Civil Rights Act of 1964, referred to in text, is Pub. L. 88-352, July 2, 1964, 78 Stat. 241, as amended. Title II of the Act is classified generally to subchapter II (§ 2000a et seq.) of chapter 21 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

EFFECTIVE DATE

Section effective 18 months after July 26, 1990, see section 310(a) of Pub. L. 101-336, set out as a note under section 12181 of this title.

§ 12188. Enforcement

(a) In general

(1) Availability of remedies and procedures

The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.

(2) Injunctive relief

In the case of violations of sections 12182(b)(2)(A)(iv) and section¹ 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.

(b) Enforcement by Attorney General

(1) Denial of rights

(A) Duty to investigate

(i) In general

The Attorney General shall investigate alleged violations of this subchapter, and shall undertake periodic reviews of com-

¹ So in original. The word "section" probably should not appear.

pliance of covered entities under this subchapter.

(ii) Attorney General certification

On the application of a State or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which persons, including individuals with disabilities, are provided an opportunity to testify against such certification, certify that a State law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of this chapter for the accessibility and usability of covered facilities under this subchapter. At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of this chapter.

(B) Potential violation

If the Attorney General has reasonable cause to believe that—

(i) any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter; or

(ii) any person or group of persons has been discriminated against under this subchapter and such discrimination raises an issue of general public importance,

the Attorney General may commence a civil action in any appropriate United States district court.

(2) Authority of court

In a civil action under paragraph (1)(B), the court—

(A) may grant any equitable relief that such court considers to be appropriate, including, to the extent required by this subchapter—

(i) granting temporary, preliminary, or permanent relief;

(ii) providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and

(iii) making facilities readily accessible to and usable by individuals with disabilities;

(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount—

(i) not exceeding \$50,000 for a first violation; and

(ii) not exceeding \$100,000 for any subsequent violation.

(3) Single violation

For purposes of paragraph (2)(C), in determining whether a first or subsequent violation has occurred, a determination in a single

action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(4) Punitive damages

For purposes of subsection (b)(2)(B) of this section, the term "monetary damages" and "such other relief" does not include punitive damages.

(5) Judicial consideration

In a civil action under paragraph (1)(B), the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this chapter by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

(Pub. L. 101-336, title III, § 308, July 26, 1990, 104 Stat. 363.)

EFFECTIVE DATE

Section effective 18 months after July 26, 1990, see section 310(a) of Pub. L. 101-336, set out as a note under section 12181 of this title.

CIVIL ACTIONS FOR VIOLATIONS BY PUBLIC ACCOMMODATIONS

For provisions directing that, except for any civil action brought for a violation of section 12183 of this title, no civil action shall be brought for any act or omission described in section 12182 of this title which occurs (1) during the first six months after the effective date of this subchapter, against businesses that employ 25 or fewer employees and have gross receipts of \$1,000,000 or less, and (2) during the first year after the effective date, against businesses that employ 10 or fewer employees and have gross receipts of \$500,000 or less, see section 310(b) of Pub. L. 101-336, set out as an Effective Date note under section 12181 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 12203 of this title.

§ 12189. Examinations and courses

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

(Pub. L. 101-336, title III, § 309, July 26, 1990, 104 Stat. 365.)

EFFECTIVE DATE

Section effective 18 months after July 26, 1990, see section 310(a) of Pub. L. 101-336, set out as a note under section 12181 of this title.

(Pub. L. 101-336, title V, § 503, July 26, 1990, 104 Stat. 370.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 29 sections 791, 793, 794.

§ 12204. Regulations by Architectural and Transportation Barriers Compliance Board

(a) Issuance of guidelines

Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter.

(b) Contents of guidelines

The supplemental guidelines issued under subsection (a) of this section shall establish additional requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) Qualified historic properties

(1) In general

The supplemental guidelines issued under subsection (a) of this section shall include procedures and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

(2) Sites eligible for listing in National Register

With respect to alterations of buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470 et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7(1) and (2) of the Uniform Federal Accessibility Standards.

(3) Other sites

With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1)(b) and (c) of the Uniform Federal Accessibility Standards, and shall require, at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

(Pub. L. 101-336, title V, § 504, July 26, 1990, 104 Stat. 370.)

REFERENCES IN TEXT

The National Historic Preservation Act, referred to in subsec. (c)(2), is Pub. L. 89-665, Oct. 15, 1966, 80 Stat. 915, as amended, which is classified generally to subchapter II (§ 470 et seq.) of chapter 1A of Title 16, Conservation. For complete classification of this Act to the Code, see section 470(a) of Title 16 and Tables.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 12134, 12146, 12150, 12163, 12165, 12186 of this title; title 29 section 791, 793, 794.

§ 12205. Attorney's fees

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

(Pub. L. 101-336, title V, § 505, July 26, 1990, 104 Stat. 371.)

§ 12206. Technical assistance

(a) Plan for assistance

(1) In general

Not later than 180 days after July 26, 1990, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Communications Commission, shall develop a plan to assist entities covered under this chapter, and other Federal agencies, in understanding the responsibility of such entities and agencies under this chapter.

(2) Publication of plan

The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of title 5 (commonly known as the Administrative Procedure Act).

(b) Agency and public assistance

The Attorney General may obtain the assistance of other Federal agencies in carrying out subsection (a) of this section, including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

(c) Implementation

(1) Rendering assistance

Each Federal agency that has responsibility under paragraph (2) for implementing this chapter may render technical assistance to individuals and institutions that have rights or duties under the respective subchapter or subchapters of this chapter for which such agency has responsibility.

(2) Implementation of subchapters

(A) Subchapter I

The Equal Employment Opportunity Commission and the Attorney General shall implement the plan for assistance developed under subsection (a) of this section, for subchapter 1 of this chapter.

(B) Subchapter II**(i) Part A**

The Attorney General shall implement such plan for assistance for part A of subchapter II of this chapter.

(ii) Part B

The Secretary of Transportation shall implement such plan for assistance for part B of subchapter II of this chapter.

(C) Subchapter III

The Attorney General, in coordination with the Secretary of Transportation and the Chair of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for subchapter III of this chapter, except for section 12184 of this title, the plan for assistance for which shall be implemented by the Secretary of Transportation.

(D) Title IV

The Chairman of the Federal Communications Commission, in coordination with the Attorney General, shall implement such plan for assistance for title IV.

(3) Technical assistance manuals

Each Federal agency that has responsibility under paragraph (2) for implementing this chapter shall, as part of its implementation responsibilities, ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or duties under this chapter no later than six months after applicable final regulations are published under subchapters I, II, and III of this chapter and title IV.

(d) Grants and contracts**(1) In general**

Each Federal agency that has responsibility under subsection (c)(2) of this section for implementing this chapter may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations. Such grants and contracts may be awarded to individuals, institutions not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual (including educational institutions), and associations representing individuals who have rights or duties under this chapter. Contracts may be awarded to entities organized for profit, but such entities may not be the recipients or¹ grants described in this paragraph.

(2) Dissemination of information

Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this chapter and to provide information and technical assistance about techniques for effective compliance with this chapter.

(e) Failure to receive assistance

An employer, public accommodation, or other entity covered under this chapter shall not be

excused from compliance with the requirements of this chapter because of any failure to receive technical assistance under this section, including any failure in the development or dissemination of any technical assistance manual authorized by this section.

(Pub. L. 101-336, title V, § 506, July 26, 1990, 104 Stat. 371.)

REFERENCES IN TEXT

Title IV, referred to in subsec. (c)(2)(D), (3), means title IV of Pub. L. 101-336, July 26, 1990, 104 Stat. 366, which enacted section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and amended sections 152, 221, and 611 of Title 47.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 29 sections 761a.

§ 12207. Federal wilderness areas**(a) Study**

The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act (16 U.S.C. 1131 et seq.).

(b) Submission of report

Not later than 1 year after July 26, 1990, the National Council on Disability shall submit the report required under subsection (a) of this section to Congress.

(c) Specific wilderness access**(1) In general**

Congress reaffirms that nothing in the Wilderness Act [16 U.S.C. 1131 et seq.] is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use.

(2) "Wheelchair" defined

For purposes of paragraph (1), the term "wheelchair" means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area.

(Pub. L. 101-336, title V, § 507, July 26, 1990, 104 Stat. 372.)

REFERENCES IN TEXT

The Wilderness Act, referred to in subsecs. (a) and (c)(1), is Pub. L. 88-577, Sept. 3, 1964, 78 Stat. 890, as amended, which is classified generally to chapter 23 (§ 1131 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1131 of Title 16 and Tables.

§ 12208. Transvestites

For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an

¹ So in original. Probably should be "of".

gate regulations that set forth the standards used for granting such a waiver.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

(e) Avoidance of duplicative efforts and inconsistencies

The Secretary shall develop procedures to ensure that administrative complaints filed under this section and under the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.] are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this section and the Americans with Disabilities Act of 1990.

(Pub. L. 93-112, title V, § 503, Sept. 26, 1973, 87 Stat. 393; Pub. L. 95-602, title I, § 122(d)(1), Nov. 6, 1978, 92 Stat. 2987; Pub. L. 99-506, title I, § 103(d)(2)(B), (C), title X, §§ 1001(f)(2), (3), 1002(e)(3), Oct. 21, 1986, 100 Stat. 1810, 1843, 1844; Pub. L. 100-630, title II, § 206(c), Nov. 7, 1988, 102 Stat. 3312; Pub. L. 102-569, title I, § 102(p)(31), title V, § 505, Oct. 29, 1992, 106 Stat. 4360, 4427.)

REFERENCES IN TEXT

The Americans with Disabilities Act of 1990, referred to in subsecs. (d) and (e), is Pub. L. 101-336, July 26, 1990, 104 Stat. 327, as amended, which is classified principally to chapter 126 (§ 12101 et seq.) of Title 42, The Public Health and Welfare. Title I of the Act is classified generally to subchapter I (§ 12111 et seq.) of chapter 126 of Title 42. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of Title 42 and Tables.

AMENDMENTS

1992—Subsec. (a), Pub. L. 102-569, § 102(p)(31)(A), 505(a), substituted "\$10,000" for "\$2,500" in two places, struck out ", in employing persons to carry out such contract," after "contain a provision requiring that", and substituted "individuals with disabilities" for "individuals with handicaps as defined in section 706(8) of this title".

Subsec. (b), Pub. L. 102-569, § 102(p)(31)(B), substituted "individual with a disability" for "individual with handicaps" and "individuals with disabilities" for "individuals with handicaps".

Subsec. (c), Pub. L. 102-569, § 505(b), designated existing provisions as par. (1) and added par. (2).

Subsecs. (d), (e), Pub. L. 102-569, § 505(c), added subsecs. (d) and (e).

1988—Subsec. (a), Pub. L. 100-630, § 206(c)(1), inserted a comma after "to carry out such contract".

Subsec. (b), Pub. L. 100-630, § 206(c)(2), substituted "refused" for "refuses".

Subsec. (c), Pub. L. 100-630, § 206(c)(3), substituted "which the President" for "which The President" and "when the President" for "when The President".

1986—Subsec. (a), Pub. L. 99-506, §§ 103(d)(2)(C), 1002(e)(3), substituted "individuals with handicaps" for "handicapped individuals" and "section 706(8) of this title" for "section 706(7) of this title".

Subsec. (b), Pub. L. 99-506, §§ 103(d)(2)(B), (C), 1001(f)(2), substituted "individual with handicaps" for "handicapped individual", "individuals with handicaps" for "handicapped individuals", and "a contract" for "his contract".

Subsec. (c), Pub. L. 99-506, § 1001(f)(3), substituted "The President" for "he" in two places and substituted "the reasons" for "his reasons".

1978—Subsec. (a), Pub. L. 95-602 substituted "section 706(7) of this title" for "section 706(6) of this title".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 706, 721, 796c, 796f-4 of this title.

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, 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. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(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; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Fed-

eral financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

(Pub. L. 93-112, title V, § 504, Sept. 26, 1973, 87 Stat. 394; Pub. L. 95-602, title I, §§ 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987; Pub. L. 99-506, title I, § 103(d)(2)(B), title X, § 1002(e)(4), Oct. 21, 1986, 100 Stat. 1810, 1844; Pub. L. 100-259, § 4, Mar. 22, 1988, 102 Stat. 29; Pub. L. 100-630, title II, § 206(d), Nov. 7, 1988, 102 Stat. 3312; Pub. L. 102-569, title I, § 102(p)(32), title V, § 506, Oct. 29, 1992, 106 Stat. 4360, 4428; Pub. L. 103-382, title III, § 394(i)(2), Oct. 20, 1994, 108 Stat. 4029.)

REFERENCES IN TEXT

The amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, referred to in subsec. (a), mean the amendments made by Pub. L. 95-602. See 1978 Amendments note below.

The Americans with Disabilities Act of 1990, referred to in subsec. (d), is Pub. L. 101-336, July 26, 1990, 104 Stat. 327, as amended. Title I of the Act is classified generally to subchapter 1 (§ 12111 et seq.) of chapter 126 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of Title 42 and Tables.

AMENDMENTS

1994—Subsec. (b)(2)(B). Pub. L. 103-382 substituted "section 8801 of title 20" for "section 2891(12) of title 20".

1992—Subsec. (a). Pub. L. 102-569, § 102(p)(32), substituted "a disability" for "handicaps" and "disability" for "handicap" in first sentence.

Subsec. (d). Pub. L. 102-569, § 506, added subsec. (d).

1988—Subsec. (a). Pub. L. 100-630, § 206(d)(1), substituted "her or his handicap" for "his handicap".

Pub. L. 100-259, § 4(1), designated existing provisions as subsec. (a).

Subsec. (b). Pub. L. 100-259, § 4(2), added subsec. (b).

Subsec. (b)(2)(B). Pub. L. 100-630, § 206(d)(2), substituted "section 2891(12) of title 20" for "section 2854(a)(10) of title 20".

Subsec. (c). Pub. L. 100-259, § 4(2), added subsec. (c). 1986—Pub. L. 99-506 substituted "individual with handicaps" for "handicapped individual" and "section 706(8) of this title" for "section 706(7) of this title".

1978—Pub. L. 95-602 substituted "section 706(7) of this title" for "section 706(6) of this title" and inserted provision prohibiting discrimination under any program or activity conducted by any Executive agency or by the United States Postal Service and requiring the heads of these agencies to promulgate regulations prohibiting discrimination.

EXCLUSION FROM COVERAGE

Amendment by Pub. L. 100-259 not to be construed to extend application of this chapter to ultimate beneficiaries of Federal financial assistance excluded from coverage before Mar. 22, 1988, see section 7 of Pub. L. 100-259, set out as a Construction note under section 1687 of Title 20, Education.

ABORTION NEUTRALITY

Amendment by Pub. L. 100-259 not to be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal funds to perform or pay for an abortion, see section 8 of Pub. L. 100-259, set out as a note under section 1688 of Title 20, Education.

CONSTRUCTION OF PROHIBITION AGAINST DISCRIMINATION UNDER FEDERAL GRANTS

Rights or protections of this section not affected by any provision of Pub. L. 98-457, see section 127 of Pub. L. 98-457, set out as a note under section 5101 of Title 42, The Public Health and Welfare.

COORDINATION OF IMPLEMENTATION AND ENFORCEMENT OF PROVISIONS

For provisions relating to the coordination of implementation and enforcement of the provisions of this section by the Attorney General, see section 1-201 of Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of Title 42, The Public Health and Welfare.

EXECUTIVE ORDER NO. 11914

Ex. Ord. No. 11914, Apr. 23, 1976, 41 F.R. 17871, which related to nondiscrimination in federally assisted programs, was revoked by Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of Title 42, The Public Health and Welfare.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 706, 721, 771a, 775, 794a, 1577, 2211, 2618 of this title; title 5 section 3102; title 12 section 1715z-1a; title 16 sections 410aaa-41, 410aaa-52; title 20 sections 1231e, 1232e, 2321, 2328, 2468e, 8066, 8507; title 25 section 2005; title 42 sections 290cc-33, 300w-7, 300x-57, 708, 1437l, 1437v, 1437w, 1437aaa-1, 1437aaa-2, 1760, 1769h, 2000d-7, 3608, 5057, 5309, 6727, 8623, 9849, 9906, 10406, 11386, 11394, 12134, 12142, 12143, 12144, 12146, 12147, 12148, 12162, 12635, 12832, 12872, 12873, 12892, 12893, 12899b, 12899c, 13603; title 49 section 5310.

§ 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final dis-

§ 34.109 Qualifications of peer reviewers.

The general reviewer qualification criteria to be used in the selection of peer reviewers are:

- (a) Generalized knowledge of juvenile justice or related fields; and
 - (b) Specialized knowledge in areas or disciplines addressed by the applications to be reviewed under a particular program.
- (c) Must not have a conflict of interest (see OJP M7100.1C, par. 9d).

Additional details concerning peer reviewer qualifications are provided in the OJJDP "Peer Review Guideline".

§ 34.110 Management of peer reviews.

A technical support contractor may assist in managing the peer review process.

§ 34.111 Compensation.

All peer reviewers will be eligible to be paid according to applicable regulations and policies concerning consulting fees and reimbursement for expenses. Detailed information is provided in the OJJDP "Peer Review Guideline".

Subpart C—Emergency Expedited Review (Reserved)

PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

Subpart A—General

- 5.101 Purpose.
- 5.102 Application.
- 5.103 Relationship to other laws.
- 5.104 Definitions.
- 5.105 Self-evaluation.
- 5.106 Notice.
- 5.107 Designation of responsible employees and adoption of grievance procedures.
- 5.108—35.129 [Reserved]

Subpart B—General Requirements

- 35.130 General prohibitions against discrimination.
- 35.131 Illegal use of drugs.
- 35.132 Smoking.
- 35.133 Maintenance of accessible features.
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- APPENDIX A TO PART 35—PREAMBLE TO REGULATION ON NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES (PUBLISHED JULY 26, 1991)
- AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 609, 610; Title II, Pub. L. 101-336 (42 U.S.C. 12134).
SOURCE: Order No. 1512-91, 56 FR 35716, July 26, 1991, unless otherwise noted.

Subpart A—General

§ 35.101 Purpose.

The purpose of this part is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101), which prohibits discrimination on the basis of disability by public entities.

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§ 35.102 Application.

- (a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.
- (b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA (42 U.S.C. 12141), they are not subject to the requirements of this part.

§ 35.103 Relationship to other laws.

- (a) *Rule of interpretation.* Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title.
- (b) *Other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

§ 35.104 Definitions.

For purposes of this part, the term—
Act means the Americans with Disabilities Act (Pub. L. 101-336, 104 Stat. 327, 42 U.S.C. 12101-12213 and 47 U.S.C. 225 and 611).

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids and services includes—

- (1) Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed captioning, decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making orally delivered materials available to individuals with hearing impairments;
- (2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- (3) Acquisition or modification of equipment or devices; and
- (4) Other similar services and accessories.

Complete complaint means a written statement that contains the complainant's name and address and describes the public entity's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of this part. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Designated agency means the Federal agency designated under subpart G of this part to oversee compliance activities under this part for particular components of State and local governments.

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1)(i) The phrase *physical or mental impairment* means—

- (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;
- (B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) The phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments,

cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(iii) The phrase *physical or mental impairment* does not include homosexuality or bisexuality.

(2) The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase *has a record of such an impairment* means has a history of, or does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(4) The phrase *is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

(5) The term *disability* does not include—

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

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, or equipment is located.

Historic preservation programs means programs conducted by a public entity that have preservation of historic properties as a primary purpose.

Historic Properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under State or local law.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term *illegal use of drugs* does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means a person who has a disability. The term *individual with a disability* does not include an individual who is currently engaging in the illegal use of drugs, when the public entity acts on the basis of such use.

Public entity means—

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(b) of the Rail Passenger Service Act).

Qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended.

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

§ 35.105 Self-evaluation.

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

(b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.

(c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A list of the interested persons consulted;

(2) A description of areas examined and any problems identified; and

(3) A description of any modifications made.

(d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

(Approved by the Office of Management and Budget under control number 1590-0006)

[56 FR 35718, July 26, 1991, as amended by Order No. 1684-83, 68 FR 17521, Apr. 5, 1993]

§ 35.106 Notice.

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of

this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

§ 35.107 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its non-compliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) *Complaint procedure.* A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

§ 35.108—§ 35.129 [Reserved]

Subpart B—General Requirements

§ 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b) (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities;

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits,

services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

§35.131 Illegal use of drugs.

(a) *General.* (1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

(2) A public entity shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who—

(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(ii) Is participating in a supervised rehabilitation program; or

(iii) Is erroneously regarded as engaging in such use.

(b) *Health and drug rehabilitation services.* (1) A public entity shall not deny health services, or services provided in connection with drug rehabilitation, to an individual on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.

(2) A drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.

(c) *Drug testing.* (1) This part does not prohibit a public entity from adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

(2) Nothing in paragraph (c) of this section shall be construed to encourage, prohibit, restrict, or authorize the conduct of testing for the illegal use of drugs.

§35.132 Smoking.

This part does not preclude the prohibition of, or the imposition of restrictions on, smoking in transportation covered by this part.

§35.133 Maintenance of accessible facilities.

(a) A public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.

(b) This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.

[56 FR 35716, July 26, 1991, as amended by Order No. 1694-93, 58 FR 17521, Apr. 5, 1993]

§35.134 Retaliation or coercion.

(a) No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

(b) No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part.

§ 35.135 Personal devices and services.

This part does not require a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, clothing, or dressing.

§ 35.136—§ 35.139 (Reserved)

Subpart C—Employment

§ 35.140 Employment discrimination prohibited.

(a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.

(b)(1) For purposes of this part, the requirements of title I of the Act, as established by the regulations of the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I.

(2) For the purposes of this part, the requirements of section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 CFR part 41, as those requirements pertain to employment, apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I.

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§ 35.141—§ 35.148 (Reserved)

Subpart D—Program Accessibility

§ 35.149 Discrimination prohibited.

Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

§ 35.150 Existing facilities.

(a) *General.* A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If

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an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) *Methods.*—(1) *General.* A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of § 35.150(a) in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of paragraph (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include—

(1) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(2) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(3) Adopting other innovative methods.

(c) *Time period for compliance.* Where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

(d) *Transition plan.* (1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross streets, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum—

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied with the transition plan requirement of a Federal agency regulation

Implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall apply to those policies and practices of those entities included in the previous plan.

approved by the Office of Management and Budget under control number 1190-0004) 3 FR 35716, July 26, 1991, as amended by Order No. 1694-93, 58 FR 17631, Apr. 5, 1993)

§35.161 New construction and alterations.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(b) *Alteration.* Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(c) *Accessibility standards.* Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) or in conformance with the Americans with Disabilities Act Accessibility Guidelines (appendix A to 28 CFR part 36) shall be deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained in section 4.1.3(f) and section 4.1.6(k) of ADAAG shall not apply.

(d) *Alterations to historic properties.* Alterations to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG.

(2) If it is not feasible to provide physical access that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of §35.160.

(c) *Curb ramps.* (1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having a sloped area at any intersection having a curb or other pedestrian walkway.

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able, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG.

(2) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having a sloped area at any intersection having a curb or other pedestrian walkway.

(2) *Newly constructed or altered street level pedestrian walkways.* Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

156 FR 35716, July 26, 1991, as amended by Order No. 1694-93, 58 FR 17631, Apr. 5, 1993)

§35.162—35.169 [Reserved]

Subpart E—Communications

§35.160 General.

(a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

§35.161 Telecommunication devices for the deaf (TDD's). Where a public entity communicates by telephone with applicants and beneficiaries, TDD's or equivalent shall be used to communicate with individuals with impaired hearing or speech.

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§35.162 Telephone emergency services. Telephone emergency services, including 911 services, shall provide direct access to individuals who use TDD's and computer modems.

§35.163 Information and signage. (a) A public entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence, obtain information of accessible services, and location of facilities.

(b) A public entity shall provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. The information shall be in a national symbol for accessibility of a facility.

§35.164 Duties. This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or administrative burden. In those circumstances where personnel of the public entity would fund the proposed action, the program, or activity, the action would result in undue financial or administrative burden, a public entity has the burden of proving that compliance in such alteration or burden would result in such alteration or burden. The decision shall be made by the head of the department, or his or her designee, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action or program would result in such an alteration or burden, a public entity shall take such other action that would not result in such an alteration or burden, but would nevertheless ensure that the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

§35.165—35.169 [Reserved]

Subpart F—Compliance Procedures

§35.170 Complaints.

(a) *Who may file.* An individual who believes that he or she or a specified class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself, file a complaint under this part. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the designated agency for good cause shown. A complaint on the date be filed under this section on the date it is first filed with any Federal agency.

(c) *Where to file.* An individual may file a complaint with an agency that he or she believes to be the appropriate agency designated under subpart G of this part, or with any agency that provides funding to the complainant, or with the subject of the complaint for referral to the Department of Justice (2). The Department in §35.171(a)(2).

§35.171 Acceptance of complaints. (1)(i) Any Federal agency that receives a complaint of discrimination on the basis of disability by a public entity shall promptly review it has jurisdiction to determine whether it has jurisdiction over the complaint does not have jurisdiction. If the designated agency for good cause shown, it shall promptly determine whether it is the appropriate agency for complaints filed with that public entity.

(2)(i) If an agency determines that it does not have jurisdiction, it shall promptly refer the complaint to the Department of Justice.

(ii) If an agency determines that it does not have jurisdiction, it shall promptly refer the complaint to the Department of Justice.

(iii) If an agency determines that it does not have jurisdiction, it shall promptly refer the complaint to the Department of Justice.

(iv) If an agency determines that it does not have jurisdiction, it shall promptly refer the complaint to the Department of Justice.

(v) If an agency determines that it does not have jurisdiction, it shall promptly refer the complaint to the Department of Justice.

(1) When the Department of Justice receives a complaint for which it does not have jurisdiction under section 504 and is not the designated agency, it shall refer the complaint to an agency that does have jurisdiction under section 504 or to the appropriate agency designated in subpart G of this part or, in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission.

(3)(i) If the agency that receives a complaint has section 504 jurisdiction, it shall process the complaint according to its procedures for enforcing section 504.

(ii) If the agency that receives a complaint does not have section 504 jurisdiction, but is the designated agency, it shall process the complaint according to the procedures established by this subpart.

(b) **Employment complaints.** (1) If a complainant alleges employment discrimination subject to title I of the Act, and the agency has section 504 jurisdiction, the agency shall follow the procedures issued by the Department of Justice and the Equal Employment Opportunity Commission under section 507(b) of the Act.

(2) If a complainant alleges employment discrimination subject to title I of the Act, and the designated agency does not have section 504 jurisdiction, the agency shall refer the complaint to the Equal Employment Opportunity Commission for processing under title I of the Act.

(3) Complaints alleging employment discrimination subject to this part, but not to title I of the Act shall be processed in accordance with the procedures established by this subpart.

(c) **Complete complaints.** (1) A designated agency shall accept all complete complaints under this section and shall promptly notify the complainant and the public entity of the receipt and acceptance of the complaint.

(2) If the designated agency receives a complaint that is not complete, it shall notify the complainant and specify the additional information that is needed to make the complaint a complete complaint. If the complainant fails to complete the complaint, the

designated agency shall close the complaint without prejudice.

§ 35.173 Resolution of complaints.

(a) The designated agency shall investigate each complete complaint, attempt informal resolution, and, if resolution is not achieved, issue to the complainant and the public entity a Letter of Findings that shall include—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) Notice of the rights available under paragraph (b) of this section.

(b) If the designated agency finds noncompliance, the procedures in §§ 35.173 and 35.174 shall be followed. At any time, the complainant may file a private suit pursuant to section 203 of the Act, whether or not the designated agency finds a violation.

§ 35.173 Voluntary compliance agreements.

(a) When the designated agency issues a noncompliance Letter of Findings, the designated agency shall—

(1) Notify the Assistant Attorney General by forwarding a copy of the Letter of Findings to the Assistant Attorney General; and

(2) Initiate negotiations with the public entity to secure compliance by voluntary means.

(b) Where the designated agency is able to secure voluntary compliance, the voluntary compliance agreement shall—

(1) Be in writing and signed by the parties;

(2) Address each cited violation;

(3) Specify the corrective or remedial action to be taken, within a stated period of time, to come into compliance;

(4) Provide assurance that discrimination will not recur; and

(5) Provide for enforcement by the Attorney General.

§ 35.174 Referral.

If the public entity declines to enter into voluntary compliance negotiations or if negotiations are unsuccessful, the designated agency shall refer the matter to the Attorney General with a recommendation for appropriate action.

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§ 35.176 Attorney's fees.

In any action or administrative proceeding commenced pursuant to the Act or this part, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

§ 35.176 Alternative means of dispute resolution.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Act and this part.

§ 35.177 Effect of unavailability of technical assistance.

A public entity shall not be excused from compliance with the requirements of this part because of any failure to receive technical assistance, including any failure in the development or dissemination of any technical assistance manual authorized by the Act.

§ 35.178 State immunity.

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

§ 35.179—35.189 (Reserved)

Subpart G—Designated Agencies

§ 35.190 Designated agencies.

(a) The Assistant Attorney General shall coordinate the compliance activities of Federal agencies with respect to State and local government components, and shall provide policy guidance and interpretations to designated agencies to ensure the consistent and effective implementation of the requirements of this part.

ance and interpretations to designated agencies to ensure the consistent and effective implementation of the requirements of this part.

(b) The Federal agencies listed in paragraph (b) (1) through (8) of this section shall have responsibility for the implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas.

(1) **Department of Agriculture.** All programs, services, and regulatory activities relating to farming and the raising of livestock, including extension services.

(2) **Department of Education.** All programs, services, and regulatory activities relating to the operation of elementary and secondary education systems and institutions, institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools), and libraries.

(3) **Department of Health and Human Services.** All programs, services, and regulatory activities relating to the provision of health care and social services, including schools of medicine, dentistry, nursing, and other health-related schools, the operation of health care and social service providers and institutions, including "grass-roots" and community services organizations and programs, and preschool and day-care programs.

(4) **Department of Housing and Urban Development.** All programs, services, and regulatory activities relating to state and local public housing, and housing assistance and referral.

(5) **Department of Interior.** All programs, services, and regulatory activities relating to lands and natural resources, including parks and recreation, water and waste management, environmental protection, energy, historic and cultural preservation, and museums.

(6) **Department of Justice.** All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of

justice, including courts and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless assigned to other designated agencies); state and local government support services (e.g., audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies.

(7) *Department of Labor*: All programs, services, and regulatory activities relating to labor and the work force.

(8) *Department of Transportation*: All programs, services, and regulatory activities relating to transportation, including highways, public transportation, traffic management (non-law enforcement), automobile licensing and inspection, and driver licensing.

(c) Responsibility for the implementation of subpart F of this part for components of State or local governments that exercise responsibilities, regulate, or administer services, programs, or activities relating to functions not assigned to specific designated agencies by paragraph (b) of this section may be assigned to other specific agencies by the Department of Justice.

(d) If two or more agencies have apparent responsibility over a complaint, the Assistant Attorney General shall determine which one of the agencies shall be the designated agency for purposes of that complaint.

§§ 35.191—35.999 [Reserved]

APPENDIX A TO PART 35—PREAMBLE TO REGULATION ON NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES (PUBLISHED JULY 26, 1991)

NOTE: For the convenience of the reader, this appendix contains the text of the preamble to the final regulation on nondiscrimination on the basis of disability in State and local government services beginning at the heading "Section-by-Section Analysis" and ending before "List of Subjects in 28 CFR Part 35" (56 FR 35696, July 26, 1991).

SECTION-BY-SECTION ANALYSIS

Subpart A—General

Section 35.101 Purpose

Section 35.101 states the purpose of the rule, which is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (the Act), which prohibits discrimination on the basis of disability by public entities. This part does not, however, apply to matters within the scope of the authority of the Secretary of Transportation under subtitle B of title II of the Act.

Section 35.102 Application

This provision specifies that, except as provided in paragraph (b), the regulation applies to all services, programs, and activities provided or made available by public entities, as that term is defined in § 35.104. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), which prohibits discrimination on the basis of handicap in federally assisted programs and activities, already covers those programs and activities of public entities that receive Federal financial assistance. Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance. Except as provided in § 35.134, this part does not apply to private entities.

The scope of title II's coverage of public entities is comparable to the coverage of Federal Executive agencies under the 1978 amendment to section 504, which extended section 504's application to all programs and activities "conducted by" Federal Executive agencies, in that title II applies to anything a public entity does. Title II coverage, however, is not limited to "Executive" agencies, but includes activities of the legislative and judicial branches of State and local governments. All governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements. The private entity operating the inn would also be subject to the obligations of public accommodations under title III of the Act and the Department's title III regulations at 28 CFR part 36.

Aside from employment, which is also covered by title I of the Act, there are two major categories of programs or activities covered by this regulation: those involving general public contact as part of ongoing operations of the entity and those directly administered by the entities for program beneficiaries and participants. Activities in the first category include communication with

and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe a public entity's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio. In providing the notice, a public entity must comply with the requirements for effective communication in §35.160. The preamble to that section gives guidance on how to effectively communicate with individuals with disabilities.

Section 35.107 Designation of Responsible Employee and Adoption of Grievance Procedures

Consistent with §35.105, self-evaluation, the final rule requires that public entities with 50 or more employees designate a responsible employee and adopt grievance procedures. Most of the commenters who suggested that the requirement that self-evaluation be maintained on file for three years not be limited to those employing 50 or more persons made a similar suggestion concerning §35.107. Commenters recommended either that all public entities be subject to §35.107, or that "50 or more persons" be changed to "15 or more persons." As explained in the discussion of §35.105, the Department has not adopted this suggestion.

The requirement for designation of an employee responsible for coordination of efforts to carry out responsibilities under this part is derived from the HEW regulation implementing section 504 in federally assisted programs. The requirement for designation of a particular employee and dissemination of information about how to locate that employee helps to ensure that individuals dealing with large agencies are able to easily find a responsible person who is familiar with the requirements of the Act and this part and can communicate those requirements to other individuals in the agency who may be unaware of their responsibilities. This paragraph in no way limits a public entity's obligation to ensure that all of its employees comply with the requirements of this part, but it ensures that any failure by individual employees can be promptly corrected by the designated employee.

Section 35.107(b) requires public entities with 50 or more employees to establish grievance procedures for resolving complaints of violations of this part. Similar requirements are found in the section 504 regulations for federally assisted programs (see, e.g., 45 CFR 84.7(b)). The rule, like the regulations for federally assisted programs, provides for investigation and resolution of complaints by a Federal enforcement agency. It is the view of the Department that public entities subject to this part should be required to establish a mechanism for resolution of com-

plaints at the local level without requiring the complainant to resort to the Federal complaint procedures established under subpart F. Complainants would not, however, be required to exhaust the public entity's grievance procedures before filing a complaint under subpart F. Delay in filing the complaint at the Federal level caused by pursuit of the remedies available under the grievance procedure would generally be considered good cause for extending the time allowed for filing under §35.170(b).

Subpart B—General Requirements

Section 35.130 General Prohibitions Against Discrimination

The general prohibitions against discrimination in the rule are generally based on the prohibitions in existing regulations implementing section 504 and, therefore, are already familiar to State and local entities covered by section 504. In addition, §35.130 includes a number of provisions derived from title III of the Act that are implicit to a certain degree in the requirements of regulations implementing section 504.

Several commenters suggested that this part should include the section of the proposed title III regulation that implemented section 309 of the Act, which requires that courses and examinations related to applications, licensing, certification, or credentialing be provided in an accessible place and manner or that alternative accessible arrangements be made. The Department has not adopted this suggestion. The requirements of this part, including the general prohibitions of discrimination in this section, the program access requirements of subpart D, and the communications requirements of subpart E, apply to courses and examinations provided by public entities. The Department considers these requirements to be sufficient to ensure that courses and examinations administered by public entities meet the requirements of section 309. For example, a public entity offering an examination must ensure that modifications of policies, practices, or procedures or the provision of auxiliary aids and services furnish the individual with a disability an equal opportunity to demonstrate his or her knowledge or ability. Also, any examination specially designed for individuals with disabilities must be offered as often and in as timely a manner as are other examinations. Further, under this part, courses and examinations must be offered in the most integrated setting appropriate. The analysis of §35.130(d) is relevant to this determination.

A number of commenters asked that the regulation be amended to require training of law enforcement personnel to recognize the difference between criminal activity and the effects of seizures or other disabilities such

as mental retardation, cerebral palsy, traumatic brain injury, mental illness, or deafness. Several disabled commentators gave personal statements about the abuse they had received at the hands of law enforcement personnel. Two organizations that commented cited the Judiciary report at 60 as authority to require law enforcement training.

The Department has not added such a training requirement to the regulation. Discriminatory arrests and brutal treatment are already unlawful police activities. The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities. Under this section law enforcement personnel would be required to make appropriate efforts to determine whether perceived strange or disruptive behavior or unconsciousness is the result of a disability. The Department notes that a number of States have attempted to address the problem of arresting disabled persons for noncriminal conduct resulting from their disability through adoption of the Uniform Duties to Disabled Persons Act, and encourages other jurisdictions to consider that approach.

Paragraph (a) restates the nondiscrimination mandate of section 202 of the ADA. The remaining paragraphs in §35.130 establish the general principles for analyzing whether any particular action of the public entity violates this mandate.

Paragraph (b) prohibits overt denials of equal treatment of individuals with disabilities. A public entity may not refuse to provide an individual with a disability with an equal opportunity to participate in or benefit from its program simply because the person has a disability.

Paragraph (b)(1)(i) provides that it is discriminatory to deny a person with a disability the right to participate in or benefit from his aid, benefit, or service provided by a public entity. Paragraph (b)(1)(ii) provides that his aids, benefits, and services provided to persons with disabilities must be equal to those provided to others, and paragraph (b)(1)(iii) requires that the aids, benefits, or services provided to individuals with disabilities must be as effective in affording equal opportunity to obtain the same result, to attain the same benefit, or to reach the same level of achievement as those provided to others. These paragraphs are taken from the regulations implementing section 504 and implicitly restate principles long established under section 504.

Paragraph (b)(1)(v) permits the public entity to develop separate or different aids, benefits, or services when necessary to provide individuals with disabilities with an equal opportunity to participate in or benefit from the public entity's programs or ac-

tivities, but only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Paragraph (b)(1)(iv) must be read in conjunction with paragraphs (b)(2), (d), and (e). Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with a disability still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities. Paragraph (d) requires that a public entity administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

Paragraph (b)(2) specifies that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Paragraph (e), which is derived from section 601(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with those standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.

Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status. For example, it would be a violation of this provision to require persons with disabilities to eat in the back room of a government cafeteria or to refuse to allow a person with a disability the full use of recreation or exercise facilities because of stereotypes about the person's ability to participate.

Many commentators objected to proposed paragraphs (b)(1)(v) and (d) as allowing continued segregation of individuals with disabilities. The Department recognizes that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and agrees that, in most instances, separate programs for individuals with disabilities will not be permitted. Nevertheless, section 504 does permit separate programs in limited

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circumstances, and Congress clearly intended the regulations issued under title II to adopt the standards of section 504. Furthermore, Congress included authority for separate programs in the specific requirements of title III of the Act. Section 302(b)(1)(A)(iii) of the Act provides for separate benefits in language similar to that in §35.130(b)(1)(v), and section 302(b)(1)(B) includes the same requirement for "the most integrated setting appropriate" as in §35.130(d).

Even when separate programs are permitted, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.

For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

In addition, it would not be a violation of this section for a public entity to offer recreational programs specially designed for children with mobility impairments. However, it would be a violation of this section if the entity then excluded these children from other recreational services for which they are qualified to participate when those services are made available to nondisabled children, or if the entity required children with disabilities to attend only designated programs.

Many commentators asked that the Department clarify a public entity's obligations within the integrated program when it offers a separate program but an individual with a disability chooses not to participate in the separate program. It is impossible to make a blanket statement as to what level of auxiliary aids or modifications would be required in the integrated program. Rather, each situation must be assessed individually. The starting point is to question whether the separate program is in fact necessary or appropriate for the individual. Assuming the separate program would be appropriate for a particular individual, the extent to which that individual must be provided with modifications in the integrated program will depend not only on what the individual needs but also on the limitations and defenses of this part. For example, it may constitute an undue burden for a public accommodation,

which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program. The Department cannot identify categorically the level of assistance or aid required in the integrated program.

Paragraph (b)(1)(v) provides that a public entity may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program. This paragraph is taken from the regulations implementing section 504 for federally assisted programs.

Paragraph (b)(1)(vi) prohibits the public entity from denying a qualified individual with a disability the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(3)(vii) prohibits the public entity from limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the public entity from utilizing criteria or methods of administration that deny individuals with disabilities access to the public entity's services, programs, and activities or that perpetuate the discrimination of another public entity. If both public entities are subject to common administrative control or are agencies of the same State, the phrase "criteria or methods of administration" refers to official written policies of the public entity and to the actual practices of the public entity. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in *Alexander v. Choate*, 469 U.S. 287 (1985). The Court in *Choate* explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: "These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design." *Id.* at 297 (footnote omitted).

Paragraph (b)(4) specifically applies the prohibition enunciated in §35.130(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the public entity. Paragraph

(b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the public entity, in the selection of procurement contractors, from using criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

Paragraph (b)(6) prohibits the public entity from discriminating against qualified individuals with disabilities on the basis of disability in the granting of licenses or certification. A person is a "qualified individual with a disability" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification (see § 35.104).

A number of commenters were troubled by the phrase "essential eligibility requirements" as applied to State licensing requirements, especially those for health care professions. Because of the variety of types of programs to which the definition of "qualified individual with a disability" applies, it is not possible to use more specific language in the definition. The phrase "essential eligibility requirements," however, is taken from the definitions in the regulations implementing section 504, so case law under section 504 will be applicable to its interpretation. In *Southeastern Community College v. Davis*, 442 U.S. 397, for example, the Supreme Court held that section 504 does not require an institution to "lower or effect substantial modifications of standards to accommodate a handicapped person." 442 U.S. at 413, and that the school had established that the plaintiff was not "qualified" because she was not able to "serve the nursing profession in all customary ways." *Id.* Whether a particular requirement is "essential" will, of course, depend on the facts of the particular case.

In addition, the public entity may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. For example, the public entity must comply with this requirement when establishing safety standards for the operations of licensees. In that case the public entity must ensure that standards that it promulgates do not discriminate against the employment of qualified individuals with disabilities in an impermissible manner.

Paragraph (b)(6) does not extend the requirements of the Act or this part directly to the programs or activities of licensees or certified entities themselves. The programs or activities of licensees or certified entities are not themselves programs or activities of the public entity merely by virtue of the license or certificate.

Paragraph (b)(7) is a specific application of the requirement under the general prohibitions of discrimination that public entities make reasonable modifications in policies,

practices, or procedures where necessary to avoid discrimination on the basis of disability. Section 302(b)(2)(A)(ii) of the ADA sets out this requirement specifically for public accommodations covered by title III of the Act, and the House Judiciary Committee Report directs the Attorney General to include those specific requirements in the title II regulation to the extent that they do not conflict with the regulations implementing section 504. Judicially report at 52.

Paragraph (b)(8), a new paragraph not contained in the proposed rule, prohibits the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. This prohibition is also a specific application of the general prohibitions of discrimination and is based on section 302(b)(2)(A)(i) of the ADA. It prohibits overt denials of equal treatment of individuals with disabilities, or establishment of exclusive or segregative criteria that would bar individuals with disabilities from participation in services, benefits, or activities.

Paragraph (b)(8) also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public entities may not require that a qualified individual with a disability be accompanied by an attendant. A public entity is not, however, required to provide attendant care, or assistance in collecting, eating, or dressing to individuals with disabilities, except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution.

In addition, paragraph (b)(8) prohibits the imposition of criteria that "tend to" screen out an individual with a disability. This concept, which is derived from current regulations under section 504 (see, e.g., 45 CFR 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, indirectly prevent or limit their ability to participate. For example, requiring presentation of a driver's license as the sole means of identification for purposes of paying by check would violate this section in situations where, for example, individuals with severe vision impairments or developmental disabilities or epilepsy are ineligible to receive a driver's license and the use of an alternative means of identification, such as another photo I.D. or credit card, is feasible.

A public entity may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the safe

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operation of the program in question. Examples of safety qualifications that would be justifiable in appropriate circumstances would include eligibility requirements for drivers' licenses, or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

Paragraph (c) provides that nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities, beyond those required by this part. It is derived from a provision in the section 504 regulations that permits programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with disabilities or a given class of individuals with disabilities to be limited to those individuals with disabilities. Section 504 ensures that federally assisted programs are made available to all individuals, without regard to disabilities, unless the Federal program is specifically limited to individuals with disabilities or a particular class of individuals with disabilities. Because coverage under this part is not limited to federally assisted programs, paragraph (c) has been revised to clarify that State and local governments may provide special benefits, beyond those required by the nondiscrimination requirements of this part, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities.

Paragraphs (d) and (e), previously referred to in the discussion of paragraph (b)(1)(iv), provide that the public entity must administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, i.e., in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible, and that persons with disabilities must be provided the option of declining to accept a particular accommodation.

Some commenters expressed concern that § 35.130(e), which states that nothing in the rule requires an individual with a disability to accept special accommodations and services provided under the ADA, could be interpreted to allow guardians of infants or other people with disabilities to refuse medical treatment for their wards. Section 35.130(e) has been revised to make it clear that paragraph (e) is inapplicable to the concern of the commenters. A new paragraph (e)(2) has been added stating that nothing in the regulation authorizes the representative or

guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual. New paragraph (e) clarifies that neither the ADA nor the regulation alters current Federal law ensuring the rights of incompetent individuals with disabilities to receive food, water, and medical treatment. See, e.g., *Child Abuse Amendments of 1994* (42 U.S.C. 6105a(b)(10), 5106g(10)). *Rehabilitation Act of 1973*, as amended (29 U.S.C. 794); the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. 6042).

Sections 35.130(e) (1) and (2) are based on section 501(d) of the ADA. Section 501(d) was designed to clarify that nothing in the ADA requires individuals with disabilities to accept special accommodations and services for individuals with disabilities that may segregate them.

The Committee added this section (501(d)) to clarify that nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability. For example, a blind individual may choose not to avail himself or herself of the right to go to the front of a line, even if a particular public accommodation has chosen to offer such a modification of a policy for blind individuals. Or, a blind individual may choose to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour.

Judiciary report at 71-72. The Act is not to be construed to mean that an individual with disabilities must accept special accommodations and services for individuals with disabilities when that individual can participate in the regular services already offered. Because medical treatment, including treatment for particular conditions, is not a special accommodation or service for individuals with disabilities under section 501(d), neither the Act nor this part provides affirmative authority to suspend such treatment. Section 501(d) is intended to clarify that the Act is not designed to foster discrimination through mandatory acceptance of special services when other alternatives are provided; this concern does not reach to the provision of medical treatment for the disabling condition itself.

Paragraph (f) provides that a public entity may not place a surcharge on a particular individual with a disability, or any group of individuals with disabilities, to cover any costs of measures required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part. Such measures may include the provision of

auxiliary aids or of modifications required to provide program accessibility.

Several commenters asked for clarification that the costs of interpreter services may not be assessed as an element of "court costs." The Department has already recognized that imposition of the cost of court-room interpreter services is impermissible under section 604. The preamble to the Department's section 604 regulation for its federally assisted programs states that where a court system has an obligation to provide qualified interpreters, "it has the corresponding responsibility to pay for the services of the interpreters." (45 FR 37630 (June 3, 1980)). Accordingly, recouping the costs of interpreter services by assessing them as part of court costs would also be prohibited.

Paragraph (6), which prohibits discrimination on the basis of an individual's or entity's known relationship or association with an individual with a disability, is based on sections 102(b)(4) and 302(b)(1)(E) of the ADA. This paragraph was not contained in the proposed rule. The individuals covered under this paragraph are any individuals who are discriminated against because of their known association with an individual with a disability. For example, it would be a violation of this paragraph for a local government to refuse to allow a theater company to use a school auditorium on the grounds that the company had recently performed for an audience of individuals with HIV disease.

This protection is not limited to those who have a familial relationship with the individual who has a disability. Congress considered, and rejected, amendments that would have limited the scope of this provision to specific associations and relationships. Therefore, if a public entity refuses admission to a person with cerebral palsy and his or her companions, the companions have an independent right of action under the ADA and this section.

During the legislative process, the term "entity" was added to section 302(b)(1)(E) to clarify that the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise associated with such individuals. This provision was included to ensure that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities.

Section 35.131 *Illegal Use of Drugs*

Section 35.131 effectuates section 610 of the ADA, which clarifies the Act's application to people who use drugs illegally. Paragraph (a) provides that this part does not prohibit dis-

crimination based on an individual's current illegal use of drugs.

The Act and the regulation distinguish between illegal use of drugs and the legal use of substances, whether or not those substances are "controlled substances," as defined in the Controlled Substances Act (21 U.S.C. 812). Some controlled substances are prescription drugs that have legitimate medical uses. Section 35.131 does not affect use of controlled substances pursuant to a valid prescription under supervision by a licensed health care professional, or other use that is authorized by the Controlled Substances Act or any other provision of Federal law. It does apply to illegal use of those substances, as well as to illegal use of controlled substances that are not prescription drugs. The key question is whether the individual's use of the substance is illegal, not whether the substance has recognized legal uses. Alcohol is not a controlled substance, so use of alcohol is not addressed by § 35.131 (although alcoholics are individuals with disabilities, subject to the protections of the statute).

A distinction is also made between the use of a substance and the status of being addicted to that substance. Addiction is a disability, and addicts are individuals with disabilities protected by the Act. The protection, however, does not extend to actions based on the illegal use of the substance. In other words, an addict cannot use the fact of his or her addiction as a defense to an action based on illegal use of drugs. This distinction is not artificial. Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are addicted, but to provide protection to addicts so long as they are not currently using drugs.

A third distinction is the difficult one between current use and former use. The definition of "current illegal use of drugs" in § 35.104, which is based on the report of the Conference Committee, H.R. Conf. Rep. No. 896, 101st Cong., 2d Sess. 64 (1990) (hereinafter "Conference report"), is "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem."

Paragraph (a)(2)(i) specifies that an individual who has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully and who is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(ii) clarifies that an individual who is currently participating in a supervised rehabilitation program and is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(iii) provides that a person who is erroneously regarded as engaging in current illegal use of drugs, but who is not engaging in such use, is protected.

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Paragraph (b) provides a limited exception to the exclusion of current illegal users of drugs from the protections of the Act. It prohibits denial of health services, or services provided in connection with drug rehabilitation to an individual on the basis of current illegal use of drugs, if the individual is otherwise entitled to such services. A health care facility, such as a hospital or clinic, may not refuse treatment to an individual in need of the services it provides on the grounds that the individual is illegally using drugs, but it is not required by this section to provide services that it does not ordinarily provide. For example, a health care facility that specializes in a particular type of treatment, such as care of burn victims, is not required to provide drug rehabilitation services, but it cannot refuse to treat a individual's burns on the grounds that the individual is illegally using drugs.

Some commenters pointed out that abstention from the use of drugs is an essential condition of participation in some drug rehabilitation programs, and may be a necessary requirement in inpatient or residential settings. The Department believes that this comment is well-founded. Congress clearly intended to prohibit exclusion from drug treatment programs of the very individuals who need such programs because of their use of drugs, but, once an individual has been admitted to a program, abstention may be a necessary and appropriate condition to continued participation. The final rule therefore provides that a drug rehabilitation or treatment program may prohibit illegal use of drugs by individuals while they are participating in the program.

Paragraph (c) expresses Congress' intention that the Act be neutral with respect to testing for illegal use of drugs. This paragraph implements the provision in section 610(b) of the Act that allows entities "to adopt or administer reasonable policies or procedures, including but not limited to drug testing," that ensure that an individual who is participating in a supervised rehabilitation program, or who has completed such a program or otherwise been rehabilitated successfully is no longer engaging in the illegal use of drugs. The section is not to be "construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs."

Paragraph 35.131(c) clarifies that it is not a violation of this part to adopt or administer reasonable policies or procedures to ensure that an individual who formerly engaged in the illegal use of drugs is not currently engaging in illegal use of drugs. Any such policies or procedures must, of course, be reasonable, and must be designed to identify accurately the illegal use of drugs. This paragraph does not authorize inquiry, tests, or other procedures that would disclose use of substances that are not controlled sub-

stances or are taken under supervision by licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law, because such uses are not included in the definition of "illegal use of drugs." A commenter argued that the rule should permit testing for lawful use of prescription drugs, but most commenters preferred the tests must be limited to unlawful use in order to avoid revealing the lawful use of prescription medicine used to treat disabilities.

Section 35.132 *Smoking*

Section 35.132 restates the clarification in section 601(b) of the Act that the Act does not preclude the prohibition of, or imposition of restrictions on, smoking in transportation covered by title II. Some commenters argued that this section is too limited in scope, and that the regulation should prohibit smoking in all facilities used by public entities. The reference to smoking in section 501, however, merely clarifies that the Act does not require public entities to accommodate smokers by permitting them to smoke in transportation facilities.

Section 35.133 *Maintenance of Accessible Features*

Section 35.133 provides that a public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part. The Act requires that, to the maximum extent feasible, facilities must be accessible to, and usable by, individuals with disabilities. This section recognizes that it is not sufficient to provide features such as accessible routes, elevators or ramps. If those features are not maintained in a manner that enables individuals with disabilities to use them, inoperable elevators, locked accessible doors, or "accessible" routes that are obstructed by furniture, filing cabinets, or potted plants are neither "accessible to," nor "usable by" individuals with disabilities.

Some commenters objected that this section appeared to establish an absolute requirement and suggested that language from the preamble be included in the text of the regulation. It is, of course, impossible to guarantee that mechanical devices will never fail to operate. Paragraph (b) of the final regulation provides that this section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs. This paragraph is included to clarify that temporary obstructions or isolated instances of mechanical failure would not be considered violations of the Act or this part. However, allowing obstructions or "out of service" equipment to

Subpart C—Guidelines for Determining Discriminatory Practices

GENERAL

§41.51 General prohibitions against discrimination.

(a) No qualified handicapped person, shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

(b)(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or

opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A recipient may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permitably separate or different programs or activities.

(3) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap,

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or

(iii) That perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

(4) A recipient may not, in determining the site or location of a facility, make selections:

(i) That have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from federal financial assistance or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

(d) Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

(e) Recipients shall take appropriate steps to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired vision and hearing.

EMPLOYMENT

§41.52 General prohibitions against employment discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity that receives or benefits from federal financial assistance.

(b) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(c) The prohibition against discrimination in employment applies to the following activities:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, positions, descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(d) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred

to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

§41.53 Reasonable accommodation.

A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

§41.54 Employment criteria.

A recipient may not use employment tests or criteria that discriminate against handicapped persons and shall ensure that employment tests are adapted for use by persons who have handicaps that impair sensory, manual, or speaking skills.

§41.55 Preemployment inquiries.

A recipient may not conduct a preemployment medical examination or make a preemployment inquiry as to whether an applicant is a handicapped person or as to the nature or severity of a handicap except under the circumstances described in 28 CFR 42.513.

(43 FR 2132, Jan. 13, 1978, redesignated and amended at 46 FR 40086, 40087, Aug. 11, 1981)

PROGRAM ACCESSIBILITY

§41.56 General requirement concerning program accessibility.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

§41.57 Existing facilities.

(a) A recipient shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and

the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(1) *Handicap* means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§ 84.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.*

(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap

in providing any aid, benefit, or service to beneficiaries of the recipients program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program

or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

§84.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Director, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the

form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure non-discrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Director may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§84.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Director finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Director deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another

diem allowed legislative members of interim study committees of the General Assembly and the same mileage allowance for use of a personal car as that received by all other state officials and employees or a travel allowance of actual transportation cost if traveling by public carrier.

(h) Each regional board which is composed of members who are appointed thereto by the governing authority of only one county shall have a minimum of six members, notwithstanding the provisions of subsection (b) of this Code section, which members shall in all other respects be appointed as provided in this Code section. (Code 1933, §§ 88-605, 88-606, enacted by Ga. L. 1976, p. 953, § 1; Ga. L. 1986, p. 1213, § 1; Ga. L. 1993, p. 1445, § 16; Ga. L. 1994, p. 437, § 2.)

The 1993 amendment, effective July 1, 1993, rewrote this Code section, which pertained to preparation and submission of biennial area plans for disability services.

The 1994 amendment, effective July 1, 1994, in subsection (b.2), substituted "community service board" for "regional or community services boards" at the end of the first sentence and added the second sentence; and added subsection (h).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1994, "community service board" was substituted for "community services board" at the first instance of that phrase in the first sentence in subsection (b.2).

Editor's notes. — Ga. L. 1993, p. 1445, § 18.1, not codified by the General Assembly, provides: "Nothing in this Act shall be construed to repeal any provision of Chapter 5 of Title 37 of the Official Code of Georgia Annotated, the 'Community Services Act for the Mentally Retarded.'"

Ga. L. 1993, p. 1445, § 19, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 1994; provided, however, that provisions relating to the establishment of regional and community service board boundaries and the appointments of regional boards and community service boards shall become effective on July 1, 1993, or upon whatever date is stipulated in the Act and provided, further, that the provisions authorizing a county board of health to agree to serve as the lead county board of health for only that county shall become effective upon the approval of this Act by the Governor or upon its becoming law without such approval." The Act was approved by the Governor on April 27, 1993.

Ga. L. 1993, p. 1445, which amends this Code section, provides, in § 19.1, not codified by the General Assembly, that the amendment is repealed on June 30, 1999.

JUDICIAL DECISIONS

Property interest of participants in supportive living program. — Rules and regulations of state and local supportive living program give participants in the program a

property interest subject to due process including an evidentiary hearing prior to termination from the program. *Fields v. Pittman*, 571 F. Supp. 32 (N.D. Ga. 1983).

37-2-5.1. Regional boards — Executive director; staff and personnel; allocation of funds.

(a) Each regional board shall be served by an executive director, who shall be duly qualified and appointed by the director of the division, with the approval of the regional board. The executive director shall serve as the director of the regional mental health, mental retardation, and substance abuse planning unit, which shall be a unit of the division and shall be

governed by the regional board. The executive director shall serve at the pleasure of the division director. An executive director may be appointed to serve the regional board only with such board's approval. At any time during the tenure of the executive director, the regional board may for good cause vote to request the removal of the executive director. Should such a vote for removal be taken and be approved by a majority of the full board membership, the board shall submit its request to the director of the division who shall in turn comply with the request of the board. The director of the division shall be authorized to appoint for a period not to exceed 12 months an interim executive director at any time that the position of executive director is vacant and prior to the appointment of a duly qualified and approved successor.

(b) The executive director of the regional board may appoint such other staff and personnel to work for the unit as that executive director and board deem necessary and appropriate. The executive director and such staff and personnel shall be employees of the division. Expenses for the regional board, the employment of the executive director, other staff and personnel, and the operation of the unit office shall be charged against the funding allocated to the regional board for planning and service delivery within the established region. The department and the division may impose limits on the administrative and operating expenditures of the regional board and the unit.

(c) (1) State, federal, and other funds appropriated to the department, the division, or both, and available for the purpose of funding the planning and delivery of disability services shall be distributed in accordance with this subsection. After July 1, 1995, all funds associated with services to clients residing within a given region shall be allocated through the appropriate regional board; "all funds" shall include funding for hospitals, community service boards, private and public contracts, and any contracts relating to service delivery for clients within the given region; provided, however, that nothing shall prohibit the allocation of funds through any regional board prior to July 1, 1995. The division shall establish a minimum funding amount for regional boards conditioned upon the amount of funds appropriated and a supplemental funding formula to be used for the distribution of available state funds in excess of the minimum funding amount. The minimum funding amount shall be determined, in part, based on consumer service needs, service and program history, population based funding needs, infrastructure mandates, program efficiency and effectiveness, geographic distances, and other factors affecting the cost and level of service needs within each region.

(2) The division shall establish guidelines to ensure that funding is allocated to community service boards and local services based on client population, past and future service delivery needs and capabilities, and in

consideration of special needs populations, such as homeless and transient populations. The division shall ensure that funds are allocated based primarily on services to clients and in compliance with all federal, state, and regulatory requirements.

(3) The division, in compliance with the provisions of the appropriations Act and other applicable laws, is authorized to move funds to and between community and institutional programs based on need, and the division shall ensure that the regional boards develop appropriate allocation and accounting mechanisms to move funds in a planned and rational manner between hospitals, community service boards, and other providers based on client needs and utilization. (Code 1981, § 37-2-5.1, enacted by Ga. L. 1993, p. 1445, § 16; Ga. L. 1994, p. 437, § 3.)

Effective date. — This Code section became effective July 1, 1994.

The 1994 amendment, effective July 1, 1994, in subsection (c), added the proviso at the end of the second sentence in paragraph (1).

Editor's notes. — Ga. L. 1993, p. 1445, § 18.1, not codified by the General Assembly, provides: "Nothing in this Act shall be construed to repeal any provision of Chapter 5 of Title 37 of the Official Code of Georgia Annotated, the 'Community Services Act for the Mentally Retarded.'"

Ga. L. 1993, p. 1445, § 19, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 1994; provided, however, that provisions relating to

the establishment of regional and community service board boundaries and the appointments of regional boards and community service boards shall become effective on July 1, 1993, or upon whatever date is stipulated in the Act and provided, further, that the provisions authorizing a county board of health to agree to serve as the lead county board of health for only that county shall become effective upon the approval of this Act by the Governor or upon its becoming law without such approval." The Act was approved by the Governor on April 27, 1993.

Ga. L. 1993, p. 1445, which enacts this Code section, provides, in § 19.1, not codified by the General Assembly, that this Code section is repealed on June 30, 1999.

37-2-5.2. Regional boards — Duties and functions; power to contract; delegation of powers and duties; books of account.

(a) Each regional board shall have the following duties and functions:

(1) To prepare, in consultation with consumers and families, community programs, hospitals, other public and private providers, and appropriate advisory and advocacy groups, an annual plan and mechanism for the funding and provision of all disability services in the region. The plan shall be submitted to the division at a time and in the manner specified by the division so as to ensure that the plan is a basis for the annual appropriations request. The division shall provide technical and professional expertise to the regional board upon request. Such plan may include, by way of illustration without limitation, the following:

(A) An estimate categorized by age group of the number of citizens residing in the region who require disability services and an estimate of the range of services needed for these citizens;

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the Brief of Appellees by placing a copy thereof in a properly addressed envelope with adequate postage thereon for delivery by first class mail to the individuals listed below:

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This 15th day of August 1997.



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