1992 WL 12037094 (Colo.) (Appellate Brief)
Supreme Court of Colorado.

Duc VAN LE, on behalf of himself and the class of persons similarly situated, Petitioner,
v.
Irene M. IBARRA, et al., Respondents.

No. 91SC189.
July, 1992.

**Petitioner's Supplemental Brief**

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***1** Petitioner Duc Van Le and the class he represents reply[1] to the court's questions as follows:

**1. Did the respondents violate the petitioner, Duc Van Le, and the class members rights under (a) section 504 of the Rehabilitation Act of 1972, 29 U.S.C. § 794 (1988), or (b) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by granting benefits to the elderly, blind, physically disabled and developmentally disabled and not to the mentally ill?**

Answer: Yes. This court can affirm the district court's ruling under either section 504 or the equal protection clause. Under section 504, the respondents' acceptance of federal funds triggers the statute's anti-discrimination provision. Section 504 guarantees the petitioner and the class participation in the Home and Community-Based Services ("HCBS") program that the state provides for low income elderly, blind and disabled persons. The equal protection clause protects the petitioner and the class because the respondents' refusal to apply for HCBS benefits for the mentally ill is not rationally related to a legitimate governmental purpose.

### A. *Section 504 of the Rehabilitation Act.*

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988) provides:
(a) No otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, 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* ....

***2** (b) 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.

(emphasis added) This court's April 20, 1992, opinion recognized that the parties had stipulated that the petitioner and the members of the class are "otherwise qualified individuals" who were denied HCBS benefits solely because they are mentally ill. 16 Brief Times Rptr. 633, 639 (Colo. 1992) The court, relying on case law decided before section 504 was amended to add the definition of "program or activity," ruled that the respondent officials of the department of social services and the department of institutions ("the departments" or "the respondents") did not receive federal funds within the meaning of section 504. *Id.*[2]

The court should rule that section 504 prohibits a recipient of federal funds from excluding from participation in, and denying the benefit of, or otherwise discriminating against any qualified person on the basis of a handicap. *See* 45 C.F.R. 84.4 (1991). The respondent recipients of federal funds have denied the petitioner and the class access to HCBS benefits available to ***3** others on the basis that the handicap of the petitioner and the class is mental illness. *See* *Alexander v. Choate,* 469 U.S. 287, 301 (1984) ("an otherwise qualified handicapped person must be provided with meaningful access to the benefit that the grantee offers"). The petitioner and the class require the same services that are provided to other handicapped recipients of HCBS benefits. The departments' refusal to apply for HCBS benefits for the mentally ill violates section 504 because the refusal deprives qualified handicapped persons of meaningful access to the same benefits provided to the elderly, the blind, and the developmentally disabled. *Goebel v. Colorado Dept. of Institutions,* 764 P.2d 785, 804 (Colo. 1988) (failure to provide more severely disabled mentally ill persons access to services constitutes discrimination in violation of section 504); *Homeward Bound, Inc. V. Hissom Memorial Center,* No. 85-C-437-E (N.D. Okla. July 24, 1987) [available on WESTLAW, 1987 WL 27104] (refusal to apply for HCBS benefits for mentally retarded violated section 504); *Sites v. McKenzie,* 423 F.

Supp. 1190 (N.D. Va. 1976) (denial of vocational rehabilitation benefits on basis of person's mental illness violates section 504); *Lynch v. Maher,* 507 F. Supp. 1268 (D. Conn. 1981) (denial of homecare services on basis of handicap violates section 504).

**B. *Equal Protection.***

The district court determined that the respondents' denial of HCBS benefits to the mentally ill violated equal protection ***4** under the Fourteenth Amendment of the United States Constitution, applying both rational basis and strict scrutiny review.[3] This court's opinion of April 20, 1992, reversed the district court ruling.

On rehearing, should this court determine that section 504 does not prevent the departments from refusing to provide HCBS benefits to the petitioner and the class, then the court should consider whether the respondents denied the petitioner and the class equal protection under the heightened standard of rational basis review in *City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432 (1985).[4] In *Cleburne,* the Supreme Court held that there was no rational basis for requiring a special use permit for group homes for the mentally retarded. 473 U.S. at 450. The heightened standard of review in *Cleburne* requires that there be a demonstrably rational basis in fact -- rather than any "reasonably conceivable" basis in fact -- for the governmental action; that there be a demonstrably rational nexus between the classification and a legitimate governmental purpose; and the adverse ***5** impact on the mentally retarded must be no more than an incidental burden on -- not a total deprivation of -- essential services. 473 U.S. at 446; *see* 473 U.S. at 458 (Marshall, J., concurring in part and dissenting in part).

The heightened standard of rational basis review applies also to the mentally ill. *See Cleburne,* 473 U.S. at 445-46 (mentally ill are similarly situated to mentally retarded for equal protection purposes); *Doe v. Cowherd,* 770 F. Supp. 354, 358 (W.D. Ky. 1991). The majority on April 20, 1992, wrote that the "*Cleburne* analysis applies equally to persons suffering from mental illness" and utilized *Cleburne's* rational relationship test to review the government's refusal here to provide HCBS benefits to the mentally ill. 16 Brief Times Rptr. at 638.

The April 20, 1992, opinion, however, did not discuss at length the application of the *Cleburne* standard. Instead, the court observed that in 1985 "only Vermont had a waiver to provide HCBS benefits for the mentally ill," that the staff time cost to the state for reapplication was approximately $30,000, and that a federal official had said that Colorado had "little chance" of receiving a waiver that would allow it to receive federal funding for HCBS benefits. 16 Brief Times Rptr. at 638-39. The opinion concluded that "[d]ue to the cost of reapplication and the slight chance of obtaining a waiver, it was not irrational for respondents to make a policy judgment to discontinue the HCBS program for the mentally ill." *Id.* at 639.

***6** The opinion ignored contrary evidence in the record that supported the district court's findings. More than half the states provide HCBS benefits for the mentally ill through Medicaid spend-down programs, a program that Colorado has not adopted. (Vol. 4 at 137-38) The $30,000 in staff time to prepare a reapplication pales next to the savings to the state if HCBS at an average cost of $400 per person each month replaces nursing home care at $1350 per person each month or hospitalization at $400 per person each day. (Vol. 4 at 37, 112) And a federal official believed that Colorado would have a "good chance" of obtaining an HCBS waiver if the state submitted a request.[5] (Vol. 4 at 93) *See also* exhibit 6 to the stipulated facts (vol. 2 at 351-54).

There was not a demonstrably rational basis in fact for the departments' refusal since 1985 to reapply for HCBS. The federal government's denial of the 1985 application left open the possibility of approval upon the state's full compliance with statutory and regulatory requirements. Nor was there a demonstrably rational nexus between the classification and a legitimate governmental purpose. The $30,000 in staff time to prepare a reapplication is not linked to any legitimate governmental purpose ***7** to be achieved by excluding the class of the mentally ill from HCBS benefits, particularly where provision of HCBS benefits for the mentally ill could save the state millions of dollars in hospital and nursing home expenses by preventing mentally ill persons from deteriorating to the point where, unable to assume responsibility for day-to-day

self-care, they would be institutionalized or live on the streets.

Finally, the failure to provide HCBS is a deprivation of essential services for the mentally ill. The adverse burden cannot be termed "incidental." *Cleburne,* 473 U.S. at 446. The state's failure to reapply for HCBS totally deprives the petitioner and the class of benefits that the state has made available to other handicapped groups in need of similar services. The state's termination of HCBS benefits for the mentally ill is discrimination that the equal protection clause as interpreted in *Cleburne* is intended to prohibit.

**2. Does Congress have the power to enact a public welfare revenue sharing program that permits the states to target discrete groups for certain services?**

Answer: Yes. The petitioner and the class acknowledge that Congress has the power to enact public welfare revenue-sharing programs that permit participating states to target discreet populations for certain services. The petitioner and the class, however, assert that the targeting must be based upon the needs of each population and not simply on the basis of handicap.

***8 a. If so, is the Medicaid statute, 42 U.S.C.A. § 1396 (West 1992), and the regulations pursuant thereto, an exercise of that power?**

Answer: Yes. Section 1396n(c) is an exercise of such power. It is an exception to the general structure of the Medicaid statute, 42 U.S.C. § 1396, a federal-state entitlement program in which states must strictly comply with federal requirements aimed at creating a uniform national program of medical benefits for poor persons.

**b. Did Congress intend, by passage of either section 504 of the Rehabilitation Act of 1972, 29 U.8.C. § 794 (1988), or section 202 of the Americans with Disabilities Act of 1972, 42 U.S.C.A. 12132 (West 1992), to prohibit such targeting and to thereby effectively amend the Medicaid statute?**

Answer: Both section 504 of the Rehabilitation Act and section 202 of the Americans with Disabilities Act ("ADA") can be harmonized with section 1915(c) of the Social Security Act. Section 504 of the Rehabilitation Act and section 202 of the ADA prevent a state from discriminating on the basis of handicap. Section 1915(c) authorizes a waiver of certain Medicaid requirements that permit a state with federal involvement to develop HCBS services for the elderly, disabled, and mentally ill -- populations subject to frequent institutionalization. 42 U.S.C. § 1396n(c). Implementation of HCBS programs must meet the antidiscrimination requirements in sections 504 and 202 in addition to the substantive requirements of section 1915(c).

***9** As the court's April 20, 1992, opinion noted, before 1981 many elderly, disabled, and chronically ill persons lived in institutions not because they needed medical care on a daily basis but because the institutions provided them home health care and social services. 16 Brief Times Rptr. at 636. Medicaid paid for most kinds of institutional care. Section 1915(c), adopted in 1981, authorized federal Medicaid reimbursement for home health care and social services that until then had been provided only in an institutional setting. States would be reimbursed for between 50 and 75 percent of the costs of an HCBS program if, for each person served, there was a determination that but for the provision of HCBS services, the individual would require the level of care provided in a hospital or nursing facility that could be reimbursed under the state plan. 42 U.S.C. § 1396n(c).

Medicaid pays for hospitalization for all low income persons under age 65 (and those over 65 who are not entitled to Medicare) except that Medicaid does not pay for the hospitalization of the mentally ill between the ages of 21 and 65;

traditionally, states care for poor persons who are mentally ill in state-funded hospitals. 42 U.S.C. § 1396(a)(4)(A) and (15). Medicaid, however, pays for the care (other than active treatment for mental illness) of low income mentally ill persons in nursing homes. 42 U.S.C. § 1396r(b)(3)(F)(i) and (e)(7)(G)(iii).

Section 1915(c)(7)(A) "contemplates that cost effectiveness calculations will be made for waivers that apply to 'individuals ***10** with a particular illness or condition.' 42 U.S.C. § 1396n(c)(7)(A)." 16 Brief Times Rptr. at 637. The regulations implementing the statute direct a state to apply separately for HCBS benefits for three distinct groups -- persons who are aged or disabled, or both aged and disabled; persons who are mentally retarded or developmentally disabled, or both mentally retarded and developmentally disabled; and persons who are mentally ill. 42 C.F.R. § 441.301(b)(6) (1990) Before the federal government may waive certain Medicaid statutory limitations,[6] a state must convince the federal government that, among other things, the average per capita expenditure for an HCBS program does not exceed the average per capita expenditure for Medicaid-funded, institutional-based care. 42 U.S.C. § 1396n(c)(2)(D).[7] The requirement of separate applications for the various populations is merely an administrative requirement aimed at avoiding the need to deny a waiver request for the three populations when ***11** there may be compliance problems with only one of the groups. [1985 Transfer Binder] Medicare and Medicaid Guide (CCH) § 34.532 at 9599.

Relying on section 1915(c)(7)(A) and *Beckwith v. Kizer,* 912 F.2d 1139, 1140 (9th Cir. 1990), the court's opinion of April 20, 1992, observed that "a state may target patients in a class defined by a specific illness or disability." 16 Brief Times Rptr. at 636.[8] In response to an equal protection challenge, the *Beckwith* court upheld a waiver program that limited HCBS benefits to those persons whom home care would allow to leave an institution and return to a home environment. As the court noted, the state "did not choose to limit the target group to those suffering from any particular disease or disability. It chose to define its target class in terms of the need for longterm acute hospital-level care and to look for hospitalization as a criteria." 912 F.2d at 1143. The court determined that the purpose of HCBS is to prevent institutionalization and that the state's definition of a target class in terms of need for assistance to end hospitalization was rational. The court cautioned that it was not deciding whether conditioning HCBS benefits upon hospitalization "would always be rationally related to a ***12** § 1396n(c) waiver, regardless of the nature of the targeted class." *Id.* at 1144. *Beckwith* did not involve a section 504 claim of discrimination on the basis of type of handicap, and the *Beckwith* court was not required to harmonize and give effect to section 504 and section 1915(c).

The majority opinion in the instant case went no further than its observation that section 1915(c) allowed a state to target patients with a specific illness or disability. The petitioner and the class maintain that the targeting allowed is only to enable the states to meet the unique needs of a particular population and to allow the federal government to determine the cost-effectiveness of HCBS programs for the elderly, the developmentally disabled, and the mentally ill. Here, however, where the respondents admitted that the HCBS services needed by the mentally ill are the same as those provided to the elderly, blind and disabled, the only targeting required is the separate application for administrative purposes.

Section 1915 does not permit states to exclude persons on the basis of the nature of their handicap. Instead, HCBS programs are to be based on the assessment of individual need. 42 U.S.C. § 1396n(c); H. Conf. Rep. No. 97-208, reprinted in U.S. Code Cong. & Admin. News 1327-29 (1981). Here, the respondents ignored individually assessed needs of the mentally ill and denied them benefits that are available to similarly situated elderly and developmentally disabled persons.

***13** Discrimination on the basis of type of handicap is illegal under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988) and section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213. Section 202 extended the prohibition on discrimination against disabled persons on the basis of handicap to state and local government agencies that do not receive federal aid, to employers in the private sector, to places of public accommodation, and to the provision of telecommunication services. H. Rep. No. 101-485(1), 101st Cong., 2d Sess. 329 (1990).

It is not necessary to determine -- as the court's question implies -- whether Congress intended that section 504 or section

202 amend the Medicaid statute. Because the three statutes can be harmonized,[9] there is no reason to consider whether an explicit requirement under section 1915(c) was changed or nullified by the anti-discrimination laws. Whenever possible, statutes should be read together and reconciled to give effect to each. *M.S. v. People,* 812 P.2d 632 (Colo. 1991); ***14** *State Dept. of Revenue v. Borquez,* 751 P.2d 639, 643 (Colo. 1988). Statutory construction "must begin with the statute's language." *Mallard v. U.S. District Court for Southern District of Iowa,* 490 U.S. 296 (1989). Courts must apply the plan and ordinary meaning of language when construing a statute. *People v. District Court,* 713 P.2d 918 (Colo. 1986).

In section 504, Congress stated that "no otherwise qualified handicapped individual ... shall solely be reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program ... receiving federal financial assistance." In the Civil Rights Restoration Act of 1987, Congress defined programs under section 504 to include "all of the operations of a department ... of a state ... government." 29 U.S.C. § 794. In 1990, Congress reaffirmed its intent to make illegal discrimination on the basis of handicap in publicly funded programs and benefits by enacting section 202 of the ADA. Once again, in plain language, Congress declared that "no qualified individual with a disability shall by reason of such disability be excluded from participation in or 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. Section 1915(c) establishes a federally funded program -- HCBS -- that is administered by departments of state government. To exempt HCBS from sections 504 and 202 would violate the plain meaning of the statutes.

***15** The beneficent purpose of section 1915(c) is to provide alternative community based services -- less restrictive and less costly -- that will allow disabled people who would otherwise be institutionalized to remain in the community. The purpose of section 504 and the ADA is to allow disabled persons to participate fully in society by eliminating discriminatory barriers to their participation. The purposes of the statutes are congruent; a harmonious interpretation gives full effect to the provisions of section 1915 and, as required under section 504 and the ADA, eliminates the discriminatory exclusion of qualified handicapped persons from participation in government programs.

**3. Did the enactment of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), overturn the rationale of *United States Department of Transportation v. Paralyzed Veterans,* 477 U.S. 597 (1986), and other United States Supreme Court cases?**

Answer: Yes.

In the April 20, 1992, opinion -- recognizing that the parties had stipulated that the petitioner and the class are "otherwise qualified individuals" who were denied HCBS benefits solely because they are mentally ill -- this court addressed only whether the respondents received federal funds within the meaning of section 504. 16 Brief Times Rptr. at 639. This court determined that the nondiscrimination provision in section 504 was a contractual cost to those who receive federal assistance for a particular program, and because the respondents did not accept funds for an HCBS program for the mentally ill, the "nondiscrimination ***16** provision of section 504 was not triggered." *Id.* The ruling was based entirely on *United States Dep't of Transp. v. Paralyzed Veterans of America,* 477 U.S. 597 (1986).[10]

Congress overruled the express rationale of *Paralyzed Veterans* when it adopted the Civil Rights Restoration Act of 1987.[11] The Civil Rights Restoration Act amended section 504 by adding the definition of "program or activity" in section 504(b), *supra.* at 2, to make clear that section 504 prohibits discrimination throughout entire agencies or institutions if any part of the agency or institution receives federal financial assistance. The purpose of the amendment was to restore the institution-wide coverage of section 504 that prevailed before the Supreme Court decisions in *Grove City College v. Bell,* 465 U.S. 555 (1984) and *Paralyzed Veterans.* S. Rep. No. 100-64, 100th Cong., 2d Sess. 3-13, 18 (1988).

The respondent departments receive millions of dollars each year in federal financial assistance for all programs, including HCBS benefits for the elderly, blind and disabled. When this ***17** class action was commenced in November 1988, section

504 prevented discrimination or denial of benefits by reason of a persons's handicap if the respondents received federal funds for any of their programs. The majority erred when it held that section 504 does not apply because the respondents did not receive federal funds for HCBS for the mentally ill.

**4. Did the enactment of section 2 of the Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101 (West 1992), cause Duc Van Le and the class to become a suspect class protected by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?**

Answer: Yes. The court need not reach this question unless it determines that the respondents' refusal to provide HCBS benefits for the mentally ill does not violate section 504 of the Rehabilitation Act and is rationally related to a legitimate governmental purpose. The legislative findings section of the ADA is a Congressional determination that the mentally ill comprise a suspect class for purposes of equal protection analysis. 42 U.S.C. § 12101(7). The respondents did not describe a significant governmental objective -- let alone a compelling governmental interest -- served by their refusal to apply for HCBS benefits for the mentally ill. Thus, the respondents' refusal to provide HCBS benefits for the mentally ill does not survive strict scrutiny review.

Congress adopted the legislative findings of the ADA after the Supreme Court indicated that the heightened rational relationship standard in *Cleburne* would apply to classifications that ***18** discriminated against the mentally ill.[12] The legislative findings are a Congressional declaration that the mentally ill are a suspect class for purposes of equal protection analysis.[13] Congress found that individuals who have experienced discrimination on the basis of a disability, including mental illness, 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.

42 U.S.C. § 12101(a)(7).

A governmental classification is considered suspect if it singles out religious, racial or other discrete and insular minorities for unequal treatment. *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976); *United States v. Carolene Products Co.,* 304 U.S. 144, 152-53, n.4 (1938); *Lujan v. Colorado State Bd. of Educ.,* 649 P.2d 1005, 1020-21 (Colo. 1982). A suspect class is one saddled with such disabilities, subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to ***19** command extraordinary protection from the majoritarian political process. *Murgia,* 427 U.S. at 313; *San Antonio School District v. Rodriguez,* 411 U.S. 1, 28 (1973); *Lujan,* 649 P.2d at 1020-21. Members of a suspect class may be subjected to disabilities due to "stereotyped characteristics not truly indicative of their abilities." *Murgia.* 427 U.S. at 313.

If the government action or classification operates to the disadvantage of a suspect class or adversely affects the exercise of a fundamental right,[14] equal protection analysis requires strict scrutiny review. *Murgia,* 427 U.S. at 312. Strict scrutiny requires that the government action or classification further a compelling government interest. *Cleburne,* 473 U.S. at 440.

In the instant case, the district court determined that mental illness constitutes a suspect classification for purposes of equal protection analysis. (vol. 3, p. 574) The district court also determined that the respondents showed no compelling governmental interest to support the unequal and discriminatory treatment of plaintiff and class members. (vol. 3, pp. 574, 722) For the same reasons that the state failed to demonstrate a legitimate governmental interest in its refusal to provide the petitioner ***20** and the class access to HCBS benefits, the state also failed to establish the more rigorous compelling governmental interest. The respondents' denial of HCBS benefits to the mentally ill violates the petitioner's and the class'

rights to equal protection.

**5. Did the enactment of section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12132 (West 1992), have retroactive application?**

Answer: Yes. Again, the court need not reach this issue if it determines that the respondents violated section 504 of the Rehabilitation Act or the equal protection clause in denying the petitioner and the class access to HCBS benefits. Section 202 of the ADA reaffirmed section 504's ban on discrimination in programs receiving federal financial assistance. In cases of this kind, a court is to apply the law in effect at the time it renders its decision. *Bradley v. Richmond School Board,* 416 U.S. 696, 711 (1974); *Goebel v. Colo. Department of Institutions,* 764 P.2d 785, 799 n. 17 (Colo. 1988).

Section 202 of the ADA became effective on January 26, 1992. It provides:

> Subject to the provisions of this title, 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. Section 202 reaffirms and extends Congress' previous ban of discrimination on the basis of handicap in all ***21** programs receiving federal financial assistance.[15] Consequently, there is no injustice in applying section 202 "retroactively" to the instant case.

Moreover, in cases of this kind, a court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. *Bradley,* 416 U.S. at 711 (statute that awarded attorney fees in desegregation cases became effective while appeal pending); *Goebel,* 764 P.2d at 799 n. 17 (statute limiting right to community based mental health services became effective while case pending). In *Goebel* the court observed that the general rule had "cogency" because the court was overseeing the development of a mental health plan that would be applied prospectively. 764 P.2d at 799 n. 17. Similarly, the petitioner and the class in the instant case seek prospective injunctive relief to correct the respondents' failure to provide the mentally ill access to HCBS services. Section 202 ***22** does not contain direction nor does there exist legislative history that contradicts the general rule.

If this court should rule that section 202 provides relief for the petitioner and the class and that section 504 and the constitution do not provide relief, there is no reason that the petitioner and the class should have to start over to obtain prospective injunctive relief. Section 202 should have what the court described as "retroactive application."

**a. If so, did the respondents violate section 202 by failing to provide HCBS benefits to Duc Van Le and the members of the class?**

Answer: Yes.

Section 202 of the ADA reaffirms the prohibition of discrimination on the basis of handicap in section 504 of the Rehabilitation Act. Section 504 provides that no "qualified handicapped individual" shall be excluded solely by reason of his handicap "from the participation in, be denied the benefits of, or be subject to discrimination" under any program receiving

federal financial assistance. 29 U.S.C. § 794. Section 202 provides that "no qualified individual with a disability" shall by reason of that 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 ***23** entity." 42 U.S.C. § 12132.[16] The ADA defines the term "disability" as "a physical or mental impairment that substantially limits" one or more of an individual's "major life activities," and mental impairment includes mental illness. 42 U.S.C. § 12102(2)(A); H. Rep. No. 101-485(II), 101st Cong., 2d Sess. 333 (1990). Thus, section 202 of the ADA extends section 504's ban on discrimination to discrimination by any public entity, not just those receiving federal financial assistance. Otherwise, the sections are identical.

For the same reasons that this court's majority opinion of April 20, 1992, recognized that the parties had stipulated that the petitioner and the class under section 504 of the Rehabilitation Act are "otherwise qualified individuals" who were denied HCBS benefits solely because they are mentally ill, 16 Brief Times Rptr. at 639, this court should recognize that the petitioner and the class under section 202 of the ADA are qualified individuals who were denied HCBS benefits solely because they are mentally ill. The respondents' refusal to provide the mentally ill with access to HCBS benefits violates section 202.[17]

Footnotes

1 The petitioner and the class do not take exception to the facts as stated in the introduction and part I of the majority opinion of April 20, 1992.

2 The petitioner and the class respond to this portion of the court's ruling in their answer to question 3.

3 The petitioner and the class address strict scrutiny review in response to the court's fourth question.

4 A ruling that the respondents' failure to provide HCBS benefits impermissibly discriminated against the mentally ill is no more than a ruling that the respondents did not have a demonstrably rational basis in fact for their action. If the court rules that the respondents' failure to provide HCBS benefits violated the right of the petitioner and the class to equal protection under the *Cleburne* standard, the court does not need to address the issues raised in questions 2 through 5.

5 The district court found that since 1985 Colorado has not applied for HCBS for the mentally ill and has not sought assistance from the federal government to develop a waiver from Medicaid requirements that would allow HCBS for the mentally ill. (vol. 2, p. 263; vol. 4, p. 132)

6 Section 1915(c)(3) lists the statutory limitations that are subject to waiver: section 1396a(a)(1) relating to statewideness; section 1396a(a)(10)(B) relating to comparability, and section 1396a(a)(10)(C)(i)(III) relating to income and resource rules applicable in the community. 42 U.S.C. §1396n(c)(3).

7 Colorado's 1985 application for a waiver for HCBS benefits for the mentally ill was rejected because federal investigators determined that a majority of the mentally ill recipients were not eligible for Medicaid. They were not eligible for Medicaid because, according to the investigators, they would be patients in a state mental hospital were it not for HCBS services. The state's "holding" patients released from a mental hospital for fifteen days before providing HCBS was not sufficient to make the individuals eligible. 16 Brief Times Rptr. at 634. *See* stipulated exhibit 6, v. 2, pp.339-44.

8 This is as close as the court's opinion gets to addressing question 2. The court determined that the Medicaid statute allows a state to "target" patients who are mentally ill, but it did not address whether sections 504 and 202 "prohibit such targeting."

9 If this court determines that the provisions of section 1915(c)(7)(A) that establish the categories for determining cost effectiveness of HCBS programs authorize discrimination in the provision of HCBS programs on the basis of handicap, then section 1915(c) conflicts with sections 504 and 202. An irreconcilable conflict between statutes requires the court to give full effect to the provisions of the law most recently enacted. *City of Littleton v. Board of County Commissioners,* 787 P.2d 158, 162 (Colo. 1990); *Public Employees Retirement Ass'n v. Nichols,* 615 P.2d 657, 658 (Colo. 1980). The most recently enacted statutes are section 504 as amended in 1987 and section 202, enacted in 1990.

[10] The opinion of April 20, 1992, quoted a paragraph from *Paralyzed Veterans,* 477 U.S. at 605-06. The quotation omitted the following United States Supreme Court language from the middle of the paragraph: "We relied upon this same rationale in *Grove City College v. Bell,* 465 U.S. 555 (1984), where we noted that the recipient of the federal assistance -- the College -- was free to terminate its participation in the federal grant program and thus avoid the requirements of Title IX [of the Education Amendments of 1972]."

[11] The Civil Rights Restoration Act of 1987 became law on March 22, 1988.

[12] The ADA was signed into law on July 26, 1990.

[13] Congressional findings of fact may be binding on the courts. *South Carolina v. Katzenbach,* 383 U.S. 301 (1966) (applying findings in Voting Rights Act of 1965).

[14] The court's question addresses only suspect class. The petitioner and the class argued in their original briefs before this court that the classification adversely affected their exercise of a fundamental right, i.e. their fundamental liberty interest in being treated and living in the least restrictive community setting. *See* Answer brief, pp. 24-29.

[15] In passing section 202, Congress was aware that
Title V of the Rehabilitation Act of 1973 prohibits recipients of Federal Financial Assistance from discriminating against individuals with disabilities. Many agencies of State and local government receive federal aid and thus are currently prohibited from engaging in discrimination on the basis of disability.
H.R. Rep. No. 101-485(I), 101st Cong., 2d Sess. 318 (1990), attached as exhibit A to petitioner's surreply brief.

[16] The use of the term "disability" instead of "handicap" was an effort by Congress to "make use of up-to-date, currently accepted terminology." H. Rep. No. 101-485(II), 101st Cong., 2d Sess. 332 (1990).

[17] For more detailed legal argument on the issues addressed by all of the court's questions, *see* the petitioner's answer brief and surreply brief.