AMERICANS WITH DISABILITIES ACT

ADA COMPLIANCE GUIDE

MONTHLY BULLETIN

Vol. 2, No. 7 July 1991

CDC publishes list of diseases that can be transmitted through food supply

Responding to a mandate in the Americans with Disabilities Act, the national Centers for Disease Control has published an interim list of communicable diseases that are transmitted by handling food. The list is intended to be used by the food-service industry in dealing with workers who are infected with contagious diseases.

People with communicable diseases are protected by the ADA as long as they don't pose a threat to the health and safety of others. However, Congress provided a limited exemption to that coverage by allowing restaurant owners and other food-related employers to transfer employees who are infected with any of the pathogens on the list (such as hepatitis-A and salmonella — see complete chart on p. 3) to non-foodhandling jobs, if any are available.

If no other positions are open or the risk of spreading the disease can't be eliminated by reasonably accommodating the affected workers, the employer can fire them without violating the ADA.

CDC noted that "the contamination of raw ingredients from infected food-producing animals and contamination during processing are more important causes of foodborne diseases than is contamination of food by persons with infectious or contagious diseases." But, it acknowledged, some pathogens are frequently transmitted through food by infected people.

Compromise provision

No other industry is singled out in the ADA in its treatment of people with contagious diseases. The issue arose during the congressional debate on the law, when several legislators attempted to remove all food handlers with contagious diseases from the act's coverage. Opponents of the amendment argued that the bill adequately protected the public from the risk of catching an infectious disease from infected workers.

As a compromise, Congress required the U.S. Department of Health and Human Services to annually publish and distribute a list of infectious diseases that can be transmitted through the food supply and the means by which such diseases are spread. CDC developed the list (published in the May 16 *Federal Register*) along with the Food and Drug Administration, National Institutes of Health, state and local health

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House passes revised civil rights bill; margin too small to override promised Bush veto

Amid acrimonious debate, heightened rhetoric and promises of a veto, the House voted last month to approve a new version of H.R. 1, the embattled civil rights bill that proponents claim would restore workers' protections against discrimination. The Bush administration claims that the bill would force employers to use hiring and promotion quotas.

The bill is designed to overturn a series of Supreme Court decisions that have made it harder for women and minorities to sue their employers for discrimination. (The bill would also apply, in an indirect way, to discrimination against disabled people covered by the Americans with Disabilities Act.)

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Civil

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It would allow women and ethnic and religious minorities to collect punitive damages for cases of intentional discrimination under Title VII of the 1964 Civil Rights Act. Racial minorities can sue for monetary awards under a separate federal statute.

To make the measure palatable to business groups and conservative lawmakers, the House Democratic leadership substantially rewrote the original legislation. Provisions were added that would specifically outlaw quotas, set a $150,000 cap on damages sought under title VII and ease the burden on businesses to prove that an employment practice is not discriminatory.

In a backdoor fashion, passage of H.R. 1 would affect the Americans with Disabilities Act. The employment provision of the ADA references title VII as its enforcement scheme; any changes to title VII would automatically apply under the ADA. Therefore, if punitive damages became available for women and minorities in job discrimination suits, they would be available to disabled people as well.

President Bush, who contends that H.R. 1 would force businesses to adopt hiring and promotion quotas to avoid lawsuits, has repeatedly promised to veto H.R. 1 (as he did a similar measure last year). The 273-158 House vote in favor of the bill is 17 votes short of the margin that would be needed to override a veto.

Prior to the vote, U.S. Attorney General Dick Thornburgh called the revised bill a "hoax," saying it "only bars an employer from using a quota system that required the hiring of unqualified persons."

In response, H.R. 1 sponsor and House Judiciary Committee Chairman Jack Brooks, D-Texas, said: "This is a carefully crafted bill with a straightforward purpose — to assure that all Americans have the opportunity to compete in the workplace on the basis of their individual abilities, free from discrimination based on race, color, sex, religion or national origin.

"And despite the inflammatory rhetoric coming out of the White House and the Department of Justice these days, this is absolutely not a 'quota bill.'"

Cap controversy

All the attention focused on the quota controversy somewhat obscured another dispute that sprung from the revised H.R. 1 — the cap on damages.

As passed by the House, the bill would allow plaintiffs to recover punitive and compensatory damages in cases of intentional discrimination under title VII, but would cap recovery at $150,000 for punitive damages or the amount of compensatory damages, whichever amount is greater. Currently, title VII provides only for back pay and attorneys' fees.

Because racial minorities can sue for unlimited damages under Section 1983 of the Civil Rights Act of 1866, the cap would essentially apply only to victims of discrimination based on sex, religion and ethnicity (under title VII) and disability (under the ADA).

Advocacy groups representing women and disabled people tried unsuccessfully to lift the cap, which they charged makes them second-class citizens. An alternative bill that contained no limits on damages failed in the House, as did a Bush-backed proposal that was less sweeping.

Danforth proposal

The debate now moves to the Senate, where, in an attempt to defuse the tension between congressional Democrats and the administration, nine moderate Republicans have drafted yet another version of new civil rights legislation.

Sponsored primarily by Sen. John Danforth, R-Mo., the Senate legislation would consist of three bills. Two of the bills (S. 1207 and S. 1208) address the effects of various Supreme Court decisions that shifted the burden of proof in Title VII cases from the employer to the employee.

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Americans with Disabilities Act
ADA Compliance Guide

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CDC

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officers and national public health organizations.

Two categories

The CDC list is divided into two categories, the first consisting of pathogens often transmitted through food handling by contaminated people. Included in this list are viruses that cause hepatitis-A, salmonella and dysentery, which could be present in people who have symptoms of diarrhea, vomiting, open skin sores, dark urine or jaundice.

CDC said these diseases can be spread if infected food workers fail to wash their hands (in situations such as after using the toilet, handling raw chicken, cleaning spills or carrying garbage), wear clean gloves or use clean utensils. Non-foodborne transmission (i.e., person to person) is another means of transmitting these pathogens.

The second category consists of pathogens occasionally transmitted through food by infected people, but usually spread by other routes (including at the source, in food processing or by non-foodborne means). Preventing food contact by people who have acute diarrhea will decrease the risk of transmitting these pathogens, CDC said.

The AIDS debate

AIDS and HIV infection are not included in the CDC list. When the so-called "food-handlers" amendment was being debated in Congress, proponents argued that restaurant owners needed the ability to transfer or fire HIV-infected workers, even if there was no scientific link between food handling and the spread of AIDS. People would not eat at a restaurant where a chef or waiter was known to have the disease, supporters said, causing a loss of business and jobs.

Opponents of the amendment argued that such reasoning pandered to unfounded fears about AIDS and served to perpetuate discrimination against people with the disease, running counter to the purpose of the ADA. ❑

Category I Pathogens

(*Pathogens often transmitted through food handling*)

- Hepatitis A virus
- Norwalk and Norwalk-like viruses
- *Salmonella typhi* (which cause salmonella)
- *Shigella* species (which cause dysentery)
- *Staphylococcus aureus* (which cause pus formations in boils and abscesses)
- *Streptococcus pyogenes* (which cause various diseases)

Category II Pathogens

(*Pathogens occasionally transmitted through food handling*)

Preventing food contact by people who have acute diarrheal illness will decrease the risk of transmitting the following pathogens:

- *Campylobacter jejuni*
- *Entamoeba histolytica*
- Enterohemorrhagic *Escherichia coli*
- Enterotoxigenic *Escherichia coli*
- *Giardia lamblia*
- Nontyphoidal *salmonella*
- Rotavirus
- *Vibrio cholerae* 01
- *Yersinia enterocolitica*

States consider restricting HIV protection

The AIDS debate is now being replayed in several states. North Carolina lawmakers are considering legislation that would remove food workers from protection under the state's law against HIV discrimination. The bill passed the state Senate 41-3 in May and is pending in the House of Representatives.

A spokesman for the North Carolina Lesbian and Gay Health Project said the proposed legislation would permanently exempt restaurants from the state's Communicable Diseases Act. Restaurants were given a two-year exemption from the law when it was enacted in 1989. An alternative move to make the North Carolina law parallel to the ADA's provision on food handlers failed in the state Senate, he said.

According to the AIDS Policy Center (an arm of the Intergovernmental Health Policy Project at George Washington University), two other states are considering similar legislation.

A bill introduced in the Oklahoma legislature would require the state board of health to test food service personnel for HIV infection. Those who test positive for the virus would not be allowed to handle food or drink.

In Mississippi, proposed legislation would establish a certification process for food service workers. Under the bill, a person applying for or working in food handling would have to be tested every six months for HIV; those who tested negative would carry a card indicating their status.

The Mississippi bill would make it illegal for HIV-positive people to work in food services. Uncertified employees and their employers could face a $1,000 fine and up to a year in jail. Corporations that violate the certification process could face a $10,000 fine.

These laws could face challenges under the ADA, which doesn't pre-empt state laws that provide greater protection, but does apply if the state law offers disabled people lesser coverage. In this case, the individual state laws would take away protections available to people with HIV that are provided under the ADA.

Section 103(d)(3) of the act states that the ADA doesn't pre-empt or modify state or local laws designed to protect the public from people who pose a significant health or safety risk, "pursuant to the list of infectious or communicable diseases" published by HHS. Given that AIDS and HIV aren't on that list, laws which aim at removing protections from HIV-infected food workers could face scrutiny. ❑

Disability Digest

Kansas amends state civil rights law to parallel ADA — Kansas Gov. Joan Finney has signed legislation that makes the Kansas Act Against Discrimination parallel to the Americans with Disabilities Act.

In some areas, the Kansas law goes beyond the federal law. For example, Kansas employers with four or more employees are covered by the state's non-discrimination requirements; the ADA will eventually apply to businesses with 15 or more workers.

The law was also amended to prohibit certain private membership clubs (such as country clubs) from discriminating in their membership practices. Organizations that have 100 or more members, serve food on a regular basis to non-members and collect dues are subject to the act. Fraternities, sororities and religious organizations are not covered.

States and cities are not required to amend existing anti-discrimination statutes to conform with the ADA. The ADA doesn't invalidate or limit any state or local law that provides equal or greater protection to disabled people. But where a state or local law has less stringent requirements, the ADA applies.

Title II accessibility guidelines postponed — State and local governments and transportation officials will have to wait a couple of months for ADA accessibility guidelines from the Architectural and Transportation Barriers Compliance Board.

Access board Executive Director Larry Roffe announced in May that work on title II standards will be postponed until after final guidelines for title III (public accommodations) are issued. He predicted that the remaining standards would be finished by the fall.

Under the ADA, the board was to have issued final standards for titles II and III by April 26, 1991.

Most of the access board's effort has been directed at developing accessibility guidelines for private businesses covered by title III. Roffe said a revised version of the public accommodations guidelines (proposed in January) has been sent to the Office of Management and Budget for final approval. The Justice Department will likely reference the board's standards in its final title III regulations.

But concentrating on title III guidelines has caused the board to put off work on rules for state and local governments, Roffe said. In the interim, he suggested that public officials use the Uniform Federal Accessibility Standards (UFAS — see Appendix IV) for ADA compliance. Most federal agencies cite UFAS in their regulations under Section 504 of the Rehabilitation Act, the statute which applies to federal fund recipients and on which the ADA is modeled.

Similarly, work has been delayed on final transportation guidelines (which the Department of Transportation will probably use in its ADA regulations). The access board proposed standards for transit vehicles and facilities in March.

Suspending HIV-infected doctor's surgery privileges did not violate state discrimination law, New Jersey court rules—A hospital did not violate New Jersey's anti-discrimination law when it suspended the surgery privileges of a doctor who had AIDS, the New Jersey Superior Court for Mercer County ruled.

The ear, nose and throat surgeon was a patient at the hospital where he worked. During his stay, he tested positive for HIV and was diagnosed with AIDS. The infection was plainly noted on his chart and staff members openly discussed his case.

A few weeks after his diagnosis, the hospital suspended the doctor's surgical privileges. Hospital policy restricts health care providers from participating in any activity, including surgery, that would pose a risk of transmitting HIV to patients. The hospital also required the doctor's patients to sign informed consent forms noting his HIV status.

After his death, the doctor's estate sued the hospital for violating the New Jersey Law Against Discrimination, charging the suspension discriminated against the doctor based on disability. As does the Americans with Disabilities Act, the New Jersey law includes AIDS and HIV infection as a protected disability.

The state court agreed that New Jersey's law protects the doctor as a disabled person. But it ruled that the hospital does not violate the state law in requiring HIV-positive doctors to inform their patients and limiting their medical activities. Patients must be included in the decision-making process, it said, and disclosing potential, even remote, risks is material to that process.

"The risk of transmission is not the sole risk involved," the court said. "The risk of a surgical accident, no matter how small, performed by an HIV-positive surgeon may subject a previously uninfected patient to months or even years of continual HIV testing."

A doctor's right to perform invasive procedures fails when weighed against New Jersey's "strong policy" supporting patient rights, the court added. "Where the ultimate harm is death, even the low risk of transmission justifies the adoption of a policy that precludes invasive procedures where there is 'any' risk of transmission," it concluded.

The court awarded damages to the doctor's estate for breach of confidentiality regarding his stay at the

hospital as a patient, ruling that the hospital's procedures do not provide adequate privacy protection to the patient.

New York court upholds decision to keep HIV off communicable disease list—A New York court has upheld a decision by the state's health commission to keep HIV infection off a list of communicable diseases, rejecting a challenge from several doctors' organizations that sought to have the condition classified as "dangerous to the public health."

New York law permits the state health commissioner to place diseases on a list of communicable diseases that are dangerous to the public health. Cases of any disease on the list must be reported and traced. The health commissioner decided not to include HIV infection because he thought the reporting requirement would deter people from voluntarily being tested for the virus.

The New York Court of Appeals ruled that the word "may" in the statute gives the health commission discretion about including diseases on the list, even if they are communicable (as HIV is). Also, the court said a New York law calling for a list of sexually transmitted diseases also gives the commissioner latitude.

On Capitol Hill —The Senate last month passed a bill (S. 173) that would allow regional Bell telephone companies to manufacture telecommunications equipment, lifting a ban that was imposed after AT&T was order to divest in the early 1980s.

Sponsored by Sen. Ernest Hollings, the proposed Telecommunications Equipment Research and Manufacturing Competition Act would allow the so-called "Baby Bells" to join with small manufacturing companies to develop new products, such as adaptive telecommunications equipment for hearing-impaired people.

The committee report on the bill (S. Rpt. 102-41) says: "lifting the manufacturing restriction should benefit all citizens and particularly those with disabilities. . . . Allowing the [regional companies] to engage in manufacturing will help ensure [the development] of products and services specifically designed to meet the needs of disabled persons."

A number of disability groups support the measure. Alfred Sonnestrahl, executive director of Telecommunications for the Deaf Inc., said S. 173 would help "deaf, hard-of-hearing and speech-impaired persons gain access to the 'information age,' creating the integration of . . . people with disabilities and the general public."

AT&T and a number of consumer groups oppose the bill on the grounds that it would lead to higher phone bills and allow the Bell companies to monopolize the industry.

Also in the Senate, Sen. John Kerry, D-Mass., has introduced legislation that would provide at least $2 million a year to conduct research and create demonstration projects on transportation for people with disabilities. The bill (S. 1224), the Accessible Transportation Access Act, would extend a program begun by Congress in 1988. The bill would fund training programs for transit drivers on serving disabled passengers and help transit agencies in purchasing accessible vehicles. ❑

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The last part of Danforth's triad (S. 1209) would address monetary damages. Unlike the House bill, S. 1209 would limit compensatory damages for women, disabled people and non-racial minorities in cases of intentional discrimination, based on the size of the employer. The bill would not provide punitive damages.

Danforth's bill would make businesses with fewer than 100 employees liable for up to $50,000 in pain and suffering costs; the figure would rise to $150,000 for businesses with 100 or more workers. ❑

Mark your calendars

July 26 marks the one-year anniversary of the signing of the ADA — and is also the day that the federal agencies responsible for enforcing the law must have their regulations completed and published. The federal government isn't known for meeting deadlines, but officials from the Justice Department and the EEOC insist that their rules (covering public accommodations and employment) will be out on time.

The Architectural and Transportation Barriers Compliance Board, which is devising ADA accessibility standards, also says it will make the July 26 deadline. Rules from the Transportation Department will probably be issued later in the year.

Another date to keep in mind — Jan. 26, 1992 — is the effective date for the public accommodations and state and local government provisions of the act. ❑

Justice Dept. to award technical assistance grants for ADA compliance programs

The U.S. Justice Department plans to award up to $2.5 million in technical assistance grants to help public accommodations and state and local governments comply with the ADA.

The department is seeking applications from individuals and nonprofit entities that propose "cost effective and efficient approaches of disseminating information and producing voluntary compliance with the requirements of the ADA." Preference will be given to projects that are joint ventures between covered entities and people with disabilities.

Justice must provide technical assistance for public agencies and private businesses covered by titles II and III of the act, and it wants to get these projects off the ground soon in anticipation of the Jan. 26, 1992, effective date for both sections.

Targeted industries

Although the technical assistance efforts are open to all types of businesses subject to title III of the ADA, Justice is particularly interested in developing guidance on barrier removal and auxiliary aids for six targeted industries: restaurants, hotels and motels, retail stores, hospitals and health care facilities, places of assembly (such as stadiums, theaters and convention centers) and day care facilities. Materials would focus on issues unique to these industries, such as accessibility in restaurant dining rooms or hotel check-in procedures.

Other issues include training law enforcement personnel to better interact with disabled people whose conditions may mistakenly appear to be disorderly conduct (such as epilepsy) and developing auxiliary aids and accommodations that would enable disabled people to participate in courses and examinations.

Strategies

Applications for technical assistance grants must discuss components of program strategy, Justice said. Although not required, Justice suggested several program activities that could be included in the proposals:

- achieve specific cases of voluntary compliance (which Justice considers a "very important" activity);
- craft and distribute ADA materials;
- set up telephone information lines;
- create training courses;
- develop model compliance programs; and
- develop dispute resolution programs.

Coordinating with other federal agencies

An important aspect of the proposals, the department said, is to coordinate Justice-funded programs with technical assistance sponsored by other federal agencies, such as the Equal Employment Opportunity Commission (EEOC).

EEOC and Justice plan to jointly fund a contract to train a cross-section of disabled people in understanding the requirements of titles I, II and III of the ADA. People trained under this program would then educate other disabled people, businesses and state and local governments about the act, as well as work to develop informal dispute resolution methods. (For more information about this contract, contact Chris Bell at EEOC (202) 663-4177 or James Bennett at Justice (202) 307-2220.)

In addition, the National Institute of Disability Research and Rehabilitation (NIDRR) and the Rehabilitation Services Administration (RSA) intend to fund ADA-related assistance projects (see below).

What works, what doesn't

Finally, Justice said part of its long-term planning is to determine what types of technical assistance programs (e.g., education or compliance strategies) are most effective. Applications therefore should describe ways and criteria to measure the performance of the proposal.

Applications for the Justice grants (which will range between $85,000 and $120,000) must be submitted by July 22. For more information, contact James Bennett or Philip Breen in the Office on the Americans with Disabilities Act, (202) 307-2220 and (202) 307-2226, respectively. This notice was published in the June 5 *Federal Register*, Pages 25980-25983.

NIDRR proposes ADA projects

The National Institute on Disability Research and Rehabilitation at the U.S. Department of Education has proposed funding priorities to help implement the ADA.

Under NIDRR's plan, grants would be awarded for establishing national peer training, developing training materials and resources (on accessibility/public accommodations, employment and communications/telecommunications) and setting-up regional disability and business accommodation centers.

Both the Senate and House reports that accompanied the fiscal 1991 appropriations bill for the departments of Labor, Health and Human Services and Education and related agencies called on NIDRR to provide technical assistance for the

new disability law. The House specifically recommended that 10 new regional centers on disability be established.

For more information NIDRR's proposal, contact David Esquith (202) 732-5081. This notice was published in the May 21 *Federal Register*, on Pages 23336-23342.

Also within the Education Department, the Rehabilitation Services Administration has proposed two ADA-related initiatives. The first project would create statewide advocacy and protection pilot projects so that people with severe disabilities would be ensured their rights under federal and state disability laws, including the ADA, the Fair Housing Act and the Rehabilitation Act.

Additionally, RSA plans to fund projects that would train vocational rehabilitation and employment counselors in the requirements of titles I (employment) and III (public accommodations) of the ADA.

For more information on the RSA programs, contact Beverly Stafford, (202) 732-1331. ❑

Questions & Answers

Our art supply store (located in a shopping mall) doesn't have a public bathroom, only a small facility for our employees. Do we have to renovate the restroom to make it accessible for disabled customers?

No. You would not be required to renovate your restroom for customers because it is an employee, not public, facility.

What if a person in a wheelchair applies for a job? Can we refuse to hire him or her because of the lack of an accessible bathroom? The room is quite small, and to modify it for a wheelchair is not feasible because it would take up too much retail space.

You cannot refuse to hire the person, but you do have to make reasonable accommodations in your employment practices. If modifying the bathroom is impossible, you could make other arrangements for the employee (for example, arranging to have him use accessible facilities in the mall or in a neighboring store). You could not penalize the employee for taking extra time to use those facilities, however.

Would it be legal under the ADA for our community pool to charge disabled members a higher fee than it charges non-disabled members?

Charging a special rate for disabled people could violate the ADA. Fee structures for facilities such as community pools can be based on usage (i.e., a higher rate for unlimited use). Families can be charged a different rate than single members, and it is also appropriate to have rates based on income. However, it would appear difficult to justify a special rate for disabled members.

Must all of our state parks have accessible trails as a result of the ADA? We have received funding from the U.S. Department of the Interior over the years, and some parks (but not all) have accessible trails and facilities.

If you have been in compliance with the Rehabilitation Act because you received federal funding, then you will likely be in compliance with the ADA. The question is whether your programs and services, including the trails, are accessible "when viewed in their entirety." This means that not every trail has to be accessible, but could mean that at least one be accessible in a single park. This too would apply to campsites, nature centers and any other facility you make available to the public in your parks.

As an aside, the ADA calls on the National Council on Disability to study the accessibility of federal wildnerness areas. The council is currently working on that project.

Will the ADA have any effect on credit cards?

Credit card and related services must be available to disabled people who qualify for them. It's unlikely that cards themselves will have to be available in braille to accommodate visually-impaired users because the cardholder's name and card number are already printed in raised lettering on the front. It may be necessary, however, to raise the customer service phone number that appears on the back of the card (and perhaps move it to the front of the card).

Customer service telephone facilities will probably have to have telecommunications devices for the deaf (TDDs) available to handle calls from hearing-impaired people.

Our company is holding a business meeting for several field offices. As part of the conference, we are sponsoring field trips to tourist sites for the employees. Are we responsible for ensuring the accessibility of the tourist spots under the ADA?

You aren't responsible for making the tourist sites accessible, but under the ADA, you must offer the employees with disabilities the benefits you offer to non-disabled employees. This would include providing accessible transportation and equivalent sightseeing benefits. Generally, the purpose of these sidetrips is to boost morale by allowing employees to socialize informally. Not all employees need to interact at the same places, but disabled employees must have the opportunity to socialize. There's nothing to prevent you from offering some trips or activities at accessible sites. ❑

ADA COMPLIANCE GUIDE

Filing Instructions: July 1991

In this month's update you'll find the latest issue of your ADA Monthly Bulletin newsletter. After reading it, the newsletter should be placed behind the "Monthly Bulletins" tab in your manual.

To add the other pages in this month's mailing, follow the directions below, discarding the old pages and adding the new ones as appropriate.

Pages to Remove (Dated)	**Pages to Add** (Dated July 1991)	**Description of Changes**
pp. xi–xiii (various)	pp. xi–xiii	Update to Table of Contents; Current Contents page
Tab 200 pp. 63–64 (August 1990)	Tab 200 pp. 63–65	Update to ¶242 to include discussion of CDC list of diseases transmitted through food handling
Tab 300 pp. 27–28 (November 1990)	Tab 300 pp. 27–28	Addition of cross-reference to ¶242 in ¶311

DISCARD THIS SHEET AFTER CHANGES HAVE BEEN MADE

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ADA Compliance Guide

Current Contents as of July 1991

The following is a list of all pages that make up the *ADA Compliance Guide*.

Also, Section 104(d)(2) of the ADA specifically permits employers to conduct drug testing of job applicants and employees and make employment decisions based on the results of those tests. Employers must, of course, comply with other applicable federal, state or local laws concerning quality control, confidentiality and rehabilitation in conducting the tests, however.

Finally, the act specifically permits employers to "adopt or administer reasonable policies or procedures, including but not limited to drug testing" (§104(b)(3)) to ensure that individuals who are participating in or have completed supervised drug rehabilitation programs are not currently using illegal drugs.

Employers may refuse to hire an applicant or may take action against an employee who tests positive for drugs if the test accurately detects the presence of drugs. This is true even if the individual who tested positive states that he or she has ceased using drugs.

¶242 Communicable Diseases

People with contagious diseases, such as hepatitis, tuberculosis, AIDS or infection with the HIV virus, are considered disabled under the ADA. However, this coverage extends only to people whose condition does not pose a health or safety risk to themselves or co-workers.

Specifically, section 103(b) of the ADA permits employers to require that individuals with currently infectious diseases or infections do not pose a "direct threat to the health or safety of other individuals in the work place." According to the Senate report that accompanied the legislation (Sen. Rpt. 101-116, p. 40), this direct threat would mean "the person [poses] a significant risk of transmitting the infection to others in the work place which cannot be eliminated by reasonable accommodation."

This is consistent with the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and is based on interpretations of the Rehabilitation Act by Congress, the U.S. Supreme Court and the U.S. Justice Department.

The Supreme Court best explained this policy in connection with a teacher who had recurring, but non-contagious, tuberculosis (*School Board of Nassau County v. Arline,* 480 U.S. 273 (1987); see Appendix V:2). The teacher was fired after a relapse of the disease, without any attempt to provide accommodation, because of the fears that she might infect her students and co-workers. In determining whether to include contagious diseases as disabilities for purposes of section 504, the Court wrote:

> The fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the act all persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated

in light of medical evidence and a determination made as to whether they were "otherwise qualified."

Following that decision, the Justice Department reversed its 2-year-old position considering people with AIDS and HIV infection not disabled for purposes of section 504. Also, Congress amended the Rehabilitation Act in 1988 to expand the definition of disability in section 504 to include contagious diseases, provided infected persons do not threaten the health and safety of others and are able to perform their jobs.

The *Arline* decision also makes it clear that any claim that an individual's contagiousness poses a direct threat must be established on the basis of objective evidence, such as the sound medical judgments of public health officials. Generalized assumptions, subjective fears and speculation are not sufficient to prove such a direct threat.

***Special considerations for food handlers**

After much debate, Congress included special provisions in the ADA concerning employees who handle food and have communicable diseases. First of all, the act directs the U.S. Secretary of Health and Human Services to develop and publish annually a list of "infectious and communicable diseases which are transmitted through handling of the food supply," as well as the "methods by which such diseases are transmitted" (§103(d)(1)).

This list was published in the May 16, 1991, *Federal Register* (Pages 22726-22727) by the national Centers for Disease Control. (The list is reprinted in Figure 242-A.) CDC developed the list in cooperation with the U.S. Food and Drug Administration, National Institutes of Health, state and local health officers and national public health organizations.

Section 103(d)(2) of the act permits employers to "refuse to assign or continue to assign" to a job involving food handling any individual who has a disease on this list and the risk of contagion cannot be eliminated through the use of reasonable accommodation. Naturally, reassignment to a job that does not involve food handling would always be a reasonable accommodation in this case. (See ¶250 and ¶330 for discussions of reasonable accommodations.)

***Two categories**

The CDC list is divided into two categories. The first consists of pathogens often transmitted through food handling by contaminated people. CDC noted that "the contamination of raw ingredients from infected food-producing animals and contamination during processing are more important causes of foodborne diseases than is contamination of food by persons with infectious or contagious diseases." However, CDC acknowledged that some pathogens are frequently transmitted through food by infected people.

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* Indicates new or revised material.

Included in this first category are viruses that cause hepatitis-A, salmonella and dysentery, which could be present in people who have symptoms of diarrhea, vomiting, open skin sores, dark urine or jaundice. These conditions can be spread if infected food workers fail to wash their hands (in situations such as after using the toilet, handling raw chicken, cleaning spills or carrying garbage), wear clean gloves or use clean utensils. Non-foodborne transmission (person to person) is another means of transmitting these pathogens.

The second category consists of pathogens occasionally transmitted through food by infected people, but usually spread by other routes (including at the source, in food processing or by non-foodborne means). Preventing food contact by people who have acute diarrhea will decrease the risk of transmitting these pathogens, CDC said.

Figure 242-A

CDC List of Pathogens Transmitted Through Food Handling

Category I Pathogens

(*Pathogens often transmitted through food handling*)

- Hepatitis A virus
- Norwalk and Norwalk-like viruses
- *Salmonella typhi*
- *Shigella* species
- *Staphylococcus aureus*
- *Streptococcus pyogenes*

Category II Pathogens

(*Pathogens occasionally transmitted through food handling*)

Preventing food contact by people who have acute diarrheal illness will decrease the risk of transmitting the following pathogens:

- *Campylobacter jejuni*
- *Entamoeba histolytica*
- Enterohemorrhagic *Escherichia coli*
- Enterotoxigenic *Escherichia coli*
- *Giardia lamblia*
- Nontyphoidal *salmonella*
- Rotavirus
- *Vibrio cholerae* 01
- *Yersinia enterocolitica*

[The next page is Tab 200, Page 71.]

For example, a person in a wheelchair applies to be the only secretary at Company A. At this company, the essential job functions for the secretary are typing, taking shorthand, answering the phone and delivering mail. The secretary also lifts boxes and runs occasional errands, but these are considered non-essential duties because they are infrequent and could be assigned to any of several other employees.

Under the ADA, Company A may evaluate only the applicant's ability to perform the essential tasks (testing her typing, shorthand and phone skills). It may not, however, inquire about her ability to drive or lift heavy items, or deny her the job (if she is the most qualified applicant) because her condition precludes these things.

Company A would be required to reasonably accommodate her disability. In this case, the accommodation could be as simple as reassigning errands and lifting to another employee, perhaps in exchange for the secretary assuming other tasks. If steps within the office prevented mail delivery, then a ramp could be installed.

No employer is required to employ any individual who, even with an accommodation, is unable to perform the essential functions of the job effectively and safely. Such an individual would not be considered qualified. If no reasonable accommodation would enable the disabled individual to perform the job in question, the employer can, solely on the basis of the individual's disability, terminate the employee or deny employment to the applicant.

In the example above, Company A would not have to hire the applicant if she did not know shorthand. Reassigning that responsibility (an essential function) to another employee would not be a reasonable accommodation, because there are not other employees who have that skill.

The employer cannot establish any blanket rule excluding people with certain disabilities, except in the very limited situation where in all cases a physical condition by its very nature would prevent a person with a disability, even with reasonable accommodation, from performing the essential functions of that position. An example of such a case might be to exclude all deaf people as telephone operators.

¶311 Health and Safety Considerations

Even if a disabled person is qualified to perform a job, an employer may deny employment to an applicant or dismiss an employee if the employment would pose a direct threat to the health or safety of the individual or others or to property (§103(b)). Such a determination must be made on a case-by-case basis, and the employer must show that the person poses a significant risk, not just a speculative or remote one. The ADA defines a direct threat as a "significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation" (§101(3)).

Health and safety considerations probably receive the most attention in the area of contagious diseases such as AIDS and tuberculosis. The ADA makes it clear that people with communicable diseases are covered by the act, and that they can be denied employment *only* if they pose a threat to the health and safety of others.

The ADA contains a limited exception of coverage for people with contagious diseases in food-handling positions (§103(d)). The law requires the Secretary of the U.S. Department of Health and Human Services to publish a list of communicable diseases that may be transmitted through food-handling (¶242). As a reasonable accommodation, employers may reassign employees with a disease included on that list to positions not involving food-handling. Such an accommodation is subject to the undue harship limitation (¶251). Thus, if no appropriate position were available, then the employer would have the right to terminate the affected employee or not hire the job applicant.

See ¶230 for a detailed discussion of how ADA protects people with communicable diseases.

¶312 Perception of Disability

The ADA's definition of disability also bars employers from discriminating against people who have had a disabling condition or are *perceived* to be disabled. One situation in which this can occur is when a person has had a disability that has been cured. An employer cannot base an employment decision on an employee's or applicant's history of a disability, such as cancer, because the employer is afraid that the disease will recur, or because the employer believes that the individual is somehow "less able" to perform the work.

Similarly, an employer may not discriminate against someone with an impairment that is not a disability but that the employer regards as a disability. Common examples of this include burns, limps and lisps.

The ADA also prohibits employers from discriminating against an able-bodied employee or applicant because of any association or relationship that person might have with a disabled individual. Thus, it would be illegal to deny employment to an able-bodied person whose spouse has AIDS because the employer fears that the employee will have frequent absences to attend to the spouse. Likewise, it would be discriminatory to terminate employees whose spouses or children became disabled because of a fear that the employees might miss work to care for them. However, if such an employee proved unable to comply with the regular time and attendance policy — for whatever reason, including the illness of a family member — then it would not be discriminatory to fire that employee.

[The next page is Tab 300, Page 41.]

HANDICAPPED
Requirements Handbook

Supplement No. 152 July 1991

Highlights

Current Developments

CDC publishes list of diseases that can be transmitted through food supply

Responding to a mandate in the Americans with Disabilities Act, the national Centers for Disease Control has published an interim list of communicable diseases that are transmitted by handling food. The list is intended to be used by the food-service industry in dealing with workers who are infected with contagious diseases.

People with communicable diseases are protected by the ADA, as long as they don't pose a threat to the health and safety of others. However, Congress provided a limited exemption to that coverage by allowing restaurant owners and other food-related employers to transfer employees who are infected with any of the pathogens on the list (such as hepatitis-A and salmonella) to non-foodhandling jobs, if any are available.

If no other positions are open or the risk of spreading the disease can't be eliminated by reasonably accommodating the affected workers, the employer can fire them without violating the ADA.

The U.S. Department of Health and Human Services must annually publish and distribute a list of infectious diseases that can be transmitted through the food supply and the means by which such diseases are spread. CDC developed this first list (published in the May 16 *Federal Register*) along with the Food and Drug Administration, National Institutes of Health, state and local health officials and national public health organizations.

Two categories

The CDC list is divided into two categories, the first consisting of pathogens often transmitted through food handling by infected people. Included in this list are viruses that cause hepatitis-A, salmonella and dysentery, which could be present in people who have symptoms of diarrhea, vomiting, open skin sores, dark urine or jaundice.

CDC said these pathogens can be spread if infected food workers fail to wash their hands (in situations such as after using the toilet, handling raw chicken, cleaning spills or carrying garbage), wear clean gloves or use clean utensils. Non-foodborne transmission (i.e., person to person) is another means of transmission.

The second category consists of pathogens occasionally transmitted through food by

infected people, but usually spread by other means (including at the source, in food processing or by non-foodborne means). Preventing food contact by people who have acute diarrhea will decrease the risk of transmitting these pathogens, CDC said.

AIDS and HIV infection are not included in the CDC list.

Title II accessibility guidelines postponed

State and local governments and transportation officials will have to wait a couple of months for ADA accessibility guidelines from the Architectural and Transportation Barriers Compliance Board.

Access board Executive Director Larry Roffe announced that work on title II standards will be postponed until after final guidelines for title III (public accommodations) are issued. He predicted that the title II standards would be finished by the fall. Under the ADA, the board was to have issued final standards for titles II and III by April 26, 1991.

Most of the access board's effort has been directed at developing accessibility guidelines for private businesses covered by title III, which has delayed work on the rules for state and local governments, Roffe said. In the interim, he suggested that public officials use the Uniform Federal Accessibility Standards (UFAS — see Appendix III) for ADA compliance.

Most federal agencies cite UFAS in their section 504 regulations.

Similarly, work has been delayed on final transportation guidelines, which the Department of Transportation will probably use in its ADA regulations. The access board proposed standards for transit vehicles and facilities in March.

New York court upholds decision to keep HIV off communicable disease list

A New York court has upheld a decision by the state's health commission to keep HIV infection off a list of communicable diseases, rejecting a challenge from several doctors' organizations that sought to have the condition classified as "dangerous to the public health."

New York law permits the state health commissioner to place diseases on a list of communicable diseases that are dangerous to the public health. Cases of any disease on the list must be reported and traced. The health commissioner decided not to include HIV infection because he thought the reporting requirement would deter people from voluntarily being tested for the virus.

The New York Court of Appeals ruled that the word "may" in the statute gives the health commission discretion about including diseases on the list, even if they are communicable (as HIV is). Also, the court said a New York law calling for a list of sexually transmitted diseases also gives the commissioner latitude.

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On Capitol Hill —

• President Bush last month signed legislation (P.L. 102-52) renewing programs under the Rehabilitation Act for one year. Congress intends to overhaul the law next year to incorporate provisions of the ADA (see Supplement No. 151, June 1991).

• The House Subcommittee on Health has approved legislation (H.R. 2311) that would create a new block grant for states to help people with mental disabilities. The bill would authorize $270 million in fiscal year 1992. States would have to submit plans outlining their needs for facilities to the Department of Health and Human Services.

• The Senate last month passed a bill (S. 173) that would allow regional Bell telephone companies to manufacture telecommunications equipment, lifting a ban that was imposed after AT&T was ordered to reorganize in the early 1980s. Sponsored by Sen. Ernest Hollings, D-S.C., the proposed Telecommunications Equipment Research and Manufacturing Competition Act would allow the so-called "Baby Bells" to join with small manufacturing companies to develop new products, such as adaptive telecommunications equipment for hearing-impaired people.

• Also in the Senate, Sen. John Kerry, D-Mass., has introduced legislation that would provide at least $2 million a year to conduct research and create demonstration projects on transportation for people with disabilities. The bill (S. 1224), the Accessible Transportation Access Act, would extend a program begun by Congress in 1988, fund training programs for transit drivers on serving disabled passengers and help transit agencies purchase accessible vehicles.

In the Courts

Court rules compensatory, but not punitive, damages available under section 504

A person may sue for compensatory damages and request a jury trial under section 504, the U.S. District Court for the Northern District of Illinois has ruled. But, the court said, punitive relief is not available.

Julio Cortes sued Northeastern Illinois University for alleged employment discrimination based on disability. Cortes, who uses a wheelchair, was passed over for a position at the university, despite being rated the most qualified candidate. According to testimony, a member of the committee interviewing candidates repeatedly asked Cortes improper questions about his disability.

The Rehabilitation Act doesn't specify if people can sue for damages under section 504. The Supreme Court has ruled that equitable relief (such as back pay) is available, but lower federal courts are divided over whether compensatory damages are available.

Looking to other decisions, the District Court ruled that "the weight of authority supports the view" that plaintiffs may seek compensatory damages under section 504. Such damages, it added, are "arguably necessary to accomplish the statutory goals."

The court held that punitive damages are not available. Such a remedy is "not necessary to 'make good the wrong' when [the] plaintiff is already being allowed to seek back pay, front pay, compensatory damages and even reinstatement," the court said.

Finally, the court held that Cortes was entitled to a jury trial because he was seeking a legal remedy (compensatory damages) as well as equitable relief. This case is *Cortes v. Board of Governors*, Appendix IV:495.

Employee with back pain who could perform most job tasks not handicapped under section 504, court rules

An employee who complained of pain but could perform most of her responsibilities is not handicapped under section 504, the U.S. District Court for the District of Columbia has ruled.

Sandra Mitchiner is a position classification specialist for the D.C. Office of Personnel. She claimed that the agency discriminated against her based on disability after she had experienced back and wrist pain from muscle strains and falls.

Mitchiner cited a report of a doctor who diagnosed her as having "chronic pain syndrome."

The doctor recommended that Mitchiner's job functions be modified to reduce the amount of lifting and writing, and that she be equipped with special furniture to reduce the strain on her back and wrist.

But the court stated that the agency did accommodate Mitchiner, such as giving her a word processor, liberal leave, special furniture and more space than other employees. It also cited other medical reports, one of which said that although Mitchiner complained of pain, she could perform "the vast majority of the functions assigned to her."

The court concluded that Mitchiner did not suffer from any impairment which substantially limited her ability to work, and thus was not handicapped under the act. This case is *Mitchiner v. District of Columbia*, Appendix IV:496.

Agency Action

Justice Dept. to award grants for ADA technical assistance programs

The U.S. Justice Department plans to award up to $2.5 million in technical assistance grants to help public establishments and state and local governments comply with the ADA.

The department is seeking applications from individuals and non-profit organizations that propose "cost effective and efficient approaches of disseminating information and producing voluntary compliance with the requirements of the ADA." Preference will be given to joint ventures of covered entities and people with disabilities.

Although the grants will be awarded to provide technical assistance to all types of entities subject to titles II and III of the ADA, Justice is particularly interested in developing guidance on barrier removal and auxiliary aids for six targeted industries: restaurants, hotels and motels, retail stores, hospitals and health care facilities, places of assembly (such as stadiums, theaters and convention centers) and day care facilities. Materials would focus on issues unique to these industries, such as accessibility in restaurant dining rooms or hotel check-in procedures.

Other issues include training law enforcement personnel to better interact with disabled people whose conditions may mistakenly appear to be disorderly conduct (such as epilepsy) and developing auxiliary aids and accommodations that would enable disabled people to participate in courses and examinations.

Applications for technical assistance grants must discuss components of program strategy, Justice said. Although not required, Justice suggested several program activities that could be included in the proposals:

- achieve specific cases of voluntary compliance (which Justice considers a "very important" activity)
- develop and disseminate information on the ADA;
- set up telephone information lines;
- create training courses;
- develop model compliance programs; and
- develop dispute resolution programs.

Applications for the grants (which will range from $85,000 to $120,000) must be submitted by July 22. For more information, contact James Bennett or Philip Breen in the Office on the Americans with Disabilities Act, (202) 307-2220 and (202) 307-2226, respectively. (June 5 *Federal Register*, Pages 25980-25983.)

HUD proposes internal section 504 regulations

The U.S. Department of Housing and Urban Development has proposed regulations that would implement section 504 as it applies to HUD's programs and activities (24 C.F.R. Part 9). The rule would define handicapped, set standards for what constitutes discrimination and establish a mechanism to resolve complaints. For more information, contact Mary-Jean Moore at HUD's Office of Fair Housing and Equal Opportunity, (202) 708-0015 (voice/TDD). (May 30 *Federal Register*, Pages 24604-24620.)

HUD to hold seminars on accessibility guidelines

The Office of Fair Housing and Equal Opportunity at the U.S. Department of Housing and Urban Development (HUD) will hold a series of nationwide seminars to discuss its housing accessibility guidelines released in March (see Supplement No. 148, March 1991). The guidelines provide design and construction standards to help builders comply with the Fair Housing Amendments Act.

HUD said builders, building code officials, architects and disabled people, among others, should attend the seminars. Topics to be discussed include requirements of the Fair Housing Act, relationship of the act to other laws, and design and construction requirements.

For more information, contact the Office of Fair Housing and Equal Opportunity, (202) 708-0015 (voice/TDD). The seminars are free, but advance registration is required.

The HUD seminars are scheduled for:

July 18 —	Thomas P. O'Neill Federal Building Boston
July 25 —	Stouffer Airport Hotel Denver
Aug. 1 —	The Worthington Ft. Worth, Texas
Aug. 7 —	Hyatt Regency Phoenix Phoenix
Aug. 15 —	Allis Plaza Hotel Kansas City, Mo.
Aug. 21 —	Oakland Convention Center San Francisco
Aug. 29 —	Biltmore Hotel Los Angeles
Sept. 6 —	Vista Hotel New York City
Sept. 12 —	R.B. Russell Federal Building Atlanta
Sept. 17 —	Stouffer Orlando Resort Orlando, Fla.
Sept. 26 —	Swissotel Chicago

ED proposes rule for state transition services programs

The U.S. Department of Education (ED) has proposed regulations (34 C.F.R. Part 325) that would enable the department to award one-time, five-year grants to state rehabilitation and educational agencies to develop and improve transition services for disabled youth after they leave school.

Congress created the authority for state transition services programs when it reauthorized the Education of the Handicapped Act (and renamed it the Individuals with Disabilities Education Act) last year. States that receive grants would be required to increase the availability and improve the quality of transition services for disabled youth, help counselors, parents and advocates work with students, and improve working relationships among educational personnel.

For more information on the proposal, contact William Halloran at ED, (202) 732-1112. (June 11 *Federal Register*, Pages 26856-26859.)

Personnel training grants proposed by ED

The Education Department intends to amend its regulations for the Training Personnel for the Education of Individuals with Disabilities program (34 C.F.R. Part 318) to incorporate changes in the Individuals with Disabilities Education Act enacted by Congress in 1990. The proposed rules include provisions that would focus on special education of minority groups, add reporting requirements and change target populations.

In addition, the department has proposed rules for a new program focusing on children and youth with serious emotion disturbance (34 C.F.R. Part 328). The proposed regulation would provide information about the kinds of projects supported under the program and application and selection criteria.

These notices were published in the June 14 *Federal Register*, Pages 27473-27484.

ED issues interim rules on 'protection of human subjects'

An interim rule from the Education Department would ensure protections for disabled children and mentally disabled people who are the subject of research conducted by the National Institute of Disability Research and Rehabilitation.

The regulation (34 C.F.R Parts 350 and 356) would require institutional review boards to include at least one person concerned with the welfare of disabled children and mentally disabled people when the board reviews research that involves them.

The ED rule is a common rule issued by the Office of Science and Technology Policy and adopted by several other agencies, including the Department of Health and Human Services.

For more information, contact Edward Glassman (202) 401-3132. (June 18 *Federal Register*, Pages 28029-28032.)

Questions & Answers

Our company, a federal grantee, is holding a business meeting for several field offices. As part of the conference, we are sponsoring field trips to tourist sites for the employees. Are we responsible for ensuring the accessibility of the tourist spots under section 504?

You aren't responsible for making the tourist sites accessible, but under section 504, you must offer the employees with disabilities the benefits you offer to non-disabled employees. This would include providing accessible transportation and equivalent sightseeing benefits. Generally, the purpose of these sidetrips is to boost morale by allowing employees to socialize informally. Not all employees need to interact at the same places, but disabled employees must have the opportunity to socialize. There's nothing to prevent you from offering some trips or activities at accessible sites.

Would it be legal under section 504 for our municipal pool to charge disabled members a higher fee than it charges non-disabled members? The Parks Department receives federal funds.

Charging a special rate could for disabled people would violate section 504. Fee structures for facilities such as community pools can be based on several things, such as: usage (e.g., a higher rate for unlimited use), family status (e.g., higher rates for families than for singles), or income. However, it would appear difficult to justify a special rate for disabled members.

Must all of our state parks have accessible trails as a result of the ADA or section 504? We have received funding from the U.S. Department of the Interior over the years, and some parks (but not all) have accessible trails and facilities.

If you have been in compliance with the Rehabilitation Act because you receive federal funding, then you will likely be in compliance with the ADA. The question is whether your programs and services, including the trails, are accessible "when viewed in their entirety." This means that not every trail has to be accessible, but could mean that at least one be accessible in a single park. This, too, would apply to campsites, nature centers and any other facilities you make available to the public in your parks.

Currently, the National Council on Disability is conducting an ADA-mandated study on the accessibility of federal wilderness areas.

Our university offers an adult education "extension program" through which classes are offered off-campus for a fee. The program is self-sufficient, paid for through the fee charged to participants. Would this program be covered by section 504?

Yes, if your university receives federal funds, including student loans. When Congress passed the Civil Rights Restoration Act in 1988, it amended section 504 to clarify that *all* programs and activities of a university are covered, not just the ones receiving federal funds. This means that even if the adult education program is self-sufficient, you would still have to make it accessible to disabled people if any of your other programs were federally funded.

Additionally, such programs will be covered by the Americans with Disabilities Act, regardless of whether or not you are subject to section 504. Programs offered by state and local public universities are covered by Title II of the ADA; private universities are covered by title III.

Handbook Page Changes in Supplement No. 152

July 1991

Pages to be DISCARDED	Pages to be ADDED (Dated July 1991)	Description of Revisions
pp. v & vi (June 1991)	pp. v & vi	Update to Current Contents page
Appendix IV pp. 257–258 (May 1991)	Appendix IV pp. 257–258	Addition of Court Cases Nos. 495–496

DISCARD THIS SHEET AFTER CHANGES HAVE BEEN MADE

Contents of Basic 504 Compliance Guide

The following is a listing of all pages that make up the Basic 504 Compliance Guide of the *Handicapped Requirements Handbook* with the inclusion of the July 1991, Supplement No. 152 update pages.

Appendix IV

Appendix V

Appendix VI

Appendix VII

Index

492 *Chiari v. City of League City*, 920 F.2d 311 (5th Cir. 1991)

Construction inspector who has Parkinson's disease not otherwise qualified to perform essential functions of the job

A city did not violate Section 504 of the Rehabilitation Act when it fired a construction inspector who would lose his balance and thus was unable to perform the essential functions of the job, the 5th U.S. Circuit Court of Appeals ruled.

Antonio Chiari, an engineer who has Parkinson's disease, was a construction inspector for League City, Texas. Inspectors are responsible for approving construction plans and verifying that the work was properly completed. Nearly half of the job is spent at construction sites visually inspecting contractors' work, which requires considerable walking and climbing.

In early 1987, Chiari began to have trouble walking; he was seen stumbling in the city hall and falling while at a construction site. At the request of his supervisor, Chiari was examined separately by two neurosurgeons, who found he had an unsteady "shuffling gait and body rigidity." They both said his loss of balance rendered him unable to continue his job as a construction inspector and that he would be a danger to himself and others if he continued to work.

Chiari's personal physician also examined him, and saw "no particular limitation of [Chiari's] work, as long as he [did] not climb."

City officials tried unsuccessfully to restructure the job to accommodate Chiari's condition. First, they assigned another inspector to do on-site work while Chiari remained at his desk to review the plans. That arrangement did not work because to do the job properly, an inspector must review plans before visiting the site. They tried to create a new position, but could not due to budgetary constraints, and the city had no open positions for a transfer.

After these attempts failed, the city fired Chiari in April 1987. He sued, charging that the dismissal violated section 504 and the Texas Human Rights Act. He said he had never fallen on or injured a co-worker, and that the risk of personal injury was not a factor under section 504. Chiari also argued that the city could have provided him with part-time work as an accommodation.

The city said Chiari was not protected by section 504 because he could not perform the essential functions of the job, namely walking and climbing around construction sites safely.

The U.S. District Court for the Southern District of Texas ruled in favor of the city. That ruling was upheld by the 5th Circuit, which agreed that Chiari was no longer qualified to be a construction inspector. Citing *Arline* (see Appendix IV:329) and other section 504 cases, the appeals court said a "handicapped person cannot perform the essential functions of a job if his handicap poses a significant safety risk to those around him."

To support its judgment, the court cited the neurosurgeons' diagnoses that Chiari's balance problem would prevent him from working safely. Chiari's doctor concluded similarly when he was read the job description during the case.

The appeals court disagreed with Chiari that the risk of personal injury was immaterial. It cited section 501 regulations that include "health and safety of the individual" in the definition of qualified handicapped person. The existence of a personal safety rule in section 501 creates a similar rule under section 504, the court said.

Finally, the court ruled that city officials "went beyond their statutory duty in an effort to accommodate Chiari's disease" and that they were not required to create a new part-time position as an accommodation.

"All the city must do is demonstrate that a part-time schedule would not accommodate Chiari's performance on that job that he is currently doing," it said. "Even if Chiari worked fewer hours, he still would not be able to climb buildings or climb into ditches, [which are] 'essential functions' of a construction inspector's job."

For the same reasons cited under section 504, the court found no violations of the Texas discrimination law.

493 *Gault v. University of Chicago Hospitals*, No. 90-C0321 (N.D. Ill. 1991)

Epileptic nurse not otherwise qualified to work in burn unit of hospital

A nurse who suffers from epileptic seizures is not "otherwise qualified" within in the meaning of Section 504 of the Rehabilitation Act to work in the burn unit of a hospital, the U.S. District Court for the Northern District of Illinois ruled.

Freida Gault sued the University of Chicago Hospitals for allegedly violating section 504 when it dismissed her as a burn-unit nurse. Gault has idiopathic epilepsy, which causes her to have unpredictable generalized seizures. Before the onset of a seizure, Gault will stare blankly. She then experiences convulsions, falls to floor and loses consciousness. After she recovers, there is a period of confusion.

Gault suffered seizures while on duty. According to hospital officials, seizures occurred while she was: using scissors to change a dressing; assisting an infant's breathing apparatus "resulting in extubation of the patient and her inability to summon needed medical care"; and cutting a dressing, which caused the patient to leave his room to summon help.

Additionally, Gault suffered a head injury during one seizure that required emergency room treatment and made her unable to help a seriously burned patient on a ventilator and tube feeding.

The hospitals knew of Gault's condition before they hired her, and did not relieve her from duty after the first seizure. One doctor at the hospital thought the seizures were under control and would not endanger her or others. Several seizures followed, however, and Gault agreed to consult an expert from another hospital.

That doctor told Gault that the seizures were not under control and that it was dangerous for her to work in a burn unit or operating room. Gault would not tell hospital officials about this diagnosis, and as a result, the hospitals placed her on leave.

Based on these circumstances, the court ruled that Gault is not otherwise qualified because she was not meeting the position requirements of a burn-unit nurse. Further, the court found no section 504 violations on the part of the hospitals.

Gault cannot "contend that the decision process to remove her from the burn unit . . . was motivated by prejudice against her handicap or was conducted unfairly," the court said. "The hospitals are indisputably willing to hire epileptics and to assign them to critical care units."

494 *Teahan v. Metro-North Commuter Railroad Company*, No. 88 Civ. 5376 (S.D.N.Y. 1991)

Recovered alcoholic fails to prove disability as sole basis for job dismissal

A rehabilitated alcoholic failed to prove he was fired from his job solely because of his disability, the U.S. District Court for the Southern District of New York ruled.

John Teahan, a telephone and telegraph maintainer for Metro-North Railroad, was fired for what the railroad said was excessive, unauthorized absenteeism. During a four-year span, Teahan's drug and alcohol addiction caused him to miss many work days. In 1984 he was absent 19 days; his absenteeism rose to 139 days in 1986. He was disciplined for these absences.

In early 1986, Teahan sought help from the company's rehabilitation program and voluntarily entered a hospital program. The treatment failed, however, and his substance abuse and absentee

ism returned. He missed 57 work days in 1987. Later that year, Teahan entered and successfully completed a month-long treatment program. As required by union rules, he returned to work in January 1988 and was not absent for any reason until being fired in April 1988.

Teahan claimed the firing violated section 504 because the railroad acted against his disability. Section 504 protects rehabilitated substance abusers from discrimination based on disability, but does not cover people whose current use of drugs or alcohol prevents them from performing their jobs or constitutes a direct threat to others or property.

The railroad claimed that it acted solely based on Teahan's excessive absenteeism and asked for summary judgment, which the District Court granted.

The court acknowledged that Teahan raised issues of material fact that Metro-North did not disprove. First, the railroad argued that Teahan was not disabled within the meaning of section 504. However, the court said, Teahan had successfully completed treatment and was not absent before being fired. Based on this evidence, he could qualify as being rehabilitated and "therefore within the protection of the act," the court noted.

Second, Metro-North contended that Teahan was not otherwise qualified for his job because he could not be depended on to report to work. But noting that his prior absences were due to addiction and that he had not missed work since being rehabilitated, the court suggested that Teahan could be capable of reporting to work at the time of his dismissal.

The court found that Metro-North would succeed on the issue that Teahan was legitimately fired only because of his absentee record. The court said Teahan failed to prove his argument that he was terminated solely based on his disability.

Teahan, the court said, argued only that he was a member of a protected group without presenting evidence of disparate treatment. "Teahan's assertion that Metro-North knew he had an alcohol and drug problem is insufficient proof of discriminatory intent to survive a summary judgment," the court said. "In fact, Teahan fails to present any affidavits, deposition or other evidence at all in opposition to Metro-North's motion."

495 *Cortes v. Board of Governors*, No. 89 C 3449 (N.D. Ill. 1991)

Compensatory, but not punitive, damages available under section 504

A plaintiff may sue for compensatory damages and request a jury trial under section 504, the U.S. District Court for the Northern District of Illinois ruled. However, the court said punitive relief is not available.

Julio Cortes, an employee of Northeastern Illinois University, sued the school for alleged employment discrimination based on disability. Cortes, who uses a wheelchair, was passed over for a position as director of a university program for Hispanic students, despite being rated the most qualified candidate. According to testimony, a member of the committee interviewing candidates repeatedly asked Cortes improper questions about his disability.

The court denied the university's request for summary judgment, on the grounds that material issues of fact existed in the case. In this separate motion, the university asked the court to throw out Cortes' claim for damages (including compensatory and punitive damages, back pay and attorneys' fees) and a jury trial.

The Rehabilitation Act does not specify whether a plaintiff can sue for damages under section 504. Instead, it references Title VI of the Civil Rights Act, which authorizes relief "consistent with the objectives of the statute." The Supreme Court, in *Guardians v. Civil Service Commission* (Appendix IV: 904), ruled that plaintiffs must allege intentional discrimination to get monetary relief under title VI. The Court further stated that victims of intentional discrimination may be entitled to compensatory awards.

The District Court noted that federal courts are divided over the issue of whether compensatory damages are available under section 504. Some, it said, have cited Title VII of the Civil Rights Act, which specifically states that only equitable relief is available. But the District Court held that the remedy portions of title VII are not analogous to section 504.

Instead it cited *Miener v. Missouri* (Appendix IV:69), in which the 8th U.S. Circuit Court of Appeals noted that a House/Senate conference committee eliminated a provision that would have prohibited monetary damages when Congress amended the Rehabilitation Act in 1978. "The weight of authority supports the view," the District Court said, that plaintiffs are entitled to seek compensatory damages under section 504. Such damages, it added, "are arguably necessary to accomplish the statutory goals."

The court held that punitive damages are not available. Such a remedy is "not necessary to 'make good the wrong' when [the] plaintiff is already being allowed to seek back pay, front pay, compensatory damages and even reinstatement," the court said.

Finally, the court held that Cortes was entitled to a jury trial because he was seeking a legal remedy (compensatory damages) as well as equitable relief.

496 *Mitchiner v. District of Columbia*, No. 89-0720 (D.D.C. 1991)

Employee with history of back and wrist pain is not handicapped under section 504

An employee who complained of pain but was able to perform the vast majority of her responsibilities is not handicapped under section 504, the U.S. District Court for the District of Columbia ruled.

Sandra Mitchiner, a position classification specialist for the Washington, D.C. Office of Personnel, alleged that the agency discriminated against her based on disability after she had experienced back and wrist pain from muscle strains and falls.

Mitchiner cited a report of a doctor who diagnosed her as having "chronic pain syndrome." This doctor recommended that Mitchiner's job functions be modified to reduce the amount of lifting and writing, and that she be equipped with special furniture to reduce the strain on her back and wrist.

The court noted that the agency did accommodate Mitchiner, giving her a word processor, liberal leave, special furniture and more space than other employees. It also cited other medical reports, one of which indicated that although Mitchiner complained of pain, she could perform "the vast majority of the functions assigned to her."

One doctor found that she could work 8-hour days (with specific breaks every 30 minutes), as well as lift and grip items with both hands. Another said Mitchiner had "no compensable disability . . . and nothing to prevent [her] from returning to work immediately without limitations."

The court concluded that Mitchiner did not suffer from any impairment which substantially limited her ability to work, and thus was not considered handicapped under the act.

AMERICANS WITH DISABILITIES ACT

ADA COMPLIANCE GUIDE

MONTHLY BULLETIN

Vol. 2, No. 6 June 1991

ADA services division created at EEOC

A new office devoted to disability-rights issues has been created within the Equal Employment Opportunity Commission.

The EEOC announced last month that it would add ADA Services to its Office of Legal Counsel. Full-time staff will develop policy and provide technical assistance to the rest of the commission and the public on the Americans with Disabilities Act. The EEOC will enforce the employment provisions (title I) of the act.

"Under the ADA, we are required to fight discrimination in the workplace against people with disabilities and to tell those affected by the new law how it works and how to comply with it. This new service will help us do that," said EEOC Chairman Evan J. Kemp, Jr.

According to the commission, ADA Services will have two divisions: ADA Policy and ADA Technical Assistance. The policy branch will develop regulations under both the ADA and sections 501 and 504 of the Rehabilitation Act (which cover non-discrimination by the federal government and federal grantees, respectively). The EEOC proposed ADA regulations in February (see March 1991 *Monthly Bulletin*).

ADA guidance will be handled by the technical assistance division. This will include developing a technical assistance manual and other publications on the rights and responsibilities under the ADA. The manual is due Jan. 26, 1992, six months before the effective date of title I.

The technical assistance division will manage a nationwide training and education program that EEOC plans to develop for employers and disabled individuals.

In establishing ADA Services, the EEOC followed the lead of the U.S. Justice Department, which created last year an Office on the Americans with Disabilities Act within its Civil Rights Division.❑

Businesses urge restraint, disability groups seek rights in comments to EEOC

Nearly 800 groups and individuals have submitted comments to the Equal Employment Opportunity Commission concerning its proposed rules on Title I of the Americans with Disabilities Act.

Overall, the comments were supportive of the commission's attempt to put the employment provisions of the act into a regulatory framework (although one Washington-state business owner complained that the "whole thing is bunk and should be thrown out"). As can be expected, disability groups generally sought a broad reading of the statute with respect to the rights of disabled people.

Business groups, while endorsing the goals of the ADA, petitioned the EEOC to maintain a narrow interpretation of the law where it concerns their responsibilities as employers.

Published in the Feb. 28 *Federal Register*, the draft regulations would prohibit public and private employers from discriminating against qualified job applicants and employees on the basis of disability (see March 1991 *Monthly Bulletin*). The rules would bar disability bias in all aspects of the employment process, from applications and interviews to employee benefits and

See ***Comments,*** *Page 2*

IN THIS ISSUE

Comments

Continued from Page 1

employer-sponsored social activities.

The EEOC must issue final rules by July 26, 1991. The employment provisions become effective July 26, 1992, for businesses with 25 or more employees and July 26, 1994, for employers with 15 or more workers.

"An administrative and legal quagmire"

A sampling of the comments reveals a willingness from business groups to embrace the spirit of the ADA, although there is some resistance to certain parts of the law. A representative of Arby's restaurants wrote that the proposed rule will "create an administrative and legal quagmire that will inhibit and possibly prohibit a small business like ours to remain solvent."

Writing on behalf of The Bailey Company (which operates, builds and staffs Arby's), J. Mark Eagleton had many concerns about the draft rules, among them a contention that disabled workers, while dependable, are "less productive workers." Among his comments were suggestions that a company need not spend more than .5 percent of its after-tax profits on all reasonable accommodations, and that the cost of hiring readers, interpreters or other assistants for a disabled worker should come out of that person's salary.

The Bailey Company also contends that employers should be excused from lawsuits or fines until the EEOC offers technical assistance.

A lengthy set of comments was submitted by the Equal Employment Advisory Council, a Washington, D.C.-based coalition of businesses. The council raised numerous issues in its comments, among them the use of the words "primary" and "intrinsic" in the EEOC's proposed definition of essential job functions.

The council said these terms are subjective and not useful for determining whether a particular function is essential. Neither word appears in the statute or legislative history, the council said. Instead, it suggested that the EEOC focus on the difference between whether a task is essential or marginal to the position.

Regarding reasonable accommodation, the council said an employer should only be responsible for accommodating known disabilities, and that the employee is responsible for identifying and requesting an accommodation. Employers should not have to eliminate essential job functions through job restructuring, the comments stated.

Further, the council said, the final rule should clarify that an accommodation is not necessarily "reasonable" for one employee merely because the employer made it for a different individual.

In other areas, the council recommended that the EEOC:

- recognize "good faith efforts" as evidence of compliance, even if a particular accommodation is not provided;
- coordinate with requirements imposed on federal contractors under Section 503 of the Rehabilitation Act (such as the invitation for self-identification);
- incorporate into the final rules much of the interpretative guidance found in the appendix to the draft rules; and
- retain language in the proposed rules that employers may legitimately consider individual safety when determining if a disabled applicant can perform the essential job functions.

Substance abuse

One issue raised by several commenters was the EEOC's proposed coverage of substance abusers. Current illegal drug users are not protected by the ADA. However, the act does protect past drug users who have successfully com-

*See **EEOC**, Page 3*

Americans with Disabilities Act
ADA Compliance Guide

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EEOC

Continued from Page 2

pleted or are undergoing rehabilitation. It also protects alcoholics, as long as their alcoholism doesn't interfere with their work or pose a threat to others or property.

Employer groups generally supported a conservative approach toward covering substance abusers. The Equal Employment Advisory Council, for example, said the final rule should "clarify that private employers, as well as law enforcement agencies, may impose a qualification standard excluding past users of illegal drugs."

Additionally, the council proposed that employers be allowed to refuse to rehire someone fired for substance abuse, even if the employee successfully undergoes treatment. It also asked the EEOC to make clear in the rules that casual drug users are not covered by the act.

Substance-abuse rehabilitation organizations and agencies took the position that drug use and alcoholism should be specifically mentioned in the rules as examples of physical and mental impairments, as the Justice Department did in its proposed public accommodations rules (see March 1991 *Monthly Bulletin*).

One recurring issue raised was the EEOC time frame to determine if someone is "currently engaging" in drug use. In the appendix to the draft rules, the commission indicated that "current" is not limited to drug use "on the day of, or within a matter of days or weeks before the employment action in question."

Christine Lubinski, public policy director for the National Council on Alcoholism and Drug Dependence, Inc., said this definition provides no time frame at all and would allow inquiries about "drug use occurring many weeks or months before the employment decision." Arthur Webb, director of New York state's Division of Substance Abuse, said the definition "opens the door to the legal discrimination of substance abusers in employment and continues a propensity for exclusion."

Lubinski recommended that EEOC adopt language from the Justice Department, which defines "current" as the 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."

> Disability groups contend that the 'risk-to-self' argument, as used by employers, is perhaps "the most pervasive basis of discrimination" against disabled people.

She also objected to a provision in the appendix that allows employers to categorically exclude people with a history of drug use from certain positions. "This suggestion flies in the face of the legislative history of the [ADA] which clearly supported individualized determinations and prohibited this kind of blanket rule," she said.

"This appendix reference invites business and industry to establish policies which effectively screen out recovered drug-dependent persons, regardless of length of sobriety and ability to perform the job."

Fear of paternalism

Many disabled individuals and advocacy groups submitted comments prepared by the Disability Rights Education and Defense Fund (DREDF), which had several concerns with the EEOC draft. Among them was the issue of "threat to oneself."

Under the EEOC rules, an employer could require individuals to be able to perform the essential functions of a job, without posing a direct threat to the health or safety of themselves or others. The ADA mentions only the threat to others, although courts have invoked the "risk to self" standard in cases under Section 504 of the Rehabilitation Act.

DREDF contends that the risk-to-self argument "is perhaps the most pervasive basis of discrimination against persons with disabilities. The concern about risk to self is usually economic or paternalistic. Neither are strong policy reasons to deny work to a person with a disability for 'his own good.'"

The group would like the risk-to-self standard eliminated. But if it's kept, DREDF said, the rules should make clear that "concerns about increased costs or paternalism based on stereotype will not suffice" as a defense for not hiring a disabled person. Also, risk should be based on a present condition, not on speculation about the future course of the disability.

In other areas, DREDF wrote that including daily attendant care in the list of possible reasonable accommodations is of "the highest priority." EEOC indicated that personal assistants, for page turning or travel, are examples of accommodations, but that employers are not required to provide aids for personal, non-job related services.

DREDF said the regulations should make clear that daily attendant care during work hours for toileting, eating, driving, etc., is job-related. "Without this explicit clarification, many severely disabled individuals will be unable to attain or retain employment."❑

John Wodatch: the ADA "point man" at the Department of Justice

Civil rights official says ADA compliance involves "common sense"

John Wodatch has been a busy man lately.

Across from his desk sit 16 loose-leaf notebooks filled with 2,500 comments — more than 15,000 pages — that were submitted in response to the Justice Department's proposed rules on titles II and III of the Americans with Disabilities Act. And as the department's point man on the ADA, it's his job to read them.

"We are going through them, we are reading every single one, analyzing them all," Wodatch said. "They're very good — they're very helpful. Surprisingly, we didn't get a lot of 'we're shocked and appalled that that you're doing this.' Certainly there were disagreements with choices we have made. There were a lot of suggestions."

Wodatch heads the Office on the Americans with Disabilities Act, the division at Justice responsible for getting out the rules and technical advice to the estimated 3.8 million businesses that will be affected by the public accommodations provisions of the act. His office will also issue regulations for state and local governments.

For Wodatch and his colleagues at Justice, the comment process (what he calls "our reality check") is the second stage in the long and involved process of codifying the ADA. The department issued draft rules for both public accommodations and public services in February (see March 1991 *Monthly Bulletin*). Final versions are due July 26, 1991.

"Our goal in the regulation is to keep the same balance as there is in the statute, which is between providing access for persons with disabilities while still recognizing that there's a price tag that comes along with this for business," he said.

Wodatch sometimes refers to that balance in the ADA as the "unlesses" — a business must provide auxiliary aids, unless it imposes an undue burden or a fundamental alteration, for example. An employer must provide reasonable accommodations to disabled employees, unless that imposes an undue hardship. This equivocal aspect of the law is an issue for Justice in writing the regulations.

"There's a certain tension between giving flexibility to the entities covered by the ADA and at the same time giving them enough guidance so they know what's expected of them," Wodatch noted. "We're trying to find the right mix of that in the regulations and it's a daunting task."

The section 504 experience

Wodatch is no stranger to disability issues. A veteran government lawyer, he's been involved with federal disability law for more than 15 years. He was director of the Office for Civil Rights at the Department of Health, Education and Welfare in 1977 when HEW issued the first regulations under Section 504 of the Rehabilitation Act. The predecessor of the ADA, section 504 prohibits federal grantees from discriminating based on disability in their programs and activities.

Wodatch believes the section 504 experience should ease the transition to ADA compliance for both the federal government and entities covered by the new law. Many of the terms in the ADA, such as reasonable accommodation, undue hardship and otherwise qualified, come from section 504.

"It was very important to have section 504 be the basis for the ADA because we did have the track record, we knew what it meant, and it would not only ease compliance, it would [also] let people know what was expected of them," he noted.

Myths and misconceptions

Wodatch said that while there is a "great deal of knowledge" that the ADA has been enacted, "there's a great deal of misinformation about what it is."

The ADA is a flexible law, he stressed. "The federal government is not telling you how to run your businesses. It's telling you that you must open up your business to persons with disabilities and leaving options to do it in the way that makes most sense given the services you provide and facility you provide them in."

A common misconception among business is that altering one part of a building means that the entire building must be made accessible, Wodatch said. Under the ADA and the proposed Justice Department rules, if part of a building is renovated, the altered part must be accessible, but not the whole building.

From the disabled community, Wodatch senses an "unawareness" of some of the limitations in the ADA. Some activists portray the ADA as a "new day" for disabled people, he noted. And while that's true to a large extent, he said, "the ADA is a very limited piece of legislation in terms of what's required."

As an example, Wodatch pointed out that while businesses must provide auxiliary aids, they can

choose which auxiliary aid to provide and they don't have to do it if it's an undue burden. "I don't think people have an appreciation of the checks and balances in the ADA," he said.

Issues to address

Wodatch has identified a number of trends in the comments. One concerns people with hearing impairments, who feel that the proposed rule pays too much attention to mobility impairments and not enough to communications barriers.

Title III of the ADA requires businesses to remove communication barriers that are structural in nature, if it's readily achievable to do so. "We don't have a lot about that in the rule and we will correct that," Wodatch said.

> *"Businesses should see [ADA] as an opportunity to provide their goods and services to a wider audience."*
>
> -John Wodatch

Some disability groups want the department to reorder priorities for removing barriers. In the draft rule, Justice advised businesses with limited budgets to first remove barriers to entrances. Accessible bathrooms would be the second priority, access to goods and services the third, and any other changes to remove barriers the fourth. Groups would like the second and third priorities switched.

Wodatch said the main complaint from the business community stemmed from the Architectural and Transportation Barriers Compliance Board's proposed ADA guidelines (see February 1991 *Monthly Bulletin*). Many disagreements with the specifics of the guidelines were based on a misunderstanding of what they meant, he said, but some were valid and will be addressed in the final standards. Justice expects to reference the access board's guidelines in its final title III rules.

State and local governments

Wodatch said title II of the ADA, which covers state and local governments, hasn't gotten the attention that has been paid to parts of the act that apply to the private sector. Many jurisdictions are covered by section 504 because they receive federal funds. "[Title II] is not as ground-breaking as titles I or III, so it doesn't have the potential for major impact," he said. "But in those areas where there will be changes, the impact will be great."

Examples of key issues? Town halls (most aren't covered by section 504, and there are a lot of complaints about them, he said); "911" emergency services for hearing-impaired people; police department arrest procedures for disabled people whose conditions may appear to be disorderly conduct (e.g., epilepsy, cerebral palsy); accessibility of state courts; and licensing procedures (i.e., hunting, pharmacy).

What to do now

Wodatch is heartened by the business-community response to the ADA, finding a "great deal of willingness" to comply with the law. The business attitude, he says, is "just let us know what it is that we have to do."

His advice?

First, he said, businesses should become familiar with the law and develop ways to accommodate disabled people. "Businesses should see this as an opportunity to provide their goods and services to a wider audience," he said. "They can see this as a marketing tool, not just another federal obligation."

Compliance, he said, should involve a functional approach. During the debate on the ADA, some groups claimed the measure would cover "900 different types" of disabilities. Wodatch believes that's not a fair way of looking at the ADA. "We're not talking about medical issues," he said.

Instead, he said, a place of public accommodation will have to look at its business from just a few perspectives — mobility impairment, visual impairment, hearing impairment, limited manual dexterity and reduced mental capacity. For example, how will a dry cleaner work with someone in a wheelchair, or how will a store communicate with a deaf customer?

Wodatch also recommends that businesses seek advice from disability-rights and community organizations on accessibility issues.

"They shouldn't just rush off and hire an architect or talk to their attorney," he said. "They should start doing some planning — can they put in a simple ramp, do they have to widen the door?" Services normally offered to customers could be provided or adapted for disabled people, he added.

Training staff to accommodate disabled customers is also essential. (In their comments, disability groups spoke of "codifying common courtesy," Wodatch said.) For example, a company can instruct staff to read menus or prices for blind people, to be patient when a customer needs more time to get a wallet, or to use a pad and pen with a deaf person.

"A lot of [compliance] is common sense," Wodatch said. "And it's a different way of thinking about their business. But I think the first step is understanding the law."❑

Psychologist advises businesses on making accommodations beyond the physical

Mention "reasonable accommodations" to some employers and they think of one thing only — structural changes to their offices or facilities. Reasonable accommodation to them is synonymous with construction crews.

It's true that some disabled employees will need physical alterations in the workplace. Building a ramp over a couple of steps, installing grab bars in the restroom, perhaps widening a doorway, are some examples of what could be required of businesses as a result of the Americans with Disabilities Act.

But many accommodations don't require a hammer and nails. Instead, according to a specialist in adaptive design, accommodations can often involve simple steps to help integrate disabled workers into the workplace, without causing financial burdens or renovation headaches for the employer.

"With a reasonable accommodation, a [disabled] person can interact with the environment in a way that allows him or her to do the job," says Dr. Deborah Kearney, a psychologist and mechanical engineer. Accommodations, she says, help increase a person's capacity for work.

Kearney spoke during a panel discussion on "Accommodating Beyond the Physical" at Expo '91: Access to the Workplace, sponsored by the Brooklyn Center for Independence of the Disabled and the United Way of New York City. Her Massachusetts-based firm, WorkStations, advises businesses on integrating ergonomics and adaptive design into the workplace.

Attitude change

Kearney believes the first accommodation employers should make is changing stereotypical attitudes about disabilities. Age, injury, disease — they affect everyone," she says.

On average, Kearney notes, a person with a disabling condition will have 70 percent of the capacities considered necessary for work. For example, a person with arthritis may not be able to reach or grip well, but will likely have other faculties, such as mobility, speech, vision, hearing, intellect and memory, that allow them to perform most jobs.

All of these capacities, if impaired, can be enhanced through technology (e.g., "speaking" computers, assistive listening devices, headset-controlled keyboards or mobility aids). Kearney noted that the cost of such technology has and will continue to drop as advances are made.

"See what the person is bringing to the job, not the disabling condition," she says. "Don't look at a person in a wheelchair and only see the wheelchair."

"Essential factors"

As part of her service, Kearney evaluates how a particular workplace can be adapted for greater access with respect to 22 "essential factors." These factors can be physical — for example, the layout of an office — but many involve non-physical aspects, such as noise, fatigue, participation and signage.

Assessing these factors, Kearney says, helps determine the types of accommodations that can be made for disabled workers. And while the goal is to integrate the individual worker, often the change will have broader ramifications.

"You should consider the radius of effect," she says. "One accommodation for one disabled worker may help the whole department. And there is a cross-benefit: the accommodation aligns disabled workers with their peers, instead of making them different."

Keeping these essential factors in mind, Kearney offered some suggestions on making non-physical accommodations in the workplace:

• ***Centralize offices in a "circular array."*** Most offices are arranged in a linear layout — cubicles or individual offices placed in a row. "That layout makes it easy to vacuum, but doesn't do a thing for accessibility," Kearney says. As an accommodation for people with mobility impairments, she suggests that companies centralize important office functions, such as files, copying facilities and lunch/break rooms.

This would help provide access to people in wheelchairs by cutting down on the amount of travel and perhaps eliminating some barriers. Also, the circular layout fosters integration of all employees, disabled or not, who would come together in a central meeting place, Kearney noted.

• ***"Map" individual offices.*** One possible accommodation for an employee in a wheelchair is to reduce the amount of maneuvering needed to get through the door and behind a desk in an office. This can be achieved, Kearney says, by "mapping" the office — rearranging furniture and supplies so that equipment and items are easily within the employee's reach.

What are some steps an employer can take? Kearney suggests repositioning desks to expose the "open" side, placing heavier items closer,

*See **Kearney**, Page 7*

Democrats offer alternative civil rights package

Democratic congressional leaders unveiled last month a compromise anti-job discrimination bill designed to break the impasse among lawmakers, business groups and the Bush administration that has stymied passage of new civil rights legislation.

The Democrats' bill is intended to overturn certain Supreme Court decisions that made it harder for women and minorities to sue for job discrimination. The rulings effectively placed on employees the burden of proving that an employment practice is discriminatory.

Last year, President Bush vetoed a similar measure, arguing that it would force businesses to adopt hiring and promotions quotas. The administration also opposed a provision in the bill that would have amended Title VII of the 1964 Civil Rights Act to allow women and minorities to collect unlimited punitive damages for incidents of job bias. Business groups have generally opposed the legislation for those same reasons.

Because the employment section of the Americans with Disabilities Act references title VII as its enforcement scheme, passage of the civil rights bill would allow disabled workers to seek monetary awards under the ADA.

In attempt to boost the bill's chance of passage, the Democrats proposed setting a $150,000 cap on the amount of punitive damages that women and minorities could collect. Currently, money damages are unavailable under title VII. Blacks may sue employers for unlimited damages to redress race discrimination under a separate statute (known as section 1983).

Civil rights groups claim that imposing a cap for women would be unfair.

Meanwhile, the House was scheduled to take up H.R. 1, the version of the legislation originally endorsed by the Democrats and civil rights leaders. That bill, which passed both the House Judiciary and Education and Labor committees, contains no limit on damages.❑

Kearney

Continued from Page 6

and lighter items further away (e.g., put books on lower shelves, paper clips near the top), and perhaps putting files or computer tables on wheels.

• ***Take advantage of resources on hand***. Disabled people are often the best source of accommodations ideas. After interviewing disabled job applicants, Kearney advises, take them on a tour of the facility. This way, they can become familiar with the work environment and perhaps suggest accommodations they would need if employed there.

Another approach is to ask current disabled employees for new ideas they may have about workplace accommodations.

• ***Fight noise with noise***. Background noise can be a problem for people who use hearing aids. Some hearing aids amplify sounds, making all noises louder. This makes it hard for the person using the device to hear co-workers, speakers or phone conversations.

Eliminating background noise in an office is a difficult, if not impossible task. To mitigate its effects, Kearney suggests adding "white noise" that will diminish extraneous sounds and allow a person to concentrate. A small portable fan can often do the trick, she says.

• ***Recognize "not obvious" disabilities***. Employers should recognize that impairments often lead to "not-obvious" disabilities, particularly stress and fatigue, that also need accommodations.

"Everyone will face stress and fatigue on the job," says Kearney, "but they're exacerbated by disabling conditions." For example, dependency on others leads to stress, while the need to shift positions while seated (something everyone does) contributes to fatigue.

Common sense can be an effective accommodation to mitigate the effects of stress and fatigue. Rather than evaluating employees for fatigue and stress at 9:00, wait until mid-morning, Kearney suggests, when work factors start to work against them.

Flexibility also helps. Instead of scheduling out-of-office meetings for a disabled employee at 10:00 or 3:00, make them the first or last item of the day. This avoids the employee having to come to the office, leave, and come back again, which adds to the stress and fatigue levels. Another alternative would be to hold the meeting in the employee's worksite.

• ***Make signs readable***. "Pathfinding" and display signs within offices can fall victim to art, while forsaking any practical value they would otherwise have. "Take into consideration what people can see," Kearney says, recalling one client that mounted white signs with light-blue lettering — attractive, but not very useful. Consider color, letter size and contrast when designing signs, she advises.❑

ADA COMPLIANCE GUIDE

Filing Instructions: June 1991

In this month's update you'll find the latest issue of your ADA Monthly Bulletin newsletter. After reading it, the newsletter should be placed behind the "Monthly Bulletins" tab in your manual.

To add the other pages in this month's mailing, follow the directions below, discarding the old pages and adding the new ones as appropriate.

Pages to Remove (Dated)	Pages to Add (Dated June 1991)	Description of Changes
p. xiii (various)	p. xiii	Update to Current Contents page
Tab 700 pp. 35-36 (August 1990)	Tab 700 pp. 35-36	Correction of typographical error

CURRENT CONTENTS

ADA Compliance Guide

Current Contents as of June 1991

The following is a list of all pages that make up the *ADA Compliance Guide*.

¶720 Survey of State Laws

This is a survey of state non-discrimination laws in the areas of employment, housing, places of public accommodation, education and accessibility. It is a survey of state laws that parallel the protections at the federal level extended under the Americans with Disabilities Act, the Rehabilitation Act and the Architectural Barriers Act.

The following citations reference who is protected under the state law (e.g., physically disabled people); where there is special coverage (e.g., public employment only), it is so noted.

Citations to "White Cane" laws are included. These are statutes that traditionally provide criminal sanctions for discrimination against blind people but now also extend in many cases to other disabled people.

In certain states there are generic anti-discrimination laws related to employment or housing that may or may not cover disabled people. These laws are commonly referred to, for instance, as fair housing, fair employment or civil rights laws. Where such laws protect disabled people, it is so noted.

In the accessibility area, coverage of the law to public and private buildings is noted. Also noted are the current architectural standards in use. For standards, the following abbreviations are used: American National Standards Institute, Inc. (ANSI); Uniform Federal Accessibility Standards (UFAS); Architectural and Transportation Barriers Compliance Board (ATBCB); and Building Officials and Code Administrators (BOCA).

Where there is a blank space next to a category, it means the absence of a civil rights law in this area protecting disabled people. It could also mean that an existing civil rights law in the area does not extend protection to disabled people.

(NOTE: In all of these areas, the laws and regulations are dynamic and subject to change. A cite, therefore, should be checked with legal counsel before relying on it. Also, laws covering state-funded programs, such as Individuals with Disabilities Education Act programs, are not noted.)

	Employment	Public Accommodations	Housing	Education	Accessibility
Alabama	Public employment only. Physically handicapped. Ala. Code 21-7-1.	White Cane Law only. Ala. Code 21-7-3.	Physically handicapped. Ala. Code 21-7-9.		Buildings used by the public or constructed with government funds. ANSI A117.1-1961/71. See also state code, Ala. Code 21-4-1.
Alaska	Physically and mentally handicapped. Alaska Stat. 18.80.220. Physically and mentally handicapped. Publicly funded employment. Alaska Stat. 18.47.010.	Publicly funded facilities. Physically and mentally handicapped. Alaska Stat. 18.80.200. Prohibits discrimination in publicly funded programs and activities. White Cane Law. Alaska Stat. 18.06.020.	Publicly funded housing. Alaska Stat. 47.80.010, supra.	Publicly funded education. Alaska Stat. 47.80.010, supra.	State owned buildings. Public buildings ANSI A117.1-1980. See also state code, Alaska Stat. 35.10.015.

	Employment	Public Accommodations	Housing	Education	Accessibility
Arizona	Physically handicapped. Ariz. Rev. Stat. 41-1463.	White Cane Law. Ariz. Stat. 24-411.			Public and private facilities. Coverage of alterations expanding after January 1987. ANSI A117.1-1980. See also state code, Ariz. Rev. Stat. 34-401.
Arkansas	Public employment. Physically handicapped. Ark. Stat. Ann. 82-2901.	White Cane Law. Ark. Stat. Ann. 82-2902.	White Cane Law. Ark. Stat. Ann. 82-2905.		Publicly funded buildings. ATBCB-1981. See also state code, Ark. Stat. Ann. 14-627.
California	Physically handicapped. Also protects persons on the basis of medical condition. Cal. Code Government Sec. 12940.	Physically handicapped. Cal. Civil Code 51-54.3.	Within definition of public accommodation, Cal. Civil Code 51-54.3, supra.	Private (physically handicapped, blind, deaf) within Cal. Civil Code 51-54.3. State-funded post secondary Cal.-Ed. Sec. 67310. Community Colleges. Cal.-Ed. Secs. 72011, 78440.	Public and private facilities. See Cal. Code Government Sec. 4450.
Colorado	Physically and mentally handicapped (state employment). 4CCR 801-1. Physically handicapped. Col. Rev. Stat. 24-34-402. White Cane Law. Col. Rev. Stat. 24-34-801. Mentally handicapped as of July 1, 1992.	Physically handicapped. Col. Rev. Stat. 24-34-602. White Cane Law. Col. Rev. Stat. 24-34-801. Mentally handicapped as of July 1, 1992.	Physically handicapped. Col. Rev. Stat. 24-34-502. Mentally handicapped as of July 1, 1992.	Within definition of place of public accommodations. Col. Rev. Stat. 24-34-602. Mentally handicapped as of July 1, 1992.	Public and private facilities. Col. Rev. Stat. 9-5-101.
Connecticut	Physically and mentally handicapped and mentally retarded. Conn. Gen. Stat. Ann. 46a-60.	Physically handicapped and mentally retarded. Conn. Gen. Stat. Ann. 46a-64.	Physically handicapped and mentally retarded. Within definition of place of public accommodation. Conn. Gen. Stat. Ann. 46a-64.	Physically handicapped and mentally retarded. Conn. Gen. Stat. 46a-75.	Public and private facilities. ANSI A117.1 as revised. See also state code, Conn. Gen. Stat. 29-269 to 29-274. Conn. Gen. Stat. 29-270 repealed 1988: posting of accessibility symbols.
Delaware	Physically and mentally handicapped. Del. Code 19-724.	White Cane Law. Del. Code 9-2903.	Physically and mentally handicapped. Del. Code 6-4601.		State owned, leased, altered public buildings. ANSI A117.1-1980. See also state code, Del. Code 29-73.
District of Columbia	Physically and mentally handicapped. D.C. Code 1-2512. White Cane Law. D.C. Code 6-1504.	Physically and mentally handicapped. D.C. Code 1-2519. White Cane Law. D.C. Code 6-1501.	Physically and mentally handicapped. D.C. Code 1-2515. White Cane Law. D.C. Code 6-1505.	Physically and mentally handicapped. D.C. Code 1-2520.	Public and private facilities. See D.C. Code 6-1703.
Florida	Physically handicapped, mental retardation and developmental disability. Fla. Stat. Ann. 760.22. White Cane Law. Fla. Stat. Ann. 413.08.	White Cane Law. Fla. Stat. Ann. 413.08.	Physically handicapped. Fla. Stat. Ann. 760.23. White Cane Law. Fla. Stat. Ann. 413.08.	"Handicapped person." Fla. Stat. Ann. 228.2001.	Facilities state owned or built on its behalf used by the public. ANSI A117.1-1980. See also state code, Fla. Stat. Ann. 255.21.

HANDICAPPED
Requirements Handbook

Supplement No. 150 May 1991

Highlights

Major changes proposed for DOT section 504 rules

In an effort to consolidate its accessible transit requirements, the U.S. Department of Transportation (DOT) has proposed major changes to its section 504 regulations (49 C.F.R. Part 27) that would replace entire subparts of the rule with references to the Americans with Disabilities Act (ADA).

Mass transit requirements removed

Perhaps the most notable change DOT would make is to remove Subpart E of the section 504 rules, the standards for accessible mass transit. Bedeviled by controversy since they were first issued in 1979, the mass transit rules have been the subject of two court cases and congressional and executive scrutiny over matters such as scope, spending limits and local options on how to provide accessible transportation.

The ADA effectively settled these disputes by requiring all public and private transportation operators — whether or not they receive federal funds — to acquire only accessible buses, train cars and vans after Aug. 25, 1990. The law also requires all public transit agencies that operate fixed-route transportation (e.g., city bus or subway service) to provide complementary paratransit service for people whose disabilities make it impossible for them to use mainline service.

DOT noted that Subpart E will no longer be needed after the final ADA rules go into effect Jan. 26, 1992.

For that same reason, DOT would also delete from the section 504 rules portions of Subparts B (employment) and D (program accessibility requirements in specific operating administration programs), a number of definitions and all of Subpart C (program accessibility — general).

DOT emphasized that grantees will be required to comply with all ADA regulations, including those issued by the Equal Employ-

ment Opportunity Commission and the Department of Justice (see Supplement No. 148, March 1991).

DOT issued new Section 504 proposal last month (April 4 *Federal Register*, Pages 13856-13981) along with its proposals for paratransit service under ADA. DOT had issued final regulations mandating accessible buses and trains in public transportation last October (49 C.F.R. Part 37 — see Supplement No. 144, November 1990). Also with that final rule, DOT had added a provision to its section 504 rules that tied receipt of federal transportation funding to ADA compliance.

The department is seeking comment on whether any of the deleted sections should be kept or other parts removed. Written comments should be sent by June 3 to Docket Clerk, Docket No. 47483, DOT, 400 Seventh St. S.W., Room 4107, Washington, D.C. 20590.

ADA Update

DOT outlines requirements for paratransit service

New rules that would require transit agencies to provide alternative forms of public transportation for disabled people were proposed last month by the U.S. Department of Transportation.

Published in the April 4 *Federal Register*, the draft regulations (49 C.F.R. Part 37) would partially implement Title II of the Americans with Disabilities Act, which requires public transportation agencies to offer "paratransit" service to disabled people.

Additionally, DOT proposed amendments to final rules on accessible vehicles and service standards that it issued last year (see Supplement No. 140, November 1990), making mostly technical changes and reordering the subparts of the regulation for greater clarity. Under DOT's section 504 regulations, compliance with the ADA is a prerequisite to receiving federal transportation funding.

"One of the primary goals of the ADA is to make it easier for people with disabilities to become part of the American mainstream by ensuring they have access to adequate public transportation," said DOT Secretary Samuel K. Skinner. "This proposed rule would help individuals with disabilities to better meet their basic employment, educational and health needs, and also allow them to take advantage of social, recreational and cultural opportunities."

Paratransit requirements

Under the ADA, public transit agencies that operate "fixed-route" transportation (e.g., city bus or subway lines) are required to offer paratransit service for disabled people who, because of their condition, are unable to use conventional transit. Paratransit usually involves accessible vans that transport dis-

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abled people to and from their homes, most often by reservation.

Many communities have been offering paratransit, some as an alternative to accessible mainline service, as a way of complying with section 504. However, the ADA requires all public transit agencies to provide paratransit as a complement to their fixed-route operations, even if the entire system is lift-equipped. The only exceptions are agencies that operate only commuter bus service (e.g., running from a suburban area into a city) or demand-responsive systems (e.g., where people must first make reservations before the bus comes — often found in rural areas).

The paratransit provisions of the ADA become effective Jan. 26, 1992.

Who is eligible?

Not every disabled person would be eligible for paratransit service under the DOT proposed rules. Instead, transit agencies would have to provide service to "ADA paratransit eligible" individuals, whom the rules define as people who:

- because of their disabilities cannot independently board, ride or disembark from accessible vehicles;
- have a "specific impairment-related condition" (such as chronic fatigue syndrome or visual or mental impairments) that prevents them from getting to or from boarding and exiting spots (but not people who find it uncomfortable or difficult to get to or from stops); and
- need to ride accessible vehicles when accessible mainline service is not offered (e.g., a person in a wheelchair wants to use public transit on a route not served by a lift-equipped bus, or when the accessible bus isn't running).

Additionally, a transit agency would always have to provide paratransit to at least one companion of an "eligible" person (and others, if space is available). This would include anyone the eligible persons wants to travel with — friends, family, a date, etc.

Service area, response time and fares

In the rule, DOT proposes several criteria for transit agencies to incorporate into their paratransit operations; one concerns service area. Under the draft, a transit agency would have to offer paratransit to destinations within corridors along each side of a bus or train route. (The width of that corridor hasn't been set; DOT suggests a range between one-quarter of a mile and 1-1/2 miles, depending on whether the route is urban, suburban or rural.)

For example, a bus route runs the length of a city thoroughfare. Under the DOT rules, a disabled person could request (and receive) paratransit service to any points up to one-quarter of a mile from each side of the street.

When a disabled person requests paratransit, the ADA requires that the response time be "comparable, to the extent practicable" with fixed-route service. The proposed rule specifies a "next-day service" standard for paratransit response time. A disabled person would call the transit provider during business hours on one day (Monday) to reserve a ride for the next (Tuesday).

DOT noted that "real-time scheduling," in which the paratransit van comes on request, was considered as a response time alternative. Advocates of this arrangement said it would be more convenient for passengers as well as being more cost efficient, because it would cut down on the number of cancellations and no-shows.

DOT opted for next-day service in the rules, but wants comments on the costs and efficiency of real-time scheduling.

Paratransit fares, under the proposed rules, could be comparable to fares charged for conventional transit. The base paratransit fare could be no higher than twice the base conventional fare, but could include surcharges that apply to fixed-route transportation (e.g., express service, transfers or rush-hour rides).

Paratransit would have to be available during the same days and hours of operation as fixed-route service.

No trip restrictions

Transit agencies would be prohibited from restricting a person's use of paratransit based on trip purpose. For example, a transit agency could not limit paratransit trips to only doctors' offices or grocery stores, or refuse to take people to visit friends.

Moreover, the rules would not allow transit agencies to impose "capacity control constraints" on the availability of paratransit. DOT points out that constraints such as waiting lists, limiting the number of times a

person can use the service (e.g., 15 times a month only) or denying service because the van isn't full would run counter to the "comparable service" concept.

Plans

The ADA requires transit agencies to submit plans outlining the paratransit service they will provide. Under the proposed DOT rules, the plans would include:

- information about local fixed-route service (e.g., overall service area, population served, number of accessible vehicles);
- a description of existing paratransit service;
- a description of the proposed paratransit service that would comply with the ADA (including budget, timetable for implementation and changes to existing service).

Plans would also have to note if paratransit is offered by a provider other than the transit agency. Transit agencies would not be required to duplicate service, but would have to supplement gaps in the other provider's service. For example, a private company may transport disabled people to and from a hospital twice a week. That service alone would not qualify as "complementary paratransit" under the ADA.

Also, transit agencies would have to allow the general public to participate in crafting the plan. Agencies should hold hearings, provide a comment period and make outreach efforts to disabled people and disability organizations. Plans should be available in accessible formats (braille, taped).

The ADA requires that initial paratransit plans be submitted (generally to state transportation agencies) by Jan. 26, 1992. The Urban Mass Transportation Administration (UMTA) at DOT will have final say in approving the plans.

DOT did not set an effective date for plans to be fully operational, pointing out that communities will differ in their ability to implement paratransit. Instead, the proposed rule would allow transit agencies to phase in paratransit service beginning Jan. 26, 1992. The department wants comments on whether a 5-year phase-in period would be appropriate for ADA-related paratransit.

Paratransit rule would apply to public universities, DOT says

Will public universities have to provide paratransit under the ADA, in addition to any campus shuttle service they may provide? According to the Department of Transportation, the answer is yes.

Title II of the ADA applies to public entities operating fixed-route transportation service. Commenters to DOT have argued that college transportation systems should not be covered by the act because they serve only a limited population (students and faculty), not the general public.

But DOT has rejected that argument, noting that the statute contains no explicit exemption for colleges and universities in this area (the law exempts only public school transportation provided by elementary and secondary schools). Public universities are clearly public entities, the department said in the preamble to proposed ADA rule changes, adding that most campus bus systems are fixed-route transportation systems as defined by the ADA (i.e., travel along a prescribed route according to a fixed schedule).

As a result, public universities would be subject to the same transportation requirements as other public entities. That means acquiring only accessible new vehicles, making accommodations for disabled riders, providing accessible route and schedule information, etc.

It would also mean providing paratransit. As a public provider of fixed-route service, DOT said, a university would be subject to the complementary paratransit requirements and eligible to apply for a waiver based on undue financial burden. The department wants comment on whether paratransit requirements for public universities should be modified in the final rule.

Private universities, DOT said, would be covered by Title III of the ADA, which applies to private entities not primarily engaged in the business of transporting people. Consequently, they would not be required to provide paratransit, although under both section 504 and the ADA, their regular shuttle services would have to be accessible to disabled riders.

Undue burden exception

The ADA allows exemptions for mandatory paratransit if a transit agency can demonstrate that providing it would impose an undue financial burden. DOT proposed three options as "triggers" that would allow transit agencies to request a waiver:

- Option 1 — Providing paratransit would have a "significant adverse effect" on the agency's overall transit service;
- Option 2 — The agency could not provide as many per capita paratransit trips as it does per capita fixed-route trips without jeopardizing overall service;
- Option 3 — The cost of providing paratransit in that community would exceed the average cost for its size (as calculated by DOT).

UMTA would consider several factors in determining whether paratransit would create a financial hardship. These would include fare increases, the effects of paratransit on current fixed-route service, the current level of accessible service and funding (as a percentage of total budget) needed to implement the plan.

Hearings and comments

DOT must issued final ADA rules by July 26, 1991. Written comments can be submitted (by June 3) to Docket Clerk, Docket No. 91-A, DOT, 400 Seventh St. S.W., Room 4107, Washington, D.C. 20590.

For more information, contact Robert Ashby at DOT, (202) 366-9306 or Susan Schruth at UMTA, (202) 366-4101. The proposed rule was published in the April 4 *Federal Register*, Pages 13856-13981.

Transportation Dept. to amend accessible transit rules

DOT intends to amend regulations (49 C.F.R. Part 37) it issued last year concerning accessible public transportation required under the ADA and section 504.

Last month the department published the proposed changes along with draft rules for paratransit service and accessible transportation facilities. In its section 504 rules, DOT has made compliance with the ADA a prerequisite for receiving federal transportation funding.

Most of the proposed amendments would be technical, addressing comments that were submitted in response to the Oct. 4, 1990, rulemaking (see Supplement No. 144, November 1990). Additionally, DOT would rearrange provisions in Part 37 for greater clarity and better organization.

Selecting "key stations"

The ADA and the DOT rules require transit agencies to make existing "key" stations in subway and light-rail systems accessible to disabled riders. Generally, this applies to high-ridership stations located in downtown areas or near tourist/cultural attractions. New York City and Philadelphia have used the key-station concept to retrofit certain stations in their rapid transit systems.

The DOT proposed rules would set criteria for determining key stations. High-ridership stations, defined as stations where passenger boardings are least 15 percent greater than the system's average, would be key stations, as would transfer, end and feeder stations. Stations serving major activity centers and "major trip generators" for disabled people would also be considered key stations.

DOT noted that transit agencies would not have to nominate every station that meets one of these criteria as a key station. Rather, DOT said, the goal is to ensure overall accessibility to the transit system.

Accessibility standards

DOT said it would incorporate accessibility guidelines being developed by the Architectural and Transportation Barriers Compliance Board (see Supplement No. 149, April 1991) into its regulations as the standards for transportation vehicles and facilities. The access board's guidelines would replace interim standards in the Oct. 4 final rule.

In addition, DOT said it would closely follow the Justice Department's requirements for new construction and alteration of public buildings as the guidelines for transportation facilities (see Supplement No. 148, March 1991). Under the Justice rules, new and altered facilities would have to be readily accessible to and usable by disabled people. In addition, if alterations are made to a "primary function area" of a facility, the "path of travel" to that area would have to be accessible.

Ticket purchase and collection areas, train or bus platforms, baggage checking areas and employment areas would qualify as primary function areas in transportation facilities under the DOT proposed rules.

Other changes

DOT would also amend the ADA rules to:

- prohibit transit agencies from charging disabled people for reasonable accommodations;
- cite enforcement procedures under section 504 for ADA violations, and the Justice Department's ADA enforcement rules for public entities that do not receive DOT funds; and
- require that accessibility features (e.g, elevators) be in working order and that accommodations be provided when they break down (e.g., announce to subway riders that an elevator is out of service at a particular stop and provide shuttle service from the nearest station).

Comments sought

Comments on the proposed amendments should be sent by June 3 to Docket Clerk, Docket No. 91-A, DOT, 400 Seventh St. S.W., Room 4107, Washington, D.C. 20590.

In the Courts

University must demonstrate attempts to accommodate disabled student, court rules

A medical school failed to show that it considered alternative testing methods to accommodate a dyslexic student, the 1st U.S. Circuit Court of Appeals has ruled.

Steven Wynne sued Tufts University for dismissing him after he twice failed to pass the first year of the medical program. Doctors diagnosed Wynne as having dyslexia, which they said impaired his ability to answer multiple choice questions. Wynne asked Tufts to give him oral exams as an accommodation. The university agreed to provide notetakers and tutors, but would not change its testing method.

Wynne argued that despite his poor academic record, he was qualified to be a medical student. He noted that he performed better on tests, such as his practicum, that used testing methods different from the multiple choice approach.

Tufts countered that Wynne was not otherwise qualified under section 504. Multiple choice exams, officials said, measure a person's ability to understand and analyze complex material, which is essential to becoming a good doctor. The university argued that Wynne's inability to perform well on multiple choice tests demonstrated that he was not qualified to be a doctor and thus did not need to be accommodated.

The U.S. District Court for the District of Massachusetts ruled in favor of the university, but in 1990, a panel of the 1st Circuit ruled in favor of Wynne (*Wynne v. Tufts University School of Medicine*, Appendix IV:483). Ruling *en banc*, the appeals court upheld that decision and remanded the case.

Under section 504, the court said, a university must demonstrate that it sought "suitable means of reasonably accommodating a handicapped person." The university never indicated that it considered alternatives to multiple choice exams, it said.

In a dissent, three judges said the university had effectively proved that Wynne was not otherwise qualified and that the court was not giving enough credence to educators' professional judgment about how the demands of medicine are "best-tested."

The dissent said Tufts is not required to accommodate characteristics (such as Wynne's condition) that inhibit a person's ability to learn to become a good doctor. Further, the dissenting judges said designing tests aimed at screening out people who will not become good doctors is a "quintessential academic task close to the heart of a professional school's basic mission" that doctors, not judges, should carry out.

Recovered alcoholic fails to prove disability led to job dismissal, court says

A rehabilitated alcoholic failed to prove he was fired from his job solely because of his disability, the U.S. District Court for the Southern District of New York has ruled.

John Teahan was a telephone and telegraph maintainer for Metro-North Railroad. Over a three-year span, his work absences increased due to a drug and alcohol addiction (from 19 days in 1984 to 139 days in 1986).

In 1986 Teahan entered a hospital program, but the treatment failed and his substance abuse and absenteeism returned. He missed 57 work days in 1987. Late that year, Teahan entered and successfully completed a month-long treatment program. As required by union rules, he was allowed to return to work in January 1988 and was not absent for any reason until being fired in April.

The railroad said it fired Teahan because of his excessive absenteeism. Teahan, however, claimed he was fired because of his disability, which he said violated section 504. Section 504 protects rehabilitated substance abusers, but doesn't cover people whose current drug or alcohol use prevents them from performing their jobs or poses a direct threat to others or property.

In handing down summary judgment for Metro-North, the court said Teahan failed to prove that he was fired solely because of his disability. Teahan argued only that he was a member of a protected group without presenting evidence of disparate treatment, the court said, and his "assertion that Metro-North knew he had an alcohol and drug problem is insufficient proof of discriminatory intent to survive a summary judgment."

On other issues, the court acknowledged that questions of material fact remained. The railroad argued that Teahan was not disabled within the meaning of section 504. But the court noted that Teahan had successfully completed treatment; therefore, he could be considered rehabilitated and be "within the protection of the act."

Metro-North also contended that Teahan was not otherwise qualified for his job because he could not be depended on to report to work. But the court disagreed, noting that his record was due to past addiction and that he had not missed work since being rehabilitated. The court ruled that Teahan could be found to be capable of reporting to work at the time of his dismissal.

This case is *Teahan v. Metro-North Commuter Railroad Company*, Appendix IV:494.

Agency Action

ED proposes funding priority for attention deficit disorder research

The U.S. Department of Education (ED) has proposed as a funding priority the establishment of research centers on children with attention deficit disorder. Knowledge obtained through this research will help educators, researchers and parents respond to the educational needs of children with this condition. Congress mandated that ED explore attention deficit disorder when it reauthorized (and renamed) the Individuals with Disabilities Education Act (formerly the Education of the Handicapped Act) last year.

Comments on this funding priority should be submitted by June 10. For more information, contact Linda Glidewell at ED, (202) 732-1009 (voice) or (202) 732-6153 (TDD). (April 9 *Federal Register*, Pages 14432-14433.)

ED announces funding priorities, available grants

ED has announced final fiscal year 1991 funding priorities and grants available for projects in two programs: educational media research, production, distribution and training; and technology, educational media and materials for individuals with disabilities.

Grants are available for priorities under both programs. For more information about the media programs, contact Joseph Clair (202) 752-4503; for information concerning technology programs, contact Linda Glidewell (202) 732-1099. (April 11 *Federal Register*, Pages 14808-14821.)

In addition, funding is available to support research under the early education program for children with disabilities and to evaluate the effectiveness of activities funded by the Individuals with Disabilities Education Act. Information on these grants can be found in the April 24 *Federal Register*, Pages 18880-18885.

Resources

• ***"Testing Accommodations for Students with Disabilities,"*** by Warren King and Jane Jarrow. Available for $17 from AHSSPPE, P.O. Box 21192, Columbus, Ohio 43221.

• ***"College Students with Learning Disabilities: A Handbook for College LD Students, Admissions Officers, Faculty and Administrators,"*** by Susan Vogel. Available for $5.50 from the Learning Disability Association Book Store, 416 Library Road, Pittsburgh, Pa. 15234.

• ***"The Civil Rights of Students with Hidden Disabilities under Section 504 of the Rehabilitation Act,"*** single copies available free from the U.S. Department of Education, Washington, D.C. 20202-1328 or from regional ED Offices for Civil Rights.

• ***"Understanding the Americans with Disabilities Act,"*** single copies available free from the Eastern Paralyzed Veterans Association, 75-20 Astoria Blvd., Jackson Heights, N.Y. 11370-1178.

Handbook Page Changes in Supplement No. 150

May 1991

Pages to be DISCARDED	Pages to be ADDED (Dated May 1991)	Description of Revisions
v & vi (April 1991)	v & vi	Update to Current Contents page
Appendix IV pp. 251-252 (July 1990)	Appendix IV pp. 251-252	Update to court case No. 483
Appendix IV p. 257 (April 1991)	Appendix IV pp. 257-258	Addition of court case No. 494

DISCARD THIS SHEET AFTER CHANGES HAVE BEEN MADE

Contents of Basic 504 Compliance Guide

The following is a listing of all pages that make up the Basic 504 Compliance Guide of the *Handicapped Requirements Handbook* with the inclusion of the May 1991, Supplement No. 150 update pages.

Appendix IV

Appendix V

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Appendix VII

Index

481 *Eastman v. Virginia Polytechnic Institute*, 732 F. Supp. 665 (W.D. Va. 1990)

Section 504 claims limited by statute of limitations in analogous state law

Claims brought under Section 504 of the Rehabilitation Act are limited to the statute of limitations prescribed by the analogous law of the state in which the case is brought, the U.S. District Court for the Western District of Virginia ruled.

Ann Eastman, a former employee of Virginia Polytechnic University (VPI), was transferred in 1986 to another department in the school. She told the university that she was disabled and would need help with both her move and with some of her new responsibilities. The university promised assistance, but provided little help for the move and none for her new job.

The plaintiff claimed that because the university did not provide the assistance, her physical condition worsened. In 1987, she was placed on disability retirement. She sued VPI, claiming its failure to provide assistance violated section 504.

Seeking to dismiss the suit, VPI argued that Eastman's claim was barred by a statute of limitations. The court agreed.

The Rehabilitation Act does not specify a statute of limitations. As a general rule, the court noted, "where there is no federal statute of limitations expressly applicable to a federal claim, the most closely analogous statute of limitations under state law applies."

In this case, the Virginia Rights of Persons with Disabilities Act provides a one-year statute of limitations. The alleged violation of section 504 occurred in 1986, but Eastman did not file suit until 1988. Therefore, the court ruled, her action is barred by the appropriate one-year statute of limitations.

482 *Doe v. Southeastern University*, 732 F. Supp. 7 (D. D. C. 1990)

Non-equitable damages not available under section 504. Statute of limitations for section 504 claims governed by appropriate state law

Claims brought under Section 504 of the Rehabilitation Act in the District of Columbia are limited to the three-year statute of limitations in the Distrit of Columbia's personal injury law, the U.S. District Court for the District of Columbia ruled. The court also ruled that monetary damages are not available under section 504.

The plaintiff in this case, a former student at Southeastern University, said he tested positive for the HIV virus (the virus which causes AIDS). He was hospitalized in 1986 and had to be excused from his fall semester classes. His doctor confirmed his medical condition in a letter to the university.

According to the plaintiff, the university gave information about his condition to faculty and staff. As a result, he said, he was embarrassed, harassed and felt forced to transfer to the University of Maryland. He further charged that Southeastern officials improperly told University of Maryland staff about his condition.

Claiming that the university's actions inflicted emotional distress, caused an invasion of privacy, and discriminated against his disability, plaintiff sued, seeking compensatory and punitive damages under section 504.

University officials said the charges should be dismissed because the Rehabilitation Act does not provide monetary damages. They also argued that his claims are barred by a one-year statute of limitations under the District of Columbia's invasion of privacy law.

The court noted that the Rehabilitation Act does not specify a statute of limitations. Instead, courts have relied on statute of limitations prescribed by appropriate state laws, and increasingly, that has been a state's personal injury statute. Because the District of Columbia's personal injury law allows a three-year time span, the court held in favor of the plaintiff on the statute of limitations issue.

However, it dismissed his claim for punitive damages. "Even reading the complaint liberally and assuming that testing positive for AIDS antibodies is a handicap, and assuming he could prove damages, the court determines that plaintiff would be limited to equitable relief," the court ruled.

Courts are divided on whether monetary damages are available under section 504, and the Supreme Court has expressly declined to rule on the issue. The District Court said it found persuasive decisions affording only equitable relief in section 504 cases, adding that monetary relief should be provided through a change in the law.

"If Congress feels that additional remedies are necessary to protect the rights of handicapped individuals, Congress must make that law, not this court," it said.

The court also dismissed the invasion of privacy and emotional distress claims.

483 *Wynne v. Tufts University School of Medicine*, No. 89-1670 (1st. Cir 1990)

Dyslexic medical student may be otherwise qualified under section 504

A dyslexic medical student could be considered otherwise qualified and entitled to reasonable accommodations under Section 504 of the Rehabilitation Act, the 1st U.S. Circuit Court of Appeals ruled.

Tufts University Medical School dismissed Steven Wynne after he failed several courses during two attempts to finish the first year of the medical program. Doctors diagnosed Wynne as having dyslexia, which they said impairs his ability to answer multiple choice questions. Wynne asked the university to modify its testing method and give him oral instead of multiple choice exams for certain courses. The university agreed to provide notetakers and tutoring, but would not change its testing method.

Wynne charged that Tufts' refusal to accommodate his condition violates section 504. Despite his poor academic record, Wynne contended that he is qualified to be a medical student. He noted that he scored "substantially higher" on practicum and other exams that used methods other than multiple choice questions to test knowledge.

University officials, however, said Wynne's problem with multiple choice exams demonstrates "an inability to process complex information," which prevents him from meeting an essential requirement for a degree — passing all his courses. They cited other cases, including *Southeastern Community College v. Davis* (Appendix IV:22), in which courts upheld the decision to dismiss a disabled student who could not meet the essential requirements of an academic program.

Additionally, Tufts contended that a school's testing policy is a matter of academic "substance" that should not be second-guessed by a court.

The U.S. District Court for the District of Massachusetts found in favor of Tufts, ruling that Wynne was unable to prove that he could meet the school's requirements. The appellate court reversed that decision, ruling that Wynne's status as otherwise qualified was not resolved.

The appeals court noted that in *Davis*, the Supreme Court held that educational institutions are not required to lower their standards or make substantial changes to their programs to accommodate disabled students. But, the Court added, reasonable accommodations are sometimes necessary to fulfill section 504's mandate.

In this case, the appeals court said, the issue is not about Wynne's ability to meet the requirements of the Tufts Medical School. Instead, it is "whether there is a reasonable accommodation to his disability that can be made by the school so as to give him 'meaningful access' to the education offered there."

And while it acknowledged that deference should given to academic decision making, the court said "section 504 requires us to examine closely supposedly academic decisions to be certain that they do not mask even unintended discrimination against the handicapped."

The court said Tufts did not explain why multiple choice exams, as opposed to other types of exams, could alone measure a student's mastery of a complex subject, except to say that they are "necessary." "We find it hard to understand why essay examinations would not meet the same objective," the court observed.

Further, the court rejected the parallel between the student in *Davis* and Wynne. In the former case, the disabled student could not perform a technical requirement of the academic program. In this case, "the alleged discrimination stems not from the particular skill required — the ability to work with complex data — but from the method by which Tufts measures that ability."

The court found insufficient evidence to determine that changing the testing method would be a "fundamental alteration" of the Tufts medical program or that Wynne would fail his courses if tested by other exams. "A dispute remains," the court concluded, "over whether [he] could survive in medical school if his abilities were evaluated in a different way."

On appeal —

Ruling *en banc*, the First Circuit reversed the District Court's summary judgment in favor of Tufts and remanded the case. Under section 504, the court said, a university must "seek suitable means of reasonably accommodating a handicapped person and . . . submit a factual record indicating that it conscientiously carried out" this duty.

Tufts argued that multiple-choice exams are essential in evaluating whether someone will become a good doctor. However, the court noted, the university neither indicated that it considered alternatives to those exams nor who made such a decision. Without such evidence, the court said it could not properly review the issues as required by statute.

In a dissent, three judges said the university had effectively proved that Wynne was not otherwise qualified and that the majority was not giving enough credence to educators' professional judgment about how the demands of medicine are "best-tested." The dissent noted three circumstances to support the university: (1) Tufts is not reasonably or lawfully required to accommodate a characteristic (such as Wynne's condition) that inhibits one's ability to learn to become a good doctor; (2) designing tests aimed at screening out people who will not become good doctors is a "quintessential academic task close to the heart of a professional school's basic mission"; and (3) designing proper tests is a judgmental matter "to which teachers and doctors are far more expert than judges and juries."

484 *Blissitt v. City of Chicago*, No. 86 C 9684 (N.D. Ill. 1990)

Chicago police department reinstatement policy for officers on disability leave does not violate section 504

The Chicago Police Department's policy of restricting light-duty assignments to police officers injured while on duty does not violate Section 504 of the Rehabilitation Act, the U.S. District Court for the Northern District of Illinois ruled.

Chicago police officers may take one year of medical leave with full pay and benefits. If after the year they are unable to return to work, officers can apply for a disability pension funded by the Police Pension Board. Under an agreement with the Chicago Fraternal Order of Police, police officers injured in the line-of-duty are entitled to limited- or light-duty assignments. These assignments involve aspects of police work other than field work (such as desk jobs).

Disabled officers not injured on-the-job are assigned light duty at the discretion of the department. In addition, officers on disability pensions who seek reinstatement may only be placed in full-duty assignments.

Shirley Blissitt is a sergeant in the Chicago Police Department. In 1983, she was placed on medical leave for epincondylitis of the right elbow (better known as "tennis elbow"). When her medical leave expired in 1984, she applied for and received disability benefits from the pension fund.

Blissitt twice applied for a light-duty assignment. The first time she was denied because the department doctor considered her unfit for full or limited police work. She was turned down a second time because she was receiving a disability pension. Blissitt sued the department, arguing that the reinstatement policy violated section 504.

The court agreed that Blissitt met the criteria for being disabled under the act, but it said the police department did not exclude her from the light-duty assignment solely by reason of her disability. Noting that an officer is entitled to light duty only if injured in the line of duty, the court said "Blissitt is simply off the mark to suggest the department denied her a light duty assignment only because she was handicapped."

Blissitt claimed she was otherwise qualified for the position because she could perform clerical tasks, which she said were essential police functions. But the court called this definition of essential police function "inaccurate," noting that Chicago police officers are sworn to "preserve order, peace and quiet and enforce the laws and ordinances throughout the city."

Second, Blissitt argued that the department's return-from-disability policy required that officers satisfy physical tasks "which may go beyond the demands of particular jobs that may be available." The court ruled that Blissitt had not been required to satisfy unreasonable physical requirements. "Whatever the demands of the job," the court said, "[she] acknowledged she did not meet them when she requested her removal to the medical roll."

492 *Chiari v. City of League City*, 920 F.2d 311 (5th Cir. 1991)

Construction inspector who has Parkinson's disease not otherwise qualified to perform essential functions of the job

A city did not violate Section 504 of the Rehabilitation Act when it fired a construction inspector who would lose his balance and thus was unable to perform the essential functions of the job, the 5th U.S. Circuit Court of Appeals ruled.

Antonio Chiari, an engineer who has Parkinson's disease, was a construction inspector for League City, Texas. Inspectors are responsible for approving construction plans and verifying that the work was properly completed. Nearly half of the job is spent at construction sites visually inspecting contractors' work, which requires considerable walking and climbing.

In early 1987, Chiari began to have trouble walking; he was seen stumbling in the city hall and falling while at a construction site. At the request of his supervisor, Chiari was examined separately by two neurosurgeons, who found he had an unsteady "shuffling gait and body rigidity." They both said his loss of balance rendered him unable to continue his job as a construction inspector and that he would be a danger to himself and others if he continued to work.

Chiari's personal physician also examined him, and saw "no particular limitation of [Chiari's] work, as long as he [did] not climb."

City officials tried unsuccessfully to restructure the job to accommodate Chiari's condition. First, they assigned another inspector to do on-site work while Chiari remained at his desk to review the plans. That arrangement did not work because to do the job properly, an inspector must review plans before visiting the site. They tried to create a new position, but could not due to budgetary constraints, and the city had no open positions for a transfer.

After these attempts failed, the city fired Chiari in April 1987. He sued, charging that the dismissal violated section 504 and the Texas Human Rights Act. He said he had never fallen on or injured a co-worker, and that the risk of personal injury was not a factor under section 504. Chiari also argued that the city could have provided him with part-time work as an accommodation.

The city said Chiari was not protected by section 504 because he could not perform the essential functions of the job, namely walking and climbing around construction sites safely.

The U.S. District Court for the Southern District of Texas ruled in favor of the city. That ruling was upheld by the 5th Circuit, which agreed that Chiari was no longer qualified to be a construction inspector. Citing *Arline* (see Appendix IV:329) and other section 504 cases, the appeals court said a "handicapped person cannot perform the essential functions of a job if his handicap poses a significant safety risk to those around him."

To support its judgment, the court cited the neurosurgeons' diagnoses that Chiari's balance problem would prevent him from working safely. Chiari's doctor concluded similarly when he was read the job description during the case.

The appeals court disagreed with Chiari that the risk of personal injury was immaterial. It cited section 501 regulations that include "health and safety of the individual" in the definition of qualified handicapped person. The existence of a personal safety rule in section 501 creates a similar rule under section 504, the court said.

Finally, the court ruled that city officials "went beyond their statutory duty in an effort to accommodate Chiari's disease" and that they were not required to create a new part-time position as an accommodation.

"All the city must do is demonstrate that a part-time schedule would not accommodate Chiari's performance on that job that he is currently doing," it said. "Even if Chiari worked fewer hours, he still would not be able to climb buildings or climb into ditches, [which are] 'essential functions' of a construction inspector's job."

For the same reasons cited under section 504, the court found no violations of the Texas discrimination law.

493 *Gault v. University of Chicago Hospitals*, No. 90-C0321 (N.D. Ill. 1991)

Epileptic nurse not otherwise qualified to work in burn unit of hospital

A nurse who suffers from epileptic seizures is not "otherwise qualified" within in the meaning of Section 504 of the Rehabilitation Act to work in the burn unit of a hospital, the U.S. District Court for the Northern District of Illinois ruled.

Freida Gault sued the University of Chicago Hospitals for allegedly violating section 504 when it dismissed her as a burn-unit nurse. Gault has idiopathic epilepsy, which causes her to have unpredictable generalized seizures. Before the onset of a seizure, Gault will stare blankly. She then experiences convulsions, falls to floor and loses consciousness. After she recovers, there is a period of confusion.

Gault suffered seizures while on duty. According to hospital officials, seizures occurred while she was: using scissors to change a dressing; assisting an infant's breathing apparatus "resulting in extubation of the patient and her inability to summon needed medical care"; and cutting a dressing, which caused the patient to leave his room to summon help.

Additionally, Gault suffered a head injury during one seizure that required emergency room treatment and made her unable to help a seriously burned patient on a ventilator and tube feeding.

The hospitals knew of Gault's condition before they hired her, and did not relieve her from duty after the first seizure. One doctor at the hospital thought the seizures were under control and would not endanger her or others. Several seizures followed, however, and Gault agreed to consult an expert from another hospital.

That doctor told Gault that the seizures were not under control and that it was dangerous for her to work in a burn unit or operating room. Gault would not tell hospital officials about this diagnosis, and as a result, the hospitals placed her on leave.

Based on these circumstances, the court ruled that Gault is not otherwise qualified because she was not meeting the position requirements of a burn-unit nurse. Further, the court found no section 504 violations on the part of the hospitals.

Gault cannot "contend that the decision process to remove her from the burn unit . . . was motivated by prejudice against her handicap or was conducted unfairly," the court said. "The hospitals are indisputably willing to hire epileptics and to assign them to critical care units."

494 *Teahan v. Metro-North Commuter Railroad Company*, No. 88 Civ. 5376 (S.D.N.Y. 1991)

Recovered alcoholic fails to prove disability as sole basis for job dismissal

A rehabilitated alcoholic failed to prove he was fired from his job solely because of his disability, the U.S. District Court for the Southern District of New York ruled.

John Teahan, a telephone and telegraph maintainer for Metro-North Railroad, was fired for what the railroad said was excessive, unauthorized absenteeism. During a four-year span, Teahan's drug and alcohol addiction caused him to miss many work days. In 1984 he was absent 19 days; his absenteeism rose to 139 days in 1986. He was disciplined for these absences.

In early 1986, Teahan sought help from the company's rehabilitation program and voluntarily entered a hospital program. The treatment failed, however, and his substance abuse and absenteeism returned. He missed 57 work days in 1987. Later that year, Teahan entered and successfully completed a month-long treatment program. As required by union rules, he returned to work in January 1988 and was not absent for any reason until being fired in April 1988.

Teahan claimed the firing violated section 504 because the railroad acted against his disability. Section 504 protects rehabilitated substance abusers from discrimination based on disability, but does not cover people whose current use of drugs or alcohol prevents them from performing their jobs or constitutes a direct threat to others or property.

The railroad claimed that it acted solely based on Teahan's excessive absenteeism and asked for summary judgment, which the District Court granted.

The court acknowledged that Teahan raised issues of material fact that Metro-North did not disprove. First, the railroad argued that Teahan was not disabled within the meaning of section 504. However, the court said, Teahan had successfully completed treatment and was not absent before being fired. Based on this evidence, he could qualify as being rehabilitated and "therefore within the protection of the act," the court noted.

Second, Metro-North contended that Teahan was not otherwise qualified for his job because he could not be depended on to report to work. But noting that his prior absences were due to addiction and that he had not missed work since being rehabilitated, the court suggested that Teahan could be capable of reporting to work at the time of his dismissal.

The court found that Metro-North would succeed on the issue that Teahan was legitimately fired only because of his absentee record. The court said Teahan failed to prove his argument that he was terminated solely based on his disability.

Teahan, the court said, argued only that he was a member of a protected group without presenting evidence of disparate treatment. "Teahan's assertion that Metro-North knew he had an alcohol and drug problem is insufficient proof of discriminatory intent to survive a summary judgment," the court said. "In fact, Teahan fails to present any affidavits, deposition or other evidence at all in opposition to Metro-North's motion."

ADA COMPLIANCE GUIDE

Filing Instructions: March 1991

In this month's update you'll find the latest issue of your ADA Monthly Bulletin newsletter. After reading it, the newsletter should be placed behind the "Monthly Bulletins" tab in your manual.

To add the other pages in this month's mailing, follow the directions below, discarding the old pages and adding the new ones as appropriate.

Pages to Remove (Dated)	**Pages to Add** (Dated March 1991)	**Description of Changes**
p. ix-xiii (various)	p. ix-xiii	Update to Table of Contents; Current Contents page
Appendix III p. 1 (October 1990)	Appendix III p. 1	Update to Appendix III Table of Contents
None	Appendix III pp. 3-9	Addition of proposed EEOC rules on ADA Title I (employment)
None	Appendix III pp. 75-88	Addition of proposed Justice Dept. rules on ADA Title III (public accommodation)
None	Appendix III pp. 151-158	Addition of proposed Justice Dept. rules on ADA Title II (public service)

DISCARD THIS SHEET AFTER CHANGES HAVE BEEN MADE

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1630

Equal Employment Opportunity for Individuals With Disabilities

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: On July 26, 1990, the Americans with Disabilities Act (ADA) was signed into law. Section 106 of the ADA requires that the Equal Employment Opportunity Commission (EEOC) issue substantive regulations implementing title I (Employment) within one year of the date of enactment of the Act. Pursuant to this mandate the Commission is publishing a proposed new part 1630 to its regulations to implement title I and sections 3(2), 3(3), 501, 503, 508, 510 and 511 of the ADA as those sections pertain to employment. These regulations prohibit discrimination against qualified individuals with disabilities in all aspects of employment.

DATES: To be assured of consideration, comments must be in writing and must be received on or before April 29, 1991. The Commission will consider any comments received on or before the closing date and thereafter adopt final regulations. Comments that are received after the closing date will be considered to the extent practicable.

ADDRESSES: Written comments should be submitted to Frances M. Hart, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 "L" Street NW., Washington, DC 20507.

As a convenience to commenters, the Executive Secretariat will accept public comments transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is (202) 663–4114. (This is not a toll-free number). Only public comments of six or fewer pages will be accepted via FAX transmittal. This limitation is necessary in order to assure access to the equipment. Comments sent by FAX in excess of six pages will not be accepted. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat Staff at (202) 663–4078. (This is not a toll-free number).

Comments received will be available for public inspection in the EEOC Library, room 6502, by appointment only, from 9 a.m. to 5 p.m., Monday through Friday except legal holidays, from March 14, 1991, until the Commission publishes the rule in final form. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. To schedule an appointment call (202) 663–4630 (voice), (202) 663–4630 (TDD).

Copies of this notice of proposed rulemaking are available in the following alternate formats: large print, braille, electronic file on computer disk, and audio-tape. Copies may be obtained from the Office of Equal Employment Opportunity by calling (202) 663–4395 (voice) or (202) 663–4399 (TDD).

FOR FURTHER INFORMATION CONTACT: Elizabeth M. Thornton, Deputy Legal Counsel, (202) 663–4638 (voice), (202) 663–7026 (TDD).

PART 1630—REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Sec.

Sec.

Authority: 42 U.S.C. 12116.

§ 1630.1 Purpose, applicability, and construction.

(a) *Purpose.* The purpose of this part is to implement title I of the Americans with Disabilities Act (ADA), requiring equal employment opportunities for qualified individuals with disabilities, and sections 3(2), 3(3), 501, 503, 508, 510, and 511 of the ADA as those sections pertain to the employment of qualified individuals with disabilities.

(b) *Applicability.* This part applies to "covered entities" as defined at § 1630.2(b).

(c) *Construction.*—(1) *In general.* Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790–794a), or the regulations issued by Federal agencies pursuant to that title.

(2) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this part.

§ 1630.2 Definitions.

(a) *Commission* means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4).

(b) *Covered Entity* means an employer, employment agency, labor organization, or joint labor management committee.

(c) *Person, labor organization, employment agency, commerce and industry affecting commerce* shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) *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.

(e) *Employer.*—(1) *In general.* The term "employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) *Exceptions.* The term employer does not include—

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) *Employee* means an individual employed by an employer.

(g) *Disability* means, with respect to an individual—

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

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment.

(See § 1630.3 for exceptions to this definition).

(h) *Physical or mental impairment* means:

(1) 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; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) *Substantially limits.*—(1) The term "substantially limits" means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of "working"—

(i) The term "substantially limits" means significant restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors should be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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DATES: To be assured of consideration, comments must be in writing and must be received on or before April 29, 1991. The Commission will consider any comments received on or before the closing date and thereafter adopt final regulations. Comments that are received after the closing date will be considered to the extent practicable.

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geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) *Has a record of such impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) *Is regarded as having such an impairment* means:

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

(2) 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

(3) Has none of the impairments defined in paragraphs (h) (1) or (2) of this section but is treated by a covered entity has having such an impairment.

(m) *Qualified individual with a disability* means an individual with a disability who satisfies the requisite skill, experience and education requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See § 1630.3 for exceptions to this definition).

(n) *Essential functions.*—(1) *In general.* The term "essential functions" means primary job duties that are intrinsic to the employment position the individual holds or desires. The term "essential functions" does not include the marginal or peripheral functions of the position that are incidental to the performance of primary job functions.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence that may be considered in determining whether a particular function is essential includes but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The work experience of past incumbents in the job; and/or

(vi) The current work experience of incumbents in similar jobs.

(o) *Reasonable accommodation.*—(1) The term *reasonable accommodation* means:

(i) Any modification or adjustment to a job application process that enables a qualified individual with a disability to be considered for the position such qualified individual desires, and which will not impose an undue hardship on the covered entity's business; or

(ii) Any modification or adjustment to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enables a qualified individual with a disability to perform the essential functions of that position, and which will impose an undue hardship on the operation of the covered entity's business; or

(iii) Any modification or adjustment that enables a covered entity's employee with a disability to enjoy the same benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities, and which will not impose an undue hardship on the operation of the covered entity's business.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(p) *Undue hardship.*—(1) *In general. Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and cost of the accommodation needed under this part;

(ii) The overall financial resources of the site or sites involved in the provision of the reasonable accommodation, the number of persons employed at such site, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the site or sites in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the site, including the impact on the ability of other employees to perform their duties and the impact on the site's ability to conduct business.

(3) *Site* means a geographically separate subpart of a covered entity.

(q) *Qualification standards* means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired. Qualification standards may include a requirement that an individual not pose

a direct threat to the health or safety of the individual or others. (See § 1630.10 Qualification standards, tests and other selection criteria).

(r) *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated by reasonable accommodation. The determination that an individual with a disability poses a "direct threat" should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm; and

(3) The likelihood that the potential harm will occur.

§ 1630.3 Exceptions to the definitions of "Disability" and "Qualified individual with a disability."

(a) The terms *disability* and *qualified individual with a disability* do not include individuals currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(1) *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).

(2) *Illegal use of drugs* means the use of drugs the possession or distribution of which is unlawful under the Controlled Substances Act, as periodically updated by the Food and Drug Administration. This term does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(b) However, the terms *disability* and *qualified individual with a disability* may not exclude an individual who:

(1) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs; or

(2) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(c) It shall not be a violation of this part for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (b) (1) or (2) of this section is no longer engaging in the illegal use of drugs. (See § 1630.16(c) Drug testing).

(d) *Disability* does not include:

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

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

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

(e) *Homosexuality and bisexuality* are not impairments and so are not disabilities as defined in this part.

§ 1630.4 Discrimination prohibited.

It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to:

(a) Recruitment, advertising, and job application procedures;

(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

(g) Selection and financial support for training, including, apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(h) Activities sponsored by a covered entity including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

The term *discrimination* includes but is not limited to the acts in §§ 1630.5 through 1630.13 of this part.

§ 1630.5 Limiting, segregating, and classifying.

It is unlawful for a covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability.

§ 1630.6 Contractual or other arrangements.

(a) *In general.* It is unlawful for a covered entity to participate in a contractual or other arrangement or relationship that has the effect of subjecting the covered entity's own qualified applicant or employee with a disability to the discrimination prohibited by this part.

(b) *Contractual or other arrangement defined.* The phrase "contractual or other arrangement or relationship" includes, but is not limited to, a relationship with an employment or referral agency; labor union, including collective bargaining agreements; an organization providing fringe benefits to an employee of the covered entity; or an organization providing training and apprenticeship programs.

(c) *Application.* This section applies to a covered entity, with respect to its own applicants or employees, whether the entity offered the contract or initiated the relationship, or whether the entity accepted the contract or acceded to the relationship. A covered entity is not liable for the actions of the other party or parties to the contract which only affect that other party's employees or applicants.

§ 1630.7 Standards, criteria, or methods of administration.

It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not job-related and consistent with business necessity, and:

(a) That have the effect of discriminating on the basis of disability; or

(b) That perpetuate the discrimination of others who are subject to common administrative control.

§ 1630.8 Relationship or association with an individual with a disability.

It is unlawful for a covered entity to exclude or otherwise deny equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.

§ 1630.9 Not making reasonable accommodation.

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can

demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

(c) A covered entity shall not be excused from 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 ADA.

(d) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

§ 1630.10 Qualification standards, tests, and other selection criteria.

(a) *In general.* It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

(b) *Direct threat as a qualification standard.* Notwithstanding paragraph (a) of this section, a covered entity may use as a qualification standard the requirement that an individual be able to perform the essential functions of the position held or desired without posing a direct threat to the health or safety of the individual or others. (See § 1630.2(r) defining "direct threat").

§ 1630.11 Administration of tests.

It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

§ 1630.12 Retaliation and coercion.

(a) *Retaliation.* It is unlawful to 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 to enforce any provision contained in this part.

(b) *Coercion, interference or intimidation.* It is unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part.

§ 1630.13 Prohibited medical examinations and inquiries.

(a) *Pre-employment examination or inquiry.* Except as permitted by § 1630.14, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

(b) *Examination or inquiry of employees.* Except as permitted by § 1630.14, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability, unless the examination or inquiry is shown to be job-related and consistent with business necessity.

§ 1630.14 Medical examinations and inquiries specifically permitted.

(a) *Acceptable pre-employment inquiry.* A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions.

(b) *Employment entrance examination.* A covered entity may require a medical examination after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination, if all entering employees in the same job category are subjected to such an examination regardless of disability.

(1) Information obtained regarding the medical condition or history of the applicant shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) The results of such examination may be used only in accordance with this part.

(3) Medical examinations conducted in accordance with this Section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation as required in this part. (See § 1630.15(b) Defenses to charges of discriminatory application of selection criteria).

(c) *Other acceptable examinations and inquiries.* A covered entity may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary

restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this Part shall be provided relevant information on request.

(2) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

§ 1630.15 Defenses.

Defenses to an allegation of discrimination under this part may include, but are not limited to, the following:

(a) *Disparate treatment charges.* It may be a defense to a charge of disparate treatment brought under §§ 1630.4–1630.8 and 1630.11–1630.12 that the challenged action is justified by a legitimate, nondiscriminatory reason.

(b) *Charges of discriminatory application of selection criteria.* It may be a defense to a charge of discrimination, as described in §.1630.10, that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(c) *Other disparate impact charges.* It may be a defense to a charge of discrimination brought under this part that a uniformly applied standard, criteria, or policy has a disparate impact on an individual or class of individuals with disabilities that the challenged standard, criteria or policy has been shown to be job-related and consistent with business necessity and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(d) *Charges of not making reasonable accommodation.* It may be a defense to a charge of discrimination, as described in § 1630.9, that a requested or necessary accommodation would impose an undue hardship on the operation of the covered entity's business.

(e) *Conflict with other Federal laws.* It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

(f) *Additional defenses.* It may be a defense to a charge of discrimination under this part that the alleged discriminatory action is specifically permitted by §§ 1630.14 or 1630.16.

§ 1630.16 Specific activities permitted.

(a) *Religious entities.* A religious corporation, association, educational institution, or society is permitted to give preference in employment to individuals of a particular religion to perform work connected with the carrying on by that corporation, association, educational institution, or society of its activities. A religious entity may require that all applicants and employees conform to the religious tenets of such organization. However, a religious entity may not discriminate against a qualified individual, who satisfies the permitted religious criteria, because of his or her disability.

(b) *Regulation of alcohol and drugs.* A covered entity:

(1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) May require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;

(5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, regarding alcohol and the illegal use of drugs; and

(6) May require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation and of the Nuclear Regulatory Commission that apply to employment in sensitive positions subject to such regulations.

(c) *Drug testing.*—(1) *General policy.* For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of drug tests by a covered entity to its job applicants or employees is not a violation of § 1630.13 of this part. However, this part does not encourage, prohibit, or authorize a covered entity from conducting drug testing of job applicants or employees for the illegal use of drugs or from making employment decisions based on such test results.

(2) *Transportation Employees.* This part does not encourage, prohibit, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to:

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

(ii) Remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (c)(2)(i) of this section.

(3) Any information regarding the medical condition or history of any employee or applicant obtained from a drug test, except information regarding the illegal use of drugs, is subject to the requirements of § 1630.14(b) (2) and (3) of this part.

(d) *Regulation of smoking.* A covered entity may prohibit or impose restrictions on smoking in places of employment. Such restrictions do not violate any provision of this part.

(e) *Infectious and communicable diseases: food handling jobs.*—(1) *In general.* Under title I of the ADA, section 103(d)(1), the Secretary of Health and Human Services is to prepare a list, to be updated annually, of infectious and communicable diseases which can be transmitted through the handling of food. If an individual with a disability is disabled by one of the infectious or communicable diseases included on this list, and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, a covered

entity may refuse to assign or continue to assign such individual to a job involving food handling. However, if the individual with a disability is a current employee, the employer must consider whether he or she can be accommodated by reassignment to a vacant position not involving food handling.

(2) *Effect on State or other laws.* This part does not preempt, modify, or amend any State, county, or local law, ordinance or regulation applicable to food handling which:

(i) Is in accordance with the list, referred to in paragraph (e)(1) of this section, of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services; and

(ii) Is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, where that risk cannot be eliminated by reasonable accommodation.

(f) *Health insurance, life insurance, and other benefit plans.*—(1) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law regulating insurance.

(2) A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law regulating insurance.

(3) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) The activities described in paragraphs (f) (1), (2), and (3) of this section are permitted unless these activities are being used as a subterfuge to evade the purposes of this part.

[The next page is Appendix III, Page 75.]

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 36

[A.G. Order No. 1472-91]

Nondiscrimination On The Basis of Disability By Public Accommodations And In Commercial Facilities

AGENCY: Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule implements title III of the Americans with Disabilities Act, Public Law 101-336, which prohibits discrimination on the basis of disability by private entities in places of public accommodation, requires that all new places of public accommodation and commercial facilities be designed and constructed so as to be readily accessible to and usable by persons with disabilities, and requires that examinations or courses related to licensing or certification for professional and trade purposes be accessible to persons with disabilities.

DATES: To be assured of consideration, comments must be in writing and must be received on or before April 23, 1991. Whenever possible, comments should refer to specific sections in the proposed regulation. Comments that are received after the closing date will be considered to the extent practicable.

ADDRESSES: Comments should be sent to: John L. Wodatch, Office on the Americans with Disabilities Act, Civil Rights Division, U.S. Department of Justice, Rulemaking Docket 003, P.O. Box 75087, Washington, DC 20013.

Comments received will be available for public inspection in room 854 of the HOLC Building, 320 First Street, NW., Washington, DC, from 9 a.m. to 5 p.m., Monday through Friday, except legal holidays, from March 8, 1991 until the Department publishes this rule in final form. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers.

Copies of this notice of proposed rulemaking are available in the following alternate formats: large print, Braille, electronic file on computer disk, and audio-tape. Copies may be obtained from the Office on the Americans with Disabilities Act at (202) 514-0301 (Voice) or (202) 514-0381 (TDD). The notice of proposed rulemaking is also available on electronic bulletin board at (202) 514-6193. These telephone numbers are not toll-free numbers.

FOR FURTHER INFORMATION CONTACT: John Wodatch, Office on the Americans with Disabilities Act and Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, and Janet Blizard, Irene Bowen, Philip Breen, Merrily Friedlander, and Sara Kaltenborn, attorneys in the Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, Washington, DC 20530, may be contacted through the Division's ADA Information Line at (202) 514-0301 (Voice), (202) 514-0381 (TDD), or (202) 514-0383 (TDD). These telephone numbers are not toll-free numbers.

Part 36—NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; Pub. L. 101–336 (42 U.S.C. 12186).

Subpart A—General

§ 36.101 Purpose.

The purpose of this part is to implement title III of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.

§ 36.102 Application.

(a) *General.* This part applies to any—

(1) Public accommodation;

(2) Commercial facility; or

(3) Private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes.

(b) *Public accommodations.* (1) The requirements of this part applicable to public accommodations are set forth in subparts B, C, and D of this part.

(2) The requirements of subparts B and C of this part obligate a public accommodation only with respect to the operations of a place of public accommodation.

(3) The requirements of subpart D of this part obligate a public accommodation only with respect to—

(i) A facility used as, or designed or constructed for use as, a place of public accommodation; or

(ii) A facility used as, or designed and constructed for use as, a commercial facility.

(c) *Commercial facilities.* The requirements of this part applicable to commercial facilities are set forth in subpart D of this part.

(d) *Examinations and courses.* The requirements of this part applicable to private entities that offer examinations or courses as specified in paragraph (a) of this section are set forth in § 36.310.

(e) *Exemptions and exclusions.* This part does not apply to any private club (except to the extent that the facilities of the private club are made available to customers or patrons of a place of public accommodation), or to any religious entity or public entity.

§ 36.103 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 or the regulations issued by Federal agencies pursuant to that title.

(b) *Section 504.* This part does not affect the obligations of a recipient of Federal financial assistance to comply with the requirements of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and regulations issued by federal agencies implementing section 504.

(c) *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.

§ 36.104 Definitions.

For purposes of this part, the term—

Act means the Americans with Disabilities Act of 1990 (Pub. L. 101–336, 104 Stat. 327, 42 U.S.C. 12101–12213 and 47 U.S.C. 225 and 611).

Commerce means travel, trade, traffic, commerce, transportation, or communication—

(1) Among the several States;

(2) Between any foreign country or any territory or possession and any State; or

(3) Between points in the same State but through another State or foreign country.

Commercial facilities means facilities—

(1) Whose operations will affect commerce;

(2) That are intended for nonresidential use by a private entity; and

(3) That are not—

(i) Facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended (42 U.S.C. 3601–3631);

(ii) Aircraft; or

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 36

[A.G. Order No. 1472-91]

Nondiscrimination On The Basis of Disability By Public Accommodations And In Commercial Facilities

AGENCY: Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule implements title III of the Americans with Disabilities Act, Public Law 101-336, which prohibits discrimination on the basis of disability by private entities in places of public accommodation, requires that all new places of public accommodation and commercial facilities be designed and constructed so as to be readily accessible to and usable by persons with disabilities, and requires that examinations or courses related to licensing or certification for professional and trade purposes be accessible to persons with disabilities.

DATES: To be assured of consideration, comments must be in writing and must be received on or before April 23, 1991. Whenever possible, comments should refer to specific sections in the proposed regulation. Comments that are received after the closing date will be considered to the extent practicable.

ADDRESSES: Comments should be sent to: John L. Wodatch, Office on the Americans with Disabilities Act, Civil Rights Division, U.S. Department of Justice, Rulemaking Docket 003, P.O. Box 75087, Washington, DC 20013.

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Part 36—NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; Pub. L. 101–336 (42 U.S.C. 12186).

Subpart A—General

§ 36.101 Purpose.

The purpose of this part is to implement title III of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.

§ 36.102 Application.

(a) *General.* This part applies to any—

(1) Public accommodation;

(2) Commercial facility; or

(3) Private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes.

(b) *Public accommodations.* (1) The requirements of this part applicable to public accommodations are set forth in subparts B, C, and D of this part.

(2) The requirements of subparts B and C of this part obligate a public accommodation only with respect to the operations of a place of public accommodation.

(3) The requirements of subpart D of this part obligate a public accommodation only with respect to—

(i) A facility used as, or designed or constructed for use as, a place of public accommodation; or

(ii) A facility used as, or designed and constructed for use as, a commercial facility.

(c) *Commercial facilities.* The requirements of this part applicable to commercial facilities are set forth in subpart D of this part.

(d) *Examinations and courses.* The requirements of this part applicable to private entities that offer examinations or courses as specified in paragraph (a) of this section are set forth in § 36.310.

(e) *Exemptions and exclusions.* This part does not apply to any private club (except to the extent that the facilities of the private club are made available to customers or patrons of a place of public accommodation), or to any religious entity or public entity.

§ 36.103 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 or the regulations issued by Federal agencies pursuant to that title.

(b) *Section 504.* This part does not affect the obligations of a recipient of Federal financial assistance to comply with the requirements of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and regulations issued by federal agencies implementing section 504.

(c) *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.

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(1) Among the several States;

(2) Between any foreign country or any territory or possession and any State; or

(3) Between points in the same State but through another State or foreign country.

Commercial facilities means facilities—

(1) Whose operations will affect commerce;

(2) That are intended for nonresidential use by a private entity; and

(3) That are not—

(i) Facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended (42 U.S.C. 3601–3631);

(ii) Aircraft; or

(iii) Railroad locomotives, railroad freight cars, railroad cabooses, commuter or intercity passenger rail cars (including coaches, dining cars, sleeping cars, lounge cars, and food service cars), any other railroad cars described in section 242 of the Act or covered under title II of the Act, or railroad rights-of-way. For purposes of this definition, "rail" and "railroad" have the meaning given the term "railroad" in section 202(e) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 431(e)).

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.

Disability means, with respect to an individual, a permanent or temporary 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) The phrase *physical or mental impairment* means—

(i) 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;

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(iii) 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, tuberculosis, drug addiction, and alcoholism.

(iv) 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 has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(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 private 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 private entity as having such an impairment.

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

(i) 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, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

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 private entity acts on the basis of such use.

Place of public accommodation means a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories—

(1) An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor;

(2) A restaurant, bar, or other establishment serving food or drink;

(3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(4) An auditorium, convention center, lecture hall, or other place of public gathering;

(5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(7) A terminal, depot, or other station used for specified public transportation;

(8) A museum, library, gallery, or other place of public display or collection;

(9) A park, zoo, amusement park, or other place of recreation;

(10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Private club means a private club or establishment exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a(e)).

Private entity means a person or entity other than a public entity.

Professional office of a health care provider means a location where a person or entity regulated by a State to provide professional services related to the physical or mental health of an individual makes such services available to the public. The term "professional office of a health care provider" only includes floor levels containing at least one or more health care providers, or any floor level designed or intended for use by at least one health care provider.

Public accommodation means a private entity that owns, leases (or leases to), or operates a place of public accommodation.

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(8) of the Rail Passenger Service Act).

Readily achievable means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable factors to be considered include—

(1) The nature and cost of the action needed under this part;

(2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources, or the impact otherwise of the action upon the operation of the site;

(3) The overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities;

(4) The type of operation or operations of the parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity; and

(5) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to the parent corporation or entity.

Religious entity means a religious organization or entity controlled by a religious organization, including a place of worship.

Service animal means any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

Shopping center or shopping mall means—

(1) A building housing five or more sales or rental establishments; or

(2) A series of buildings on a common site, either under common ownership or common control or developed either as one project or as a series of related projects, housing five or more sales or rental establishments. For purposes of this definition, places of public accommodation of the types listed in paragraph (5) of the definition of "place of public accommodation" in this section are considered sales or rental establishments. The term "shopping center or shopping mall" only includes floor levels containing at least one sales or rental establishment, or any floor level designed or intended for use by at least one sales or rental establishment.

Specified public transportation means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

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.

Undue burden means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered include—

(1) The nature and cost of the action needed under this part;

(2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources, or the impact otherwise of the action upon the operation of the site;

(3) The overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities;

(4) The type of operation or operations of the parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity; and

(5) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to the parent corporation or entity.

§§ 36.105–36.200 [Reserved]

Subpart B—General Requirements

§ 36.201 General.

(a) *Prohibition of discrimination.* 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 private entity who owns, leases (or leases to), or operates a place of public accommodation.

(b) *Landlord and tenant responsibilities*—(1) *General.* Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to this part.

(2) *Responsibility for taking readily achievable measures to remove barriers.* (i) Unless provided otherwise by contract, the landlord is responsible for making readily achievable changes in common areas or modifying policies, practices, or procedures applicable to all tenants to achieve compliance with this part.

(ii) If the lease or other contractual agreement gives the tenant the right to make alterations within the place of public accommodation with permission of the landlord—

(A) The tenant is responsible for requesting permission for any readily achievable modification required by this part.

(B) If permission is granted by the landlord, the tenant is responsible for making the required readily achievable modification.

(C) If permission is granted by the landlord but the modification necessary for access is not readily achievable for the tenant, then the landlord is responsible for making the needed modification within the public accommodation if it is readily achievable for the landlord to do so.

(iii) If the lease reserves authority for making alterations solely to the landlord or if the landlord withholds the permission requested by the tenant pursuant to paragraph (b)(2)(ii)(A) of this section, then the landlord is responsible for making any readily achievable modifications required by this part.

(iv) *Illustration.* If an office building contains a doctor's office, the tenant who operates the doctor's office would be required to make readily achievable modifications within the office (unless the contractual agreement provided otherwise), and the landlord would be required to make readily achievable modifications to the primary entrance of the building and other common areas.

(3) *Responsibility for providing auxiliary aids*—(i) *General.* The tenant is responsible for providing auxiliary aids (Braille notices, interpreters, etc.) within the place of public accommodation and the landlord is responsible for providing auxiliary aids in common areas.

(ii) *Illustration.* If an office building contains a lawyer's office, the tenant who operates the lawyer's office would be required to provide auxiliary aids within the office. However, the landlord would also be responsible for ensuring that the doorman or guard will show a person who is blind to the elevator or write a note to a person who is deaf regarding the floor number of the lawyer's office, if requested to do so.

(4) *Alterations.* If a tenant is making alterations under § 36.402 that would

(iii) Railroad locomotives, railroad freight cars, railroad cabooses, commuter or intercity passenger rail cars (including coaches, dining cars, sleeping cars, lounge cars, and food service cars), any other railroad cars described in section 242 of the Act or covered under title II of the Act, or railroad rights-of-way. For purposes of this definition, "rail" and "railroad" have the meaning given the term "railroad" in section 202(e) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 431(e)).

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.

Disability means, with respect to an individual, a permanent or temporary 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) The phrase *physical or mental impairment* means—

(i) 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;

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(iii) 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, tuberculosis, drug addiction, and alcoholism.

(iv) 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 has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(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 private 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 private entity as having such an impairment.

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

(i) 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, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

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 private entity acts on the basis of such use.

Place of public accommodation means a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories—

(1) An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor;

(2) A restaurant, bar, or other establishment serving food or drink;

(3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(4) An auditorium, convention center, lecture hall, or other place of public gathering;

(5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(7) A terminal, depot, or other station used for specified public transportation;

(8) A museum, library, gallery, or other place of public display or collection;

(9) A park, zoo, amusement park, or other place of recreation;

(10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Private club means a private club or establishment exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a(e)).

Private entity means a person or entity other than a public entity.

Professional office of a health care provider means a location where a person or entity regulated by a State to provide professional services related to the physical or mental health of an individual makes such services available to the public. The term "professional office of a health care provider" only includes floor levels containing at least one or more health care providers, or any floor level designed or intended for use by at least one health care provider.

Public accommodation means a private entity that owns, leases (or leases to), or operates a place of public accommodation.

Public entity means—

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality

trigger the § 36.403 path of travel requirement, those alterations by the tenant on its own premises do not trigger a path of travel obligation upon the landlord in areas of the facility under the landlord's authority that are not otherwise being altered.

§ 36.202 Activities.

(a) *Denial of participation.* A public accommodation shall not 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 a place of public accommodation.

(b) *Participation in unequal benefit.* A public accommodation shall not 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.

(c) *Separate benefit.* A public accommodation shall not 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.

(d) *Individual or class of individuals.* For purposes of paragraphs (a) through (c) of this section, the term "individual or class of individuals" refers to the clients or customers of the public accommodation that enters into the contractual, licensing, or other arrangement.

§ 36.203 Integrated settings.

(a) *General.* A public accommodation shall afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(b) *Opportunity to participate.* Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, a public accommodation shall not deny an individual with a disability an opportunity to participate in such programs or activities that are not separate or different.

(c) *Accommodations and services.* Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that such individual chooses not to accept.

§ 36.204 Administrative methods.

A public accommodation shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control.

§ 36.205 Association.

A public accommodation shall not 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.

§ 36.206 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.

(c) Illustrations of conduct prohibited by this section include, but are not limited to:

(1) Coercing an individual to deny or limit the benefits, services, or advantages to which he or she is entitled under the Act or this part;

(2) Threatening, intimidating, or interfering with an individual with disabilities who is seeking to obtain or use the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation;

(3) Intimidating or threatening any person because that person is assisting or encouraging an individual or group entitled to claim the rights granted or protected by the Act or this part to exercise those rights; or

(4) Retaliating against any person because that person has participated in any investigation or action to enforce the Act or this part.

§ 36.207 Places of public accommodation located in private residences.

When a place of public accommodation is located in a private residence, the portion of the residence used exclusively as a residence is not covered by this part, but that portion used exclusively in the operation of the place of public accommodation or that portion used both for the place of public accommodation and for residential purposes is covered by this part.

§ 36.208 Direct threat.

(a) This part does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others.

(b) "Direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.

(c) In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

§ 36.209 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 accommodation 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.* A public accommodation 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.

(c) *Drug testing.* (1) This part does not prohibit a public accommodation 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 this paragraph (c) shall be construed to encourage, prohibit, restrict, or authorize the conduct of testing for the illegal use of drugs.

§ 36.210 Smoking.

This part does not preclude the prohibition of, or the imposition of restrictions on, smoking in places of public accommodation.

§ 36.211 Maintenance of accessible features.

A public accommodation 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.

§ 36.212 Insurance.

(a) This part shall not be construed to prohibit or restrict—

(1) An insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) A person or organization covered by this part from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) A person or organization covered by this part from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) Paragraphs (a) (1), (2), and (3) of this section shall not be used as a subterfuge to evade the purposes of the Act or this part.

(b) A public accommodation shall not refuse to serve an individual with a disability because its insurance company conditions coverage or rates on the absence of individuals with disabilities.

§ 36.213 Relationship of subpart B to subparts C and D of this part.

Subpart B of this part sets forth the general principles of nondiscrimination applicable to all entities subject to this part. Subparts C and D of this part provide guidance on the application of the statute to specific situations. The specific provisions, including the limitations on those provisions, control over the general provisions in circumstances where both specific and general provisions apply.

§ 36.214–36.300 [Reserved]

Subpart C—Specific Requirements

§ 36.301 Eligibility criteria.

(a) *General.* A public accommodation 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 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.

(b) *Safety.* A public accommodation may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

(c) *Charges.* A public accommodation 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, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

§ 36.302 Modifications in policies, practices, or procedures.

(a) *General.* A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.

(b) *Specialties*—(1) *General.* A public accommodation may refer an individual with a disability to another public accommodation, if that individual is seeking, or requires, treatment or services outside of the referring public accommodation's area of specialization, and if, in the normal course of its operations, the referring public accommodation would make a similar referral for an individual without a disability who seeks or requires the same treatment or services.

(2) *Illustration—medical specialties.* A health care provider may refer an individual with a disability to another provider, if that individual is seeking, or requires, treatment or services outside of the referring provider's area of specialization, and if the referring provider would make a similar referral for an individual without a disability who seeks or requires the same treatment or services. A physician who specializes in treating only a particular condition cannot refuse to treat an individual with a disability for that condition, but is not required to treat the individual for a different condition.

(c) *Service animals*—(1) *Areas open to the general public.* A public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability in any area open to the general public.

(2) *Areas not open to the general public.* In areas not open to the general public, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability. If the modification would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations offered or provided by the public accommodation, or if the policies, practices, or procedures are necessary for safe operation, the use of a service animal may be denied.

(3) *Care or supervision of service animals.* Nothing in this part requires a

public accommodation to supervise or care for a service animal.

§ 36.303 Auxiliary aids and services.

(a) *General.* A public accommodation shall take those steps that 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 public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.

(b) *Examples.* The term "auxiliary aids and services" includes—

(1) Qualified interpreters, notetakers, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, television decoders, telecommunication devices for deaf persons (TDD's), 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 actions.

(c) *Effective communication.* A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.

(d) *Telecommunication devices for the deaf (TDD's).* (1) A public accommodation that offers a customer, client, patient, or participant the opportunity to make outgoing telephone calls on more than an incidental convenience basis shall make available, upon request, a TDD for the use of an individual who has impaired hearing or a communication disorder.

(2) This part does not require a public accommodation to use a TDD for receiving or making telephone calls incident to its operations.

(e) *Closed caption decoders.* Places of lodging that provide televisions in five or more guest rooms and hospitals that provide televisions for patient use shall provide, upon request, a means for decoding captions for use by an individual with impaired hearing.

(f) *Alternatives.* If provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or in an undue burden, i.e., significant difficulty or expense, the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that would not result in such an alteration or such burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation.

(g) *Personal devices and services.* This section does not require a public accommodation to provide its customers, clients, or participants with individually prescribed devices, such as prescription eyeglasses or hearing aids, or with services of a personal nature including assistance in eating, toileting, or dressing.

§ 36.304 Removal of barriers.

(a) *General.* A public accommodation shall remove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense.

(b) *Examples.* Examples of steps to remove barriers include, but are not limited to, the following actions—

(1) Installing ramps;

(2) Making curb cuts in sidewalks and entrances;

(3) Lowering shelves;

(4) Rearranging tables, chairs, vending machines, display racks, and other furniture;

(5) Lowering telephones;

(6) Adding raised letter markings on elevator control buttons;

(7) Installing flashing alarm lights;

(8) Widening doors;

(9) Installing offset hinges to widen doorways;

(10) Eliminating a turnstile or providing an alternative accessible path;

(11) Installing accessible door hardware;

(12) Installing grab bars in toilet stalls;

(13) Rearranging toilet partitions to increase maneuvering space;

(14) Insulating lavatory pipes;

(15) Installing a raised toilet seat;

(16) Installing a full-length bathroom mirror;

(17) Lowering the paper towel dispenser in a bathroom;

(18) Creating a designated accessible parking space;

(19) Installing an accessible paper cup dispenser at an existing inaccessible water fountain;

(20) Removing high pile, low density carpeting; or

(21) Modifying vehicle hand controls.

(c) *Priorities.* A public accommodation shall take measures to comply with the barrier removal requirements of this section in accordance with the following order of priorities.

(1) First, a public accommodation shall take measures to provide access to a place of public accommodation from public sidewalks, parking, or public transportation. These measures include, for example, installing an entrance ramp, widening entrances, and providing accessible parking spaces.

(2) Second, a public accommodation shall take measures to provide access to restroom facilities in places of public accommodation where restroom facilities are used by the public on more than an incidental basis. These measures include, for example, removal of obstructing furniture or vending machines, widening of doors, installation of ramps, providing accessible signage, widening of toilet stalls, and installation of grab bars.

(3) Third, a public accommodation shall take measures to provide access to those areas of a place of public accommodation where goods and services are made available to the public. These measures include, for example, adjusting the layout of display racks, rearranging tables, widening doors, and installing ramps.

(4) Fourth, a public accommodation shall take any other measures necessary to provide access to the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

(d) *Relationship to alterations requirements of subpart D of this part.* Measures taken solely to comply with the barrier removal requirements of this section are not required to conform to the requirements for alterations in §§ 36.402–36.406. These measures include, for example, installing a ramp with a steeper slope or widening a doorway to a narrower width than that required by § 36.406. No measure shall be taken, however, that poses a significant risk to the health or safety of individuals with disabilities or others.

(e) *Portable ramps.* Portable ramps should be used to comply with this section only when installation of a permanent ramp is not readily achievable. In order to avoid any significant risk to the health or safety of

individuals with disabilities or others in using portable ramps, due consideration shall be given to safety features such as nonslip surfaces, railings, anchoring, and strength of materials.

(f) *Interpretation of "readily achievable."* (1) Barrier removal is not readily achievable if it would result in significant loss of profit or significant loss of efficiency of operation.

(2) The rearrangement of temporary or movable structures, such as furniture, equipment, and display racks is not readily achievable to the extent that it results in a significant loss of selling or serving space.

§ 36.305 Alternatives to barrier removal.

(a) *General.* Where a public accommodation can demonstrate that barrier removal is not readily achievable, a public accommodation shall not fail to make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, if those methods are readily achievable.

(b) *Examples.* Examples of alternatives to barrier removal include, but are not limited to, the following actions—

(1) Providing curb service or home delivery;

(2) Retrieving merchandise from inaccessible shelves or racks;

(3) Relocating activities to accessible locations;

(4) Providing refueling service at inaccessible self-service gas stations.

(c) *Personal devices and services.* This section does not require a public accommodation to provide its customers, clients, or participants with personal devices, such as wheelchairs, or services of a personal nature including assistance in eating, toileting, or dressing.

(d) *Multiscreen cinemas.* If it is not readily achievable to remove barriers to provide access by persons with mobility impairments to all of the theaters of a multiscreen cinema, the cinema shall establish a film rotation schedule that provides reasonable access for individuals who use wheelchairs to all films. Reasonable notice shall be provided to the public as to the location and time of accessible showings.

§ 36.306 Readily achievable and undue burden: Factors to be considered.

In determining whether an action is readily achievable or would result in an undue burden, factors to be considered include—

(a) The nature and cost of the action needed under this part;

(b) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources, or the impact otherwise of the action upon the operation of the site;

(c) The overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities;

(d) The type of operation or operations of the parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity; and

(e) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to the parent corporation or entity.

§ 36.307 Accessible or special goods.

(a) This part does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities.

(b) A public accommodation shall order accessible or special goods at the request of an individual with disabilities, if, in the normal course of its operation, it makes special orders on request for unstocked goods, and if the accessible or special goods can be obtained from a supplier with whom the public accommodation customarily does business.

(c) Examples of accessible or special goods include items such as Brailled versions of books, books on audio cassettes, closed-captioned video tapes, special sizes or lines of clothing, and special foods to meet particular dietary needs.

§ 36.308 Seating in assembly areas.

(a) *Existing facilities.* (1) To the extent that it is readily achievable, a public accommodation shall—

(i) Provide a reasonable number of wheelchair seating spaces in assembly areas; and

(ii) Locate the wheelchair seating spaces so that they—

(A) Are dispersed throughout the seating area;

(B) Provide lines of sight comparable to those for all viewing areas;

(C) Adjoin an accessible route that also services as a means of egress in case of emergency;

(D) Permit individuals who use wheelchairs to sit with family members or other companions.

(2) If removal of seats is not readily achievable, a public accommodation shall provide a portable chair or other means to permit a family member or other companion to sit with an individual who uses a wheelchair.

(b) *New construction and alterations.* The provision and location of wheelchair seating spaces in newly constructed or altered assembly areas shall be governed by the appropriate requirements and standards for new construction and alterations specified in subpart D (§§ 36.401–36.406 of this part).

§ 36.309 Purchase of furniture and equipment.

A public accommodation that makes available for use tables, vending machines, exercise equipment, video games, or other furniture or equipment at a place of public accommodation, directly or through contractual or other arrangements, shall ensure that a reasonable number of the items of newly purchased furniture or equipment that it provides are accessible to and usable by individuals with disabilities, unless—

(a) The public accommodation can demonstrate that providing such furniture or equipment would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations offered; or

(b) Providing such accessible furniture or equipment is not readily achievable.

§ 36.310 Examinations and courses.

(a) *General.* Any private entity 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.

(b) *Examinations.* (1) Any private entity offering an examination covered by this section must assure that—

(i) The examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure);

(ii) An examination that is designed for individuals with impaired sensory, manual, or speaking skills is offered as

often and in as timely a manner as are other examinations; and

(iii) The examination is administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements are made.

(2) Required modifications to an examination may include changes in the length of time permitted for completion of the examination and adaptation of the manner in which the examination is given.

(3) A private entity offering an examination covered by this section shall provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills, unless that private entity can demonstrate that offering a particular auxiliary aid would fundamentally alter the examination or would result in an undue burden. Auxiliary aids required by this section may include taped examinations, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments, readers for individuals with visual impairments or learning disabilities, and other similar services and actions.

(4) Alternative accessible arrangements may include, for example, provision of an examination at an individual's home with a proctor if accessible facilities or equipment are unavailable. Alternative arrangements must provide comparable conditions to those provided for nondisabled individuals.

(c) *Courses.* (1) Any private entity that offers a course covered by this section must make such modifications to that course as are necessary to ensure that the place and manner in which the course is given are accessible to individuals with disabilities.

(2) Required modifications may include changes in the length of time permitted for the completion of the course, substitution of specific requirements, or adaptation of the manner in which the course is conducted.

(3) A private entity that offers a course covered by this section shall provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills, unless that person can demonstrate that offering a particular auxiliary aid would fundamentally alter the course or would result in an undue burden. Auxiliary aids required by this section may include taped texts, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments, readers for individuals with visual impairments and learning disabilities, classroom equipment adapted for use by individuals with manual impairments, and other similar services and actions.

(4) Courses must be administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements must be made.

(5) Alternative accessible arrangements may include, for example, provision of the course through videotape, cassettes, or prepared notes. Alternative arrangements must provide comparable conditions to those provided for nondisabled individuals.

§ 36.311 Transportation provided by private entities not primarily engaged in the business of transporting people.

(a) *General.* (1) A public accommodation that provides specified public transportation services, but that is not primarily engaged in the business of transporting people, is subject to the general and specific provisions in subparts B and C of this part for its transportation operations, except as provided in this section.

(2) Illustrations of public accommodations that provide transportation services, but that are not primarily engaged in the business of transporting people, include hotel and motel airport shuttle services, customer and employee shuttle bus services operated by private companies and shopping centers, and shuttle operations of recreational facilities such as stadiums, zoos, amusement parks, and ski resorts.

(b) *Barrier removal.* A public accommodation covered by this section shall remove transportation barriers in existing vehicles and rail passenger cars used for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift) where such removal is readily achievable.

(c) *Fixed route systems (other than over-the-road buses)*—(1) *Accessibility.* Newly purchased or leased vehicles with a seating capacity in excess of 16 passengers (including the driver) for use in fixed route systems, for which a solicitation is made on or after August 26, 1990, must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) *Equivalent service.* Newly purchased or leased vehicles with a seating capacity of 16 passengers or less (including the driver) must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the fixed route system is operated so that, when viewed in its entirety, the system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.

(d) *Demand responsive systems (other than over-the-road buses)*—(1) *Operation of system.* A public accommodation covered by this section that operates a demand responsive transportation system shall operate this system so that, when viewed in its entirety, this system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.

(2) *Vehicles.* Newly purchased or leased vehicles with a seating capacity in excess of 16 passengers (including the driver) for use in demand responsive systems, for which a solicitation is made on or after August 26, 1990, must be readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless the public accommodation can demonstrate that the system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to individuals without disabilities.

(e) *Over-the-road buses.* If a public accommodation covered by this section uses over-the-road buses in its transportation system, the buses must meet all vehicle and system requirements contained in the regulations of the Department of Transportation issued pursuant to section 306 of the Act.

(f) *Applicable standards.* The requirements for "private entities not primarily engaged in the business of transporting people" issued by the Department of Transportation pursuant to section 306 of the Act (49 CFR part 37) shall apply to vehicles and systems covered by this section.

§ 36.312–36.400 [Reserved]

Subpart D—New Construction and Alterations

§ 36.401 New construction.

(a) *General.* (1) Except as provided in paragraphs (c) and (d) of this section, any public accommodation or other private entity responsible for design and construction of a place of public accommodation or commercial facility

designed and constructed for first occupancy after January 26, 1993, shall ensure that the facility is designed and constructed to be readily accessible to and usable by individuals with disabilities.

OPTION ONE FOR PARAGRAPH (a)(2)

(2) For purposes of this section, a facility is designed and constructed for first occupancy after January 26, 1993, only—

(i) If the last application for a building permit or permit extension for the facility is received, and certified to be complete, by a State, County, or local government after January 26, 1992, and

(ii) If the first certificate of occupancy for the facility is issued after January 26, 1993.

OPTION TWO FOR PARAGRAPH (a)(2)

(2) For purposes of this section, a facility is designed and constructed for first occupancy after January 26, 1993, only—

(i) If the last application for a building permit or permit extension for the facility is received, and certified to be complete, by a State, County, or local government after July 26, 1990; and

(ii) If the first certificate of occupancy for the facility is issued after January 26, 1993.

(b) *Areas used only by employees as work stations.* (1) In order to meet the requirements of this section, the public accommodation or other private entity responsible for design and construction shall ensure that areas that may be used by employees with disabilities are designed and constructed so that individuals with disabilities can approach, enter, and exit the areas.

(2) This paragraph does not require that all individual workstations be constructed or equipped (for example, with counters or shelves) to be accessible.

(3) The public accommodation or other private entity responsible for design and construction shall give consideration to placing fixtures and equipment at a convenient height for accessibility when these fixtures and equipment are used by both employees and the general public.

(4) For fixtures and equipment that will be used only by employees, the public accommodation or other private entity responsible for design and construction shall give consideration to the purchase and installation of commercially available fixtures and equipment that are adjustable so that future attempts to make reasonable accommodations to employees who will use the facility will not pose undue hardships.

(5) The requirements set forth in this paragraph do not obviate or limit in any way the requirement that other areas, besides those used only by employees as work stations, be accessible. For example, public use and common use areas must be accessible to the extent specified by the standards in § 36.406. Areas intended for general use by employees but not by the public (*e.g.*, restrooms; employee lounges; employee cafeterias, gyms, and health facilities) must be accessible.

(c) *Exception for structural impracticability.* (1) A public accommodation or other private entity is not required to meet fully the requirements of this section where that public accommodation or other private entity can demonstrate that it is structurally impracticable to do so. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.

(2) If full compliance with this section would be structurally impracticable, the public accommodation or other private entity shall comply with the requirements of this section to the extent that it is not structurally impracticable. In that case, any portion of the facility that can be made accessible shall be made accessible to the extent that it is not structurally impracticable.

(3) If providing accessibility in conformance with this section to individuals with certain disabilities (*e.g.*, those who use wheelchairs) would be structurally impracticable, the public accommodation or other private entity shall nonetheless ensure that the facility is accessible to persons with other types of disabilities (*e.g.*, those who use crutches or who have sight, hearing, or mental impairments).

(d) *Elevator exemption.* (1) This section does not require the installation of an elevator in a facility that is less than three stories or has less than 3000 square feet per story, except with respect to any facility that houses one or more of the following:

(i) A shopping center or shopping mall, or a professional office of a health care provider. In such a facility, any area housing a sales or rental establishment or a professional office of a health care provider must be on an accessible ground floor or on a floor served by an elevator.

(ii) A terminal, depot, or other station used for specified public transportation, or an airport passenger terminal. Such a facility is not eligible for the elevator exemption set forth in this paragraph.

(2) The elevator exemption set forth in this paragraph does not obviate or limit in any way the obligation to comply with the other accessibility requirements established in paragraph (a) of this section. For example, in a facility that houses a shopping center or shopping mall, or a professional office of a health care provider, the floors above or below the accessible ground floor that do not house sales or rental establishments or a professional office of a health care provider must meet the requirements of this section but for the elevator.

(3) If a building is subject to the elevator exemption set forth in this paragraph, but the building nonetheless has an elevator or will be designed and constructed with an elevator, that elevator shall meet the requirements of this section.

§ 36.402 Alterations.

(a) *General.* (1) Any alteration to a place of public accommodation or a commercial facility, after January 26, 1992, shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) An alteration is deemed to be undertaken after January 26, 1992, if the physical alteration of the property is in progress after that date.

(b) *Affecting usability.* For the purposes of this part, an alteration is a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the facility or any part of the facility.

(1) Changes that affect usability include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and extraordinary repairs. Examples of alterations that must comply with the standards established by § 36.406 include:

(i) Replacing a floor, or installing a new floor;

(ii) Relocating an electrical outlet;

(iii) Installing or replacing faucet controls;

(iv) Relocating a furnace or replacing a heating system in a manner that requires changes to other elements of the facility; and

(v) Replacing door hardware, such as door handles or hinges.

(2) Changes that do not affect usability include: normal maintenance, reroofing, painting, wallpapering, asbestos removal, or changes to mechanical systems. Examples of

specific changes that are not alterations include, but are not limited to:

(i) Replacing an accessible floor surface, *e.g.*, carpet or linoleum, with a similar accessible floor covering;

(ii) Replacing an electrical outlet without changing its location;

(iii) Replacing faucet washers;

(iv) Replacing a furnace with a similar furnace in the same location; and

(v) Cosmetic changes such as repairing plaster, painting, or wallpapering.

(c) *To the maximum extent feasible.* The phrase "to the maximum extent feasible," as used in this section, applies to the occasional case where the nature of an existing facility makes it impossible to comply fully with applicable accessibility standards through a planned alteration. In these circumstances, the alteration shall provide the maximum physical accessibility feasible. Any altered features of the facility or portion of the facility that can be made accessible shall be made accessible. If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would not be feasible, the facility shall be made accessible to persons with other types of disabilities (e.g., those who use crutches, those who have impaired vision or hearing, or those who have other impairments).

§ 36.403 Alterations: Path of travel.

(a) *General.* An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration.

(b) *Primary function.*—(1) *General.* A "primary function" is a major activity for which the facility is intended. Areas that contain a primary function, include but are not limited to, the customer services lobby of a bank, the dining area of a cafeteria, the meeting rooms in a conference center, as well as offices and other work areas in which the activities of the public accommodation or other private entity using the facility are carried out.

(2) *Exclusion.* Mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, and restrooms are not areas containing a primary function.

(c) *Usability of or access to an area containing a primary function.* Alterations that affect the usability of or access to an area containing a primary function include, but are not limited to—

(1) Remodeling merchandise display areas or employee work areas in a department store;

(2) Replacing an inaccessible floor surface in the customer service or employee work areas of a bank;

(3) Redesigning the assembly line area of a factory; or

(4) Installing a computer center in an accounting firm.

(d) *Path of travel.* (1) A "path of travel" includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility.

(2) An accessible path of travel may consist of walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of these elements.

(3) For the purposes of this part, the term "path of travel" also includes the restrooms, telephones, and drinking fountains serving the altered area.

OPTION ONE FOR PARAGRAPH (e)(1)

(e) *Disproportionality.* (1) Alterations made to provide an accessible path of travel to the altered area, will be presumed to be disproportionate to the overall alteration when the cost exceeds 10% of the cost of the alteration to the primary function area.

OPTION TWO FOR PARAGRAPH (e)(1)

(e) *Disproportionality.* (1) Alterations made to provide an accessible path of travel to the altered area, will be presumed to be disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area.

OPTION THREE FOR PARAGRAPH (e)(1)

(e) *Disproportionality.* (1) Alterations made to provide an accessible path of travel to the altered area, will be presumed to be disproportionate to the overall alteration when the cost exceeds 30% of the cost of the alteration to the primary function area.

(2) Costs that may be counted as expenditures required to provide an accessible path of travel may include:

(i) Costs associated with providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;

(ii) Costs associated with making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes, or installing accessible faucet controls;

(iii) Costs associated with providing accessible telephones, such as relocating the telephone to an accessible height, installing amplification devices, or installing a telecommunications display device (TDD);

(iv) Costs associated with relocating an inaccessible drinking fountain.

(f) *Duty to provide accessible features in the event of disproportionality.* (1) When the cost of alterations necessary to make the path of travel to the altered area fully accessible is disproportionate to the cost of the overall alteration, then the path of travel shall be made accessible to the maximum extent feasible.

(2) In choosing which accessible elements to provide, priority should be given to those elements that will provide the greatest access, in the following order:

(i) An accessible entrance;

(ii) An accessible route to the altered area;

(iii) At least one accessible restroom for each sex or a single unisex restroom;

(iv) Accessible telephones;

(v) Accessible drinking fountains; and

(vi) When possible, additional accessible elements such as parking, storage, and alarms.

(g) *Series of smaller alterations.* (1) The obligation to provide an accessible path of travel may not be evaded by performing a series of small alterations to the area served by a single path of travel if those alterations could have been performed as a single undertaking.

(2)(i) If an area containing a primary function has been altered without providing an accessible path of travel to that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alterations to the primary function areas on that path of travel during the preceding three year period shall be considered in determining whether the cost of making that path of travel accessible is disproportionate.

(ii) For the first three years after January 26, 1992, only alterations undertaken between the effective date and the date of the alteration at issue shall be considered in determining if the cost of providing accessible features is disproportionate to the overall cost of the alterations.

§ 36.404 Alterations: Elevator exemption.

(a) This section does not require the installation of an elevator in an altered facility that is less than three stories or has less than 3,000 square feet per story, except with respect to any facility that houses a shopping center, a shopping mall, the professional office of a health care provider, a terminal, depot, or other station used for specified public transportation, or an airport passenger terminal.

(b) The exemption provided in paragraph (a) of this section does not obviate or limit in any way the obligation to comply with the other accessibility requirements established in this subpart. For example, alterations to floors above or below the accessible ground floor must be accessible regardless of whether the altered facility has an elevator.

§ 36.405 Alterations: Historic Preservation.

(a) In making alterations to facilities that are subject to Federal, State, or local statutes requiring historic preservation of the facility, priority shall be given to methods that provide physical access to individuals with disabilities.

(b) If it is not possible to provide physical access to a historic property that is a place of public accommodation without substantially impairing the historic features of the facility, alternative methods of accessibility shall be provided pursuant to the requirements of subpart C of this part.

§ 36.406 Standards for new construction and alterations.

(a) New construction and alterations subject to this part shall comply with the standards for accessible design published as Appendix A to this part.

ADD PARAGRAPH (b) IF OPTION TWO FOR PARAGRAPH (a)(2) OF § 36.401 IS ADOPTED.

(b) A facility subject to this section, and for which construction is authorized by a valid and appropriate State or local building permit obtained before [INSERT DATE ON WHICH THE FINAL REGULATION IS PUBLISHED IN THE FEDERAL REGISTER], and for which the construction begins within one year of the receipt of the permit and is completed under the terms of such permit, shall be deemed to satisfy the requirements of this section if the facility was constructed in compliance with the Uniform Federal Accessibility Standards (Appendix A to 41 CFR part 101–19, subpart 101–19.6) in effect at the time the building permit was issued.

§§ 36.407 36.500 [Reserved]

Subpart E—Enforcement

§ 36.501 Private suits.

(a) *General.* Any person who is being subjected to discrimination on the basis of disability in violation of the Act or this part or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303 of the Act or subpart D of this part may institute a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in the civil action if the Attorney General or his or her designee certifies that the case is of general public importance. Nothing in this section shall require a person with a disability to engage in a futile gesture if the person has actual notice that a person or organization covered by title III of the Act or this part does not intend to comply with its provisions.

(b) *Injunctive relief.* In the case of violations of § 36.304, § 36.401, and § 36.402 of this part, 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 the Act or this part. 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 the Act or this part.

§ 36.502 Administrative enforcement.

(a) The Attorney General shall investigate alleged violations of the Act or this part, and shall undertake periodic reviews of compliance of public accommodations or other private entities covered by this part.

(b) Any individual who believes that he or she or a specific class of persons has been subjected to discrimination prohibited by the Act or this part may request the Department to institute an investigation.

§ 36.503 Suit by the Attorney General.

The Attorney General or his or her designee may commence a civil action in any appropriate United States district court if the Attorney General or his or her designee has reasonable cause to believe that—

(a) Any person or group of persons is engaged in a pattern or practice of discrimination in violation of the Act or this part; or

(b) Any person or group of persons has been discriminated against in violation of the Act or this part and the discrimination raises an issue of general public importance.

§ 36.504 Relief.

(a) *Authority of court.* In a civil action under section 36.503, the court—

(1) May grant any equitable relief that such court considers to be appropriate, including, to the extent required by the Act or this part—

(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;

(2) May award other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General or his or her designee; and

(3) 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.

(b) *Single violation.* For purposes of paragraph (a)(3) of this section, 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.

(c) *Punitive damages.* For purposes of paragraph (a)(2) of this section, the terms "monetary damages" and "such other relief" do not include punitive damages.

(d) *Judicial consideration.* In a civil action under § 36.503, 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 part 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.

§ 36.505 Attorneys 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.

§ 36.506 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, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Act and this part.

§ 36.507 Effect of unavailability of technical assistance.

A public accommodation or other private 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.

§ 36.508 Effective date.

(a) *General.* Except as otherwise provided in this section and in this part, this part shall become effective on January 26, 1992.

(b) *Civil actions.* Except with respect to new construction and alterations, no civil action shall be brought for a violation of this part that occurs—

(1) Before July 26, 1992, against businesses with 25 or fewer employees and gross receipts of $1,000,000 or less.

(2) Before January 26, 1993, against businesses with 10 or fewer employees and gross receipts of $500,000 or less.

(c) *Transportation services provided by private entities not primarily engaged in the business of transporting people.* Newly purchased or leased vehicles (other than over-the-road buses) required to be accessible by § 36.311 must be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, if the solicitation for the vehicle is made on or after August 26, 1990.

§§ 36.509–36.600 [Reserved]

Subpart F—Certification of State Laws or Local Building Codes

§ 36.601 Definitions.

For purposes of this subpart—

Assistant Attorney General means the Assistant Attorney General for Civil Rights or his or her designee.

Certification of equivalency means a final certification that a code meets or exceeds the minimum requirements of title III of the Act for accessibility and usability of facilities covered by that title.

Code means a State law or local building code or similar ordinance that establishes accessibility requirements.

Preliminary determination of equivalency means a preliminary determination that a code appears to meet or exceed the minimum requirements of title III of the Act for accessibility and usability of facilities covered by that title.

Submitting official means the State or local official who—

(1) Has principal responsibility for administration of a code; and

(2) Files a request for certification under this subpart.

§ 36.602 General rule.

On the application of a State or local government, the Assistant Attorney General may certify that a code meets or exceeds the minimum requirements of the Act for the accessibility and usability of places of public accommodation and commercial facilities under this part by issuing a certification of equivalency. At any enforcement proceeding under title III of the Act, such certification shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of title III.

§ 36.603 Filing a request for certification.

(a) A submitting official may file a request for certification of a code under this subpart.

(b) The submitting official shall include the following materials and information in support of the request:

(1) The text of the jurisdiction's code; any standard, regulation, code, or other document incorporated by reference or otherwise referenced in the code; the law creating and empowering the agency; and any formal opinions of the State Attorney General or the chief legal officer of the jurisdiction that pertain to the code;

(2) Any model code or statute on which the pertinent code is based, and an explanation of any differences between the model and the pertinent code; and

(3) Any additional information that the submitting official may wish to be considered.

(c) The submitting official shall file the original and one copy of the request and of supporting materials with the Assistant Attorney General. The submitting official shall clearly label the request as a "request for certification" of a code. A copy of the request and supporting materials will be available for public examination and copying at the offices of the Assistant Attorney General in Washington, DC. The submitting official shall ensure that copies of the request and supporting materials are available for public examination and copying at the office of the State or local agency charged with administration and enforcement of the code. The submitting official shall ensure that adequate public notice of the request for certification and of the location at which the request and materials can be inspected is published within the relevant jurisdiction.

(d) Upon receipt of a request for certification, the Assistant Attorney General may request further information that he or she considers relevant to the determinations required to be made under this subpart.

§ 36.604 Preliminary determination.

After consultation with the Architectural and Transportation Barriers Compliance Board, the Assistant Attorney General shall make a preliminary determination of equivalency or a preliminary determination to deny certification.

§ 36.605 Procedure following preliminary determination of equivalency.

(a) If the Assistant Attorney General makes a preliminary determination of equivalency under § 36.604, he or she shall inform the submitting official, in writing, of that preliminary determination. The Assistant Attorney General shall also—

(1) Publish a notice in the Federal Register that advises the public of the

preliminary determination of equivalency with respect to the particular code, and invite interested persons and organizations, including individuals with disabilities, during a period of at least 30 days following publication of the notice, to file written comments relevant to whether a final certification of equivalency should be issued;

(2) After considering the information received in response to the notice described in paragraph (a) of this section, and after publishing a separate notice in the Federal Register, hold an informal hearing in Washington, DC, at which interested persons, including individuals with disabilities, are provided an opportunity to express their views with respect to the preliminary determination of equivalency; and

(3) Provide an opportunity for the submitting official to submit written or oral information to the Assistant Attorney General within 30 days after the close of the hearing.

(b) The Assistant Attorney General, after consultation with the Architectural and Transportation Barriers Compliance Board, and consideration of the materials and information submitted pursuant to this section and § 36.603, shall issue either a certification of equivalency or a final determination to deny the request for certification. He or she shall publish notice of the certification of equivalency or denial of certification in the Federal Register.

§ 36.606 Procedure following preliminary denial of certification.

(a) If the Assistant Attorney General makes a preliminary determination to deny certification of a code under § 36.604, he or she shall notify the submitting official of the determination. The notification may include specification of the manner in which the code could be amended in order to qualify for certification.

(b) The Assistant Attorney General shall allow the submitting official not less than 15 days to submit data, views, and arguments in opposition to the preliminary determination to deny certification. If the submitting official does not submit materials, the Assistant Attorney General shall not be required to take any further action. If the submitting official submits materials, the Assistant Attorney General shall evaluate those materials and any other relevant information. After evaluation of any newly submitted materials, the Assistant Attorney General shall make either a final denial of certification or a preliminary determination of equivalency.

§ 36.607 Effect of certification.

(a) (1) A certification shall be considered a certification of equivalency only with respect to those features or elements that are both covered by the certified code and addressed by the standards against which equivalency is measured.

(2) For example, if certain equipment is not covered by the code, the determination of equivalency cannot be used as evidence with respect to the question of whether equipment in a building built according to the code satisfies the Act's requirements with respect to equipment. By the same token, certification would not be relevant to construction of a facility for children, if the regulations against which equivalency is measured do not address children's facilities.

(b) A certification of equivalency is effective only with respect to the particular edition of the code for which certification is granted. Any amendments or other changes to the code after the date of the certified edition are not considered part of the certification.

(c) A submitting official may reapply for certification of amendments or other changes to a code that has already received certification.

§§ 36.608–36.999 [Reserved]

Appendix A to Part 36—Standards for Accessible Design

[Copies of this appendix may be obtained from the Office on the Americans with Disabilities Act, Civil Rights Division, U.S. Department of Justice, P.O. Box 66118, Washington, DC 20035–6118.]

Dated: February 12, 1991.

Dick Thornburgh,

Attorney General.

[FR Doc. 91–3755 Filed 2–21–91; 8:45 am]

BILLING CODE 4410–01–M

[The next page is Appendix III, Page 151.]

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 35

[Order No. 1474-91]

Nondiscrimination on the Basis of Disability in State and Local Government Services

AGENCY: Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule implements subtitle A of title II of the Americans with Disabilities Act, Public Law 101-336, which prohibits discrimination on the basis of disability by public entities. Subtitle A extends the prohibition of discrimination in federally assisted programs established by section 504 of the Rehabilitation Act of 1973 to all activities of State and local governments, including those that do not receive Federal financial assistance. This proposed rule, therefore, adopts the general prohibitions of discrimination established under section 504, as well as the requirements for making programs accessible to individuals with disabilities and for providing equally effective communications. It also sets forth standards for what constitutes discrimination on the basis of mental or physical disability, provides a definition of disability and qualified individual with a disability, and establishes a complaint mechanism for resolving allegations of discrimination.

DATES: To be assured of consideration, comments must be in writing and must be received on or before April 29, 1991. Whenever possible, comments should refer to specific sections in the proposed regulation. Comments that are received after the closing date will be considered to the extent practicable.

ADDRESSES: Comments should be sent to: John L. Wodatch, Office on the Americans with Disabilities Act, Civil Rights Division, U.S. Department of Justice, Rulemaking Docket 003, P.O. Box 75087, Washington, DC 20013.

Comments received will be available for public inspection in Room 854 of the HOLC Building, 320 First Street, NW., Washington, DC, from 9 a.m. to 5 p.m., Monday through Friday, except legal holidays, from March 14, 1991, until the Department publishes this rule in final form. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers.

Copies of this notice of proposed rulemaking are available in the following alternate formats: large print, Braille, electronic file on computer disk, and audio-tape. Copies may be obtained from the Office on the Americans with Disabilities Act at (202) 514-0301 (Voice) or (202) 514-0381 (TDD). The notice of proposed rulemaking is also available on electronic bulletin board at (202) 514-6193.

FOR FURTHER INFORMATION CONTACT: John Wodatch, Office on the Americans with Disabilities Act, or Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, Washington, DC 20530. These individuals may be contacted through the Division's ADA Information Line at (202) 514-0301 (Voice), (202) 514-0381 (TDD), or (202) 514-0383 (TDD). These telephone numbers are not toll-free numbers.

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

Subpart A—General

Subpart B—General Requirements

Subpart C—Employment

Subpart D—Program Accessibility

Subpart E—Communications

Subpart F—Compliance Procedures

Subpart G—Designated Agencies

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; title II, pub. L. 101–336 (42 U.S.C. 12134).

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, which prohibits discrimination on the basis of disability by public entities.

§ 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) Public transportation services, programs, and activities of public entities are covered by regulations implementing subtitle B of title II of the ADA issued by the Department of Transportation at 49 CFR part 37. The specific provisions of the Department of Transportation's regulation, including the limitations on those provisions, control over the general provisions in this part in circumstances where both specific and general provisions apply.

§ 35.103 Relationship to other laws.

This part does not invalidate or limit the remedies, rights, and procedures of any Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities.

§ 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, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, television decoders, telecommunication devices for deaf persons (TDD's), 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 actions.

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 permanent or temporary 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, 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 has been misclassified as having, a mental or physical impairment that

substantially limits one or more major life activities.

(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—

(i) 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.

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(8) 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.

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.

§ 35.106 Notice.

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons such 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 noncompliance 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 aid, 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 aid, 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; or

(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 where necessary to avoid discrimination on the basis of disability.

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

(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.

§ 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.* 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.

(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 features.

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

§ 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.

§§ 35.135–35.139 [Reserved]

Subpart C—Employment

§ 35.140 Employment discrimination prohibited.

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. The definitions, requirements, and procedures of title I of the Act, as established by the Equal Employment Opportunity Commission in 29 CFR part 1630, shall apply to employment in any service, program, or activity conducted by a public entity.

§§ 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) In the case of historic preservation programs, require a public entity to take any action that would result in a substantial impairment of significant historic features 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 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 accessibility requirements to the extent compelled by the Uniform Federal Accessibility Standards. 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 of this part 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 paragraphs (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include —

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

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

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* A public entity shall comply with the obligations established under this section within sixty days of the effective date of this regulation, except that where structural changes in facilities are undertaken, such changes shall be made within three years of the effective date of this regulation, 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 the effective date of this regulation, 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) 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.

(3) 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 shall apply only to those policies and practices that were not included in the previous transition plan.

§ 35.151 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 the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf

of, or for the use of a public entity after the effective date of this part 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.

(c) *Accessibility standards.* Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (Appendix A to 41 CFR part 101–19, subpart 101–19.6) shall be deemed to comply with the requirements of this section with respect to those facilities. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(d) *Alterations: Historic preservation.* (1) In making alterations to facilities that are subject to Federal, State, or local statutes requiring historic preservation of the facility, priority shall be given to methods that provide physical access to individuals with disabilities.

(2) If it is not possible to provide physical access to an historic property without substantially impairing the historic features of the facility, alternative methods of accessibility shall be provided pursuant to the requirements of § 35.150.

§§ 35.152–35.159 [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) A public entity shall furnish appropriate auxiliary aids where necessary to afford an individual with disabilities an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

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

(2) A public entity need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

§ 35.161 Telecommunication devices for the deaf (TDD's).

Where a public entity communicates with applicants and beneficiaries by telephone, TDD's or equally effective telecommunication systems shall be used to communicate with individuals with impaired hearing or speech.

§ 35.162 Telephone emergency services.

Telephone emergency services, including 911 services, must provide to individuals who use TDD's or computer modems access that is functionally equivalent to that provided to other telephone users. The services must be provided in all commonly used formats, such as Baudot and ASCII, that are compatible with these devices.

§ 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 and location of accessible services, activities, and 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 international symbol for accessibility shall be used at each accessible entrance 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 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 this subpart 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 the 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 an action required to comply with this subpart 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, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

§§ 35.165–35.168 [Reserved]

Subpart F—Compliance Procedures

§ 35.170 Complaints.

(a) *Who may file.* An individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part.

(b) *Time for filing.* A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the designated agency for good cause shown. A complaint is deemed to be filed under this section on the date it is first filed with any Federal agency.

§ 35.171 Acceptance of complaints.

(a) *Designated agency.* Any Federal agency that receives a complaint of discrimination on the basis of disability by a public entity shall determine under subpart G of this part whether it is the designated agency responsible for complaints filed against that public entity.

(1) If the agency determines that it is not the designated agency, it shall promptly review the complaint to determine whether it has jurisdiction over the complaint under section 504.

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

(ii) If the agency does not have section 504 jurisdiction, it shall promptly notify the complainant that it is referring the complaint to the appropriate agency designated in subpart G of this part.

(2) If the agency determines that it is the designated agency under subpart G of this part, it shall promptly review the complaint to determine whether it has jurisdiction under section 504.

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

(ii) If the designated agency does not have section 504 jurisdiction, it shall

process the complaint according to the procedures established by this subpart.

(b) *Employment complaints.* (1) Complaints alleging employment discrimination subject to both section 504 and this part shall be processed in accordance with procedures established in the coordination regulation issued by the Department of Justice and the Equal Employment Opportunity Commission under section 107(b) of the Act.

(2) Complaints alleging employment discrimination subject to this part, but not to section 504, shall be referred to the Equal Employment Opportunity Commission for processing under the definitions, requirements, and procedures of title I of the Act, 29 CFR part 1630.

(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.

§ 35.172 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 no violation, the complainant may file a private suit pursuant to section 203 of the Act. 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.

§ 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.

§ 35.175 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, factfinding, 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 compliance activities for State and local government components.

(b) The Federal agencies listed in paragraphs (b) (1) through (9) 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 Commerce:* All programs, services, and regulatory activities relating to the development and operation of commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business.

(3) *Department of Education:* All programs, services, and regulatory activities relating to the operation of preschool and daycare programs, elementary and secondary education systems and institutions, institutions of higher education and vocational education (other than medical and nursing schools), museums and libraries, the arts and humanities, and historic and cultural preservation.

(4) *Department of Health and Human Services:* All programs, services, and regulatory activities relating to the provision of health care and social services including medical and nursing schools, and the operation of health care and social service providers and institutions, including "grass-roots" and community services organizations and programs.

(5) *Department of Housing and Urban Development:* All programs, services and regulatory activities relating to state and local public housing, housing assistance and referral, rent control, the real estate industry, and housing code administration.

(6) *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, and energy.

(7) *Department of Justice:* All programs, services, and regulatory activities relating to public safety and the administration of justice, including courts; 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.

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

(9) *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) 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]

Dated: February 20, 1991.

Dick Thornburgh,
Attorney General.

[FR Doc. 91–4384 Filed 2–27–91; 8:45 am]

BILLING CODE 4410–01–M

[The next page is Appendix III, Page 201.]

Handbook Page Changes in Supplement No. 148

March 1991

Pages to be DISCARDED	Pages to be ADDED (Dated March 1991)	Description of Revisions
v & vi (February 1991)	v & vi	Update of Current Contents page
Chapter 1000 pp. 1020:1-2 (October 1990)	Chapter 1000 pp. 1020:1-2	Update of ¶1020 "Employment Consideration in the ADA"
Chapter 1000 pp. 1030:1-2 (October 1990)	Chapter 1000 pp. 1030:1-2	Update of ¶1030 to reflect change in ADA coverage of state and local governments
Appendix IV pp. 239-240.1 (May 1990)	Appendix IV pp. 239-240.1	Update court case No. 459

DISCARD THIS SHEET AFTER CHANGES HAVE BEEN MADE

Contents of Basic 504 Compliance Guide

The following is a listing of all pages that make up the Basic 504 Compliance Guide of the *Handicapped Requirements Handbook* with the inclusion of the March 1991, Supplement No. 148 update pages.

Appendix IV

Appendix V

Appendix VI

Appendix VII

Index

¶1020 Employment Considerations in the ADA

Title I of the Americans with Disabilities Act (ADA) prohibits nearly all employers from discriminating against any qualified individual with a disability. This prohibition (§102(a)) extends to a full range of employment activities, including:

- job application procedures;
- hiring and discharge;
- employee compensation;
- advancement;
- job training; and
- other terms, conditions and benefits of employment.

Most of the concepts included in the employment provision of the ADA are based on experience gained under section 504. For a discussion of section 504 as it applies to employment, see Tab 600.

*¶1021 Who is Covered

The ADA applies to all public and private employers, employment agencies, labor organizations and joint labor-management committees (§101(2)). Title I becomes effective for employers with 25 or more employees on July 26, 1992; businesses with 15 or more workers must comply beginning July 26, 1994. State and local governments are also covered by these effective dates (see ¶1031).

The act (§101(5)(B)) specifically exempts from title I coverage the U.S. government and corporations wholly owned by the U.S. government (which are covered by Section 501 of the Rehabilitation Act), Indian tribes, and private membership clubs (other than labor organizations) that are tax-exempt under §501(c) of the Internal Revenue Code.

¶1022 Discrimination in Employment

Title I of the ADA requires the fair treatment of "qualified individuals with disabilities" in employment. The statute defines such a person as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of a job." This is the same principle of non-discrimination in employment that applies to federal grantees under section 504 (and is discussed fully at Chapter 600).

Basically, the ADA prohibits employers from discriminating against qualified job applicants or employees based on their disability. The law covers all aspects of the employment process, from job applications, interviews and hiring, to compensation, advancement, training and benefits. If a qualified disabled applicant or employee needs an accommodation, the employer must provide it, as long as the accommodation does not impose an undue hardship on the employer (see ¶640, ¶1023).

As with section 504, it is important for employers covered by the ADA to identify the essential functions of a position (see ¶630). Employers are not required to hire or accommodate a person who cannot perform the essential functions of a position, even if that person has a disability.

* Indicates new or revised material.

The ADA (§101(8)) provides that written job descriptions prepared before a position is advertised or an interview given must be considered evidence of essential job functions. The terms of any collective bargaining agreement can serve as evidence of this as well. Section 504 does not have a similar requirement.

Pre-employment questions, exams

The ADA adopts section 504's constraints on pre-employment screening of disabled applicants (see ¶660). During the pre-employment process, employers are prohibited from using criteria (tests, inquiries, etc.) that screen out or tend to screen out disabled people or classes of disabled people, unless those criteria are job-related and consistent with business necessity.

Under section 504, employers are permitted to make pre-employment inquiries regarding disabilities only to redress past discrimination. Based on the language of the House report accompanying the ADA (H. Rpt. 101-485, Part 2, p. 75), it is possible that questioning under the same conditions will be permitted under the ADA, since the rules implementing the ADA will likely parallel those under section 504.

The same prohibition against pre-employment inquiries applies to medical exams. Under the ADA (and section 504), employers may not make medical inquiries that are not job-related (§102(C)). Employers may require "post-offer" medical examinations that follow a conditional offer of employment, provided the results are kept confidential and exams are required of all entering employees in a particular category.

The ADA does not make voluntary "corporate wellness" programs illegal. An employer may conduct voluntary medical examinations that are part of an employee health program available to employees at a particular work site. These programs are legal as long as the medical records are kept confidential and not used to limit health insurance eligibility or prevent the employee from advancing.

Health insurance

The ADA requires employers to provide equal medical coverage to disabled employees and non-disabled employees alike. The act also prohibits an employer from not hiring a disabled applicant because its insurance rates would increase as a result. But the ADA does not prohibit insurance policies that do not cover pre-existing conditions (including disabilities), nor does it require a private employer to change its insurance carrier if the carrier does not cover disabilities.

Under section 504, a grantee is required to change its health insurance company if it hires a disabled person and its current carrier does not cover disabilities (see ¶610).

Discrimination by association

Both section 504 and the ADA prohibit employers from discriminating against an individual based on a disability. The ADA goes a step further and bars employers from discriminating against a non-disabled individual because he or she is related to or associated with a disabled person. Thus, it would be illegal to deny employment to an able-bodied person whose spouse has AIDS because the employer fears that the employee will be absent frequently to attend to the spouse.

grantees that employ more than 15 people are still subject to section 504's employment requirements, regardless of the ADA.

Chapter 800 discusses the administrative procedures used to monitor public sector compliance with section 504; ¶1052 discusses enforcement under the ADA as it applies to state and local governments.

¶1032 Services, Programs and Activities

Title II of the ADA requires all services, programs and activities of all state and local governments and their departments, agencies or special purpose districts, to be accessible to qualified individuals with disabilities.

Jurisdictions that receive federal funding should find title II's requirements familiar, as they generally follow those imposed by section 504 (see Chapter 300). Unlike section 504, however, the ADA applies to programs and activities sponsored by all governmental entities, not merely the ones run by departments that receive federal funding. (The ADA does not require the self-evaluations or transition plans mandated by section 504.)

There are no exemptions for the types of activities covered by title II — it applies to every state, county and municipal service, from libraries and swimming pools to housing and parks.

Under the public accommodations title of the ADA, small businesses have a grace period during which they are exempt from lawsuits (see ¶1045). State and local governments are not entitled to such a grace period.

¶1033 Effective Dates and Enforcement

Title II of the ADA becomes effective Jan. 26, 1992, 18 months after the law was enacted.

*With respect to title I, the Equal Employment Opportunity Commission is authorized to file suit against state and local governments in cases where a pattern or practice of employment discrimination against disabled people exists (in the same manner as is authorized for other protected classes under the 1964 Civil Rights Act).

¶1034 Relationship of ADA to State and Local Laws

The ADA does not invalidate or limit any existing state or local disability rights law that provides greater protection for disabled people. The ADA applies in situations in which the state or local law has less stringent requirements. Therefore, federal grantees must be aware that they continue to be affected by state and local discrimination laws, as well as the ADA. (See Appendix VII:D for a summary of state disability laws.)

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* Indicates new or revised material.

[The next page is Page 1040:1.]

Courts generally give special weight to an agency's opinion when considering the legality of its action, the court said. However, it noted that Congress did not intend for courts to rely on DOT's view of the Rehabilitation Act, "a statute it is not charged with administering and in respect to which it has no special expertise."

Finally, the court said Cousins was free to submit any evidence or legal argument he wanted to include in another appeal or judicial review.

458 *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988); 714 F.Supp. 420 (D. Ariz., 1989)

Deaf inmate at state correctional facility that receives federal financial assistance may sue prison officials under the Rehabilitation Act for not providing a qualified sign language interpreter

District Court rules suit may proceed under Civil Rights Restoration Act

A deaf inmate in the Arizona State Prison may sue prison officials under Section 504 of the Rehabilitation Act for not providing him with a qualified interpreter, the Ninth Circuit Court of Appeals has ruled. Further, the court ruled, the director of the state's correctional system is a plausible defendant in the case, under the idea of respondeat superior as it applies to Section 504.

Nicki Bonner, the plaintiff, is a deaf prisoner who also suffers from deteriorating vision and reads at a fourth grade level. He communicates through American Sign Language, but none of the personnel at the Arizona State Prison knows sign language. As an inmate, Bonner had several counseling, medical and administrative contacts without the aid of a qualified sign language interpreter.

Prison officials communicate with Bonner through a telecommunications device for the deaf (TDD) and through informal inmate interpreters, who admittedly don't know sign language properly. While the prison officials acknowledge their ways of communicating with Bonner are imperfect, they maintain that nothing more is constitutionally or statutorily required of them. Bonner charges that these practices constitute handicap discrimination and violate his rights under section 504.

The appellate court reversed in part the summary judgment granted by the U.S. District Court for Arizona in favor of the defendants. In evaluating the summary judgment under section 504, the appellate court considered two things: did Congress intend that section 504 would require state prisons to provide deaf inmates with sign language interpreters; and were there any genuine issues of material fact which prevented summary judgment.

The court noted that the first issue had never been tested specifically in the courts, but it cited Fifth and Seventh Circuit decisions under section 504 where schools were required to provide sign language interpreters to deaf students who were "otherwise qualified participants in programs receiving federal assistance."

The court also cited U.S. Justice Department section 504 regulations applying to correctional facilities receiving federal money, which require prisons to "provide appropriate auxiliary aids to qualified handicapped persons with impaired sensory, manual or speaking skills" where refusal would discriminate against handicapped inmates (28 CFR Part 42.503). A qualified interpreter is one such auxiliary aid.

The court rejected the prison officials' argument that Congress never intended section 504 to cover prisoners. First, it said, the "plain language of the Justice Department's implementing regulations (28 CFR Part 42.503) and the Act itself, which states that it applies to 'any program or activity receiving federal financial assistance' (29 USC Part 794) belies their arguement."

Second, the court continued, the Act's goal of independent living and vocational rehabilitation "should in fact mirror the goals of prison officials as they attempt to rehabilitate prisoners and prepare them to lead productive lives once their sentences are complete."

The court then turned to issues of material fact and ruled that issues supporting Bonner's claims did exist, precluding summary judgment. By being deaf, Bonner is handicapped under the Rehabilitation Act; the prison qualifies by receiving federal financial assistance. When the prison provided unskilled interpreters, it perhaps discriminated against Bonner's handicap, impeding his ability to understand hearings or receive proper medical treatments, the court said.

The district court had dismissed Samuel Lewis, director of the Arizona Department of Corrections, as a defendant from the case. But the higher court reinstated him, holding that the doctrine of respondeat superior—that public officials are responsible for the actions of their subordinates—applies to actions taken under section 504. The court cited *Patton V. Dumpson* (Appendix IV:70) as precedent.

Bonner had claimed violations of his constitutional rights of due process, equal protection and safeguards against cruel and unusual punishment. The district court rejected these, and the appellate court upheld that decision. The case was remanded to the lower court.

On remand:

The U.S. District Court for the District of Arizona ruled that Bonner may sue the Department of Corrections (a federal funds recipient) retroactively under the Civil Rights Restoration Act, even though the programs involved did not directly receive federal assistance.

Citing the decision in *Leake v. Long Island Jewish Medical Center* (Appendix IV:465), the court said the Civil Rights Restoration Act does apply retroactively.

"Since the Civil Rights Restoration Act can be applied retroactively in this case, and the department has admitted that it receives a significant amount of federal assistance, the Rehabilitation Act's prohibition of discrimination against otherwise qualified handicapped individuals applies to all the programs and activities of the department regardless of which specific program receives federal funds," the court held.

The court said the department has two choices: provide qualified interpreters for Bonner or prove that not providing them is non-discriminatory. "If the department can establish that Bonner is able to effectively communicate without the use of a qualified interpreter and that adequate communication is achieved through the use of the telecommunications device and inmate interpreters, then no discrimination could have occurred," the court ruled.

459 *Moore v. Sun Bank of North Florida*, 87-617-Civ-J-16 (M.D.Fla., 1988); 923 F.2d 1423 (11th Cir. 1991)

A bank, as a participant in a Small Business Administration loan program, is a beneficiary of federal financial assistance under section 504 of the Rehabilitation Act

A bank, because it participates in a Small Business Adminstration loan program, is a recipient of federal financial assistance for purposes of the Rehabilitation Act, the U.S. District Court for the Middle District of Florida has ruled.

David E. Moore is suing his former employer, Sun Bank of North Florida, for relief under section 504 of the act. The law bars recipients of federal financial assistance from discriminating based on handicap. Contending that the court lacked subject matter jurisdiction over the case, the bank filed for a dismissal.

The court denied the motion for summary judgment, but it urged an appeal. This decision, said the court, "involves a controlling interest of law where there is substantial ground for difference of opinion." An appeal could "materially advance the ultimate termination of this litigation."

Moore claimed Sun Bank is subject to section 504 because it participates in SBA's Guaranteed Loan Program. SBA guarantees up to 90 percent of the value of a loan made by private lenders to small businesses. If a borrower defaults, then the lender receives money directly from SBA. Sun Bank made and collected on such loans during Moore's tenure.

According to the court, the issue is whether such loans constitute federal financial assistance within the meaning of the Rehabilitation Act. While section 504 doesn't define assistance, it's patterned after two federal anti-discrimination statutes that do: Title VI of the 1964 Civil Rights Act and Title IX of the 1972 Civil Rights Act. In both, Congress expressly excluded contracts of insurance or guaranty from its definition of federal financial assistance.

Moore argued the absence of that exclusionary language in section 504 means that contracts of insurance or guaranty, such as SBA's Guaranteed Loan Program, represent federal aid.

Sun Bank, however, claimed that administrative regulations issued pursuant to the Rehabilitation Act support its interpretation. It also said Titles VI and IX, as models, indicate congressional intent for excluding such contracts for purposes of section 504.

While the court found the defendant's arguments "to be highly persuasive," it said it must adopt a strict reading of the statute. Citing the Eleventh Circuit Court of Appeals' reluctance to go beyond the plain wording of the language in *Jones v. Metropolitan Atlanta Rapid Transit Authority* (IV:142) and *Arline v. School Board of Nassau County* (IV:329), the court said it must conclude "that the absence of a textually demonstrable exclusion of contracts of insurance or guaranty from section 504 is evidence of Congressional intent to not exclude such contracts."

The court further rejected Sun Bank's claim that section 505, which makes Title VI remedies, procedures and rights available under the Rehabilitation Act, restricts the meaning of federal financial assistance.

Sun Bank, citing *U.S. Department of Transportation v. Paralyzed Veterans* (IV:274), also argued that it was a mere beneficiary of SBA's program, not a recipient of financial assistance and thus not covered by the Rehabilitation Act. But the court sided with Moore's claim that the facts of this case were more closely aligned with those in *Grove City College v. Bell* (IV:902). Due to its participation in the federal Guaranteed Loan program, it held that the bank "is able to make more attractive loans on which it earns interest and profits."

Moore had also claimed that Sun Bank was a federal funds recipient because it received deposit insurance from the Federal Deposit Insurance Corporation, and because it could get loans through the discount window of the Federal Reserve System. The court rejected both these arguments.

On appeal —

On appeal, the 11th U.S. Circuit Court of Appeals held that participation in the loan program makes the bank subject to section 504 because because Congress did not specifically exclude such loans from the statute, as it had in other federal civil rights laws (e.g., Title VI of the Civil Rights Act and Title IX of the 1972 Civil Rights Act). The court said it could not read into the statute any limitations that Congress had not included itself.

Moreover, the court said, the loans are federal financial assistance because federal funds are directly reimbursed to the lending institution under the SBA guaranteed loan program upon default by the borrower. The lender, as recipient of federal financial assistance, is thus willing to make what otherwise might be a high risk loan, the court added.

The appeals court denied Sun Bank's motion for summary judgment, but did not rule on the merits of the case.

460 *Lemere v. Burnley*, 683 F. Supp. 275 (D.D.C. 1988)

The FAA reasonably accommodated an alcoholic employee under the Rehabilitation Act by offering her several opportunities to receive treatment before it fired her for repeated on-the-job difficulties

A federal agency fulfilled its duties to an alcoholic employee under the Rehabilitation Act by offering her several chances to recover before it fired her for repeated performance and attendance problems, ruled the U.S. District Court for the District of Columbia.

Mary Kathleen Lemere, an acknowledged alcoholic, worked as a contract specialist with the Federal Aviation Administration (FAA). She contends that FAA failed to accommodate her condition, as required by the law, when it fired her. Instead, she argues, the agency should have afforded her an extended leave so that she could enter a treatment program. She also seeks a reversal of the Merit System Protection Board's (MSPB) affirmation of FAA's action.

In 1984, plaintiff began to come to work intoxicated at times, and she suffered several seizures related to alcohol withdrawal. In July 1984, an FAA psychiatrist personally drove her to get treatment at an in-patient detoxification program at a hospital. The FAA granted Lemere five weeks sick leave to finish the program.

Lemere returned to work sober that autumn. After a relapse, she again had problems with absenteeism and getting along with co-workers. FAA suspended Lemere for two days in the summer of 1985 and threatened to fire her. When she voluntarily reentered the treatment center, FAA rescinded the reprimand and granted her another leave.

Again, Lemere returned to work sober, but again, she relapsed. In February 1986, FAA issued Lemere a second proposal of termination. It agreed in April to retract it and give her a minimum three months without pay for treatment if she would sign a letter agreeing to get help. Lemere signed but failed to enroll within the prescribed time limit, and later she told a supervisor that it would be "ridiculous" for her to pursue treatment. FAA fired her. Lemere eventually did enter the program.

According to the court, the issue is the extent to which the Rehabilitation Act compels a federal employer to accommodate a worker's alcoholism before it can fire the worker. It

found that the act "does not require the FAA, as a matter of law, to make additional efforts to accommodate plaintiff's handicap." The court said FAA's attempts to help Lemere were "reasonable, and, at times, even more than reasonable."

The court further cited the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act, which, the court noted, provides that "federal employers can terminate alcoholic employees when repeated efforts at treatment prove unsuccessful."

Plaintiff maintained that the FAA was required to rescind the termination when it learned she had actually entered the treatment program. The court rejected this, saying Lemere's "unreliable and erratic" behavior caused her employers an "undue hardship" which it was no longer willing to tolerate.

Lemere also argued that, under *Whitlock v. Donovan* (IV:271), the FAA had to at least obtain a medical evaluation of her condition before it could fire her. But the court said that case did not apply here: "The court in Whitlock stated that the purpose of a medical investigation is for the agency to determine whether an employee's problems are related to alcoholism, and thus to determine the agency's duties under the Rehabilitation Act." Lemere admitted that her problems were alcohol related.

The court also noted that Lemere's two-year pattern of unscheduled absences could remove her "from the protections of the Rehabilitation Act as someone who had lost the status of a qualified handicapped employee." Being absent so often prevented her from performing the essential functions of her job, which is the minimum requirement for qualified handicapped workers.

The court granted summary judgment to the FAA and upheld the MSPB decision.

461 *Gerben v. Holsclaw*, 692 F.Supp. 557 (E.D.Pa. 1988)

Infancy, by itself, is not a handicap for purposes of the Rehabilitation Act

Infancy, by itself, cannot be characterized as a mental or physical impairment within the meaning of the Rehabilitation Act, the U.S. District Court for the Eastern District of Pennsylvania has ruled. Consequently, parents who sued a hospital and two of its doctors for allegedly discriminating against their infant daughter have no claim of action under section 504 of the law.

Mary Ann and Jonathan Gerben's baby daughter, Erika, suffered and died from cystic fibrosis. The Gerbens contend that Erika's doctors unnecessarily prolonged her life with painful treatment to which, they said, they never consented.

The parents sued, alleging that "aggressive and persistent care" designed to keep the infant alive caused her undue pain and violated section 504 of the Rehabilitation Act. But rather than basing their claim on Erika's status as a handicapped individual due to her cystic fibrosis, the Gerbens argued that infancy itself was a handicap. The doctors, they said, "would not have adopted these policies and practices (had) Erika been a conscious adult and able to speak for herself."

The two principal cases cited here are *United States v. University Hospital* and *Bowen v. American Hospital Ass'n.* (both IV:248), where the Second Circuit and Supreme Court respectively heard Rehabilitation Act cases involving infants with birth defects.

The presiding judge, Louis Pollak, said the defense's argument moving to dismiss the case "came close to contend-

Continued on Page 241

Handbook Page Changes in Supplement No. 149

April 1991

Pages to be DISCARDED	Pages to be ADDED (Dated April 1991)	Description of Revisions
v & vi (March 1991)	v & vi	Update to Current Contents page
Appendix IV p. 257 (Feb. 1991)	Appendix IV p. 257	Addition of court case No. 493

DISCARD THIS SHEET AFTER CHANGES HAVE BEEN MADE

Contents of Basic 504 Compliance Guide

The following is a listing of all pages that make up the Basic 504 Compliance Guide of the *Handicapped Requirements Handbook* with the inclusion of the April 1991, Supplement No. 149 update pages.

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492 *Chiari v. City of League City*, 920 F.2d 311 (5th Cir. 1991)

Construction inspector who has Parkinson's disease not otherwise qualified to perform essential functions of the job

A city did not violate Section 504 of the Rehabilitation Act when it fired a construction inspector who would lose his balance and thus was unable to perform the essential functions of the job, the 5th U.S. Circuit Court of Appeals ruled.

Antonio Chiari, an engineer who has Parkinson's disease, was a construction inspector for League City, Texas. Inspectors are responsible for approving construction plans and verifying that the work was properly completed. Nearly half of the job is spent at construction sites visually inspecting contractors' work, which requires considerable walking and climbing.

In early 1987, Chiari began to have trouble walking; he was seen stumbling in the city hall and falling while at a construction site. At the request of his supervisor, Chiari was examined separately by two neurosurgeons, who found he had an unsteady "shuffling gait and body rigidity." They both said his loss of balance rendered him unable to continue his job as a construction inspector and that he would be a danger to himself and others if he continued to work.

Chiari's personal physician also examined him, and saw "no particular limitation of [Chiari's] work, as long as he [did] not climb."

City officials tried unsuccessfully to restructure the job to accommodate Chiari's condition. First, they assigned another inspector to do on-site work while Chiari remained at his desk to review the plans. That arrangement did not work because to do the job properly, an inspector must review plans before visiting the site. They tried to create a new position, but could not due to budgetary constraints, and the city had no open positions for a transfer.

After these attempts failed, the city fired Chiari in April 1987. He sued, charging that the dismissal violated section 504 and the Texas Human Rights Act. He said he had never fallen on or injured a co-worker, and that the risk of personal injury was not a factor under section 504. Chiari also argued that the city could have provided him with part-time work as an accommodation.

The city said Chiari was not protected by section 504 because he could not perform the essential functions of the job, namely walking and climbing around construction sites safely.

The U.S. District Court for the Southern District of Texas ruled in favor of the city. That ruling was upheld by the 5th Circuit, which agreed that Chiari was no longer qualified to be a construction inspector. Citing *Arline* (see Appendix IV:329) and other section 504 cases, the appeals court said a "handicapped person cannot perform the essential functions of a job if his handicap poses a significant safety risk to those around him."

To support its judgment, the court cited the neurosurgeons' diagnoses that Chiari's balance problem would prevent him from working safely. Chiari's doctor concluded similarly when he was read the job description during the case.

The appeals court disagreed with Chiari that the risk of personal injury was immaterial. It cited section 501 regulations that include "health and safety of the individual" in the definition of qualified handicapped person. The existence of a personal safety rule in section 501 creates a similar rule under section 504, the court said.

Finally, the court ruled that city officials "went beyond their statutory duty in an effort to accommodate Chiari's disease" and that they were not required to create a new part-time position as an accommodation.

"All the city must do is demonstrate that a part-time schedule would not accommodate Chiari's performance on that job that he is currently doing," it said. "Even if Chiari worked fewer hours, he still would not be able to climb buildings or climb into ditches, [which are] 'essential functions' of a construction inspector's job."

For the same reasons cited under section 504, the court found no violations of the Texas discrimination law.

493 *Gault v. University of Chicago Hospitals*, No. 90-C0321 (N.D. Ill. 1991)

Epileptic nurse not otherwise qualified to work in burn unit of hospital

A nurse who suffers from epileptic seizures is not "otherwise qualified" within in the meaning of Section 504 of the Rehabilitation Act to work in the burn unit of a hospital, the U.S. District Court for the Northern District of Illinois ruled.

Freida Gault sued the University of Chicago Hospitals for allegedly violating section 504 when it dismissed her as a burn-unit nurse. Gault has idiopathic epilepsy, which causes her to have unpredictable generalized seizures. Before the onset of a seizure, Gault will stare blankly. She then experiences convulsions, falls to floor and loses consciousness. After she recovers, there is a period of confusion.

Gault suffered seizures while on duty. According to hospital officials, seizures occurred while she was: using scissors to change a dressing; assisting an infant's breathing apparatus "resulting in extubation of the patient and her inability to summon needed medical care"; and cutting a dressing, which caused the patient to leave his room to summon help.

Additionally, Gault suffered a head injury during one seizure that required emergency room treatment and made her unable to help a seriously burned patient on a ventilator and tube feeding.

The hospitals knew of Gault's condition before they hired her, and did not relieve her from duty after the first seizure. One doctor at the hospital thought the seizures were under control and would not endanger her or others. Several seizures followed, however, and Gault agreed to consult an expert from another hospital.

That doctor told Gault that the seizures were not under control and that it was dangerous for her to work in a burn unit or operating room. Gault would not tell hospital officials about this diagnosis, and as a result, the hospitals placed her on leave.

Based on these circumstances, the court ruled that Gault is not otherwise qualified because she was not meeting the position requirements of a burn-unit nurse. Further, the court found no section 504 violations on the part of the hospitals.

Gault cannot "contend that the decision process to remove her from the burn unit . . . was motivated by prejudice against her handicap or was conducted unfairly," the court said. "The hospitals are indisputably willing to hire epileptics and to assign them to critical care units."

Handbook Page Changes in Supplement No. 147

February 1991

Pages to be DISCARDED	Pages to be ADDED (Dated February 1991)	Description of Revisions
v & vi (January 1991)	v & vi	Update to Current Contents page.
Appendix III Table of Contents (October 1990)	Appendix III Table of Contents	Update to Appendix III Table of Contents
Appendix III pp. III:B:1-11 (July 1988)	Appendix III pp. B:1-11	Update of section 504 government-wide regulations; deletion of outdated mass of transit rule (p. B:6) (No substantive changes)
Appendix III pp. III:C:i-xxvii (November 1978)	Appendix III pp. C:1-32	Replacement of HEW section 504 regulations and analysis with same regulations issued by HHS, rules contain new reference to UFAS at §84.23(c)
Appendix IV pp. 183-184 (November 1990)	Appendix IV pp. 183-184	Update to citation for court case No. 359
None	Appendix IV p. 257	Addition of court case No. 492

DISCARD THIS SHEET AFTER CHANGES HAVE BEEN MADE

Contents of Basic 504 Compliance Guide

The following is a listing of all pages that make up the Basic 504 Compliance Guide of the *Handicapped Requirements Handbook* with the inclusion of the February 1991, Supplement No. 147 update pages.

Appendix IV

Appendix V

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Appendix III: LAWS, REGULATIONS AND ORDERS

Government-Wide Regulations

Originally, Executive Order 11914, "Nondiscrimination With Respect to the Handicapped in Federally Assisted Programs," required the now-defunct Department of Health, Education, and Welfare (HEW) to coordinate government-wide enforcement of Section 504 of the Rehabilitation Act of 1973. On Jan. 13, 1978, HEW issued implementing regulations (45 CFR 85.1-85.58) at 43 *Federal Register* 2132.

When the Department of Education (ED) was established in 1980, authority for coordinating the government-wide enforcement of section 504 was transferred to the U.S. Department of Health and Human Services (HHS). This authority was transferred again, by Executive Order 12250 on Nov. 2, 1980, to the Attorney General at the U.S. Department of Justice (DOJ). On Aug. 11, 1981, DOJ issued a final rule in the *Federal Register,* Page 40686, transferring the original HEW regulation issued as 45 CFR Part 85 (sections 85.1-85.58) to title 28 of the *Code of Federal Regulations* and redesignating it as 28 CFR Part 41 (sections 41.1-41.58). The transfer did not change the guidelines substantively.

In some cases throughout the *Handbook*, references are made to the HEW regulations (45 CFR 85.1-85.58) rather than the renumbered (but identical) DOJ regulations (28 CFR 41.1-41.58). To find the appropriate section of the government-wide regulation using the HEW references, look for the appropriate *section number* (which falls after the period — e.g., section 85.4 would refer to section 4). A reference to 45 CFR 85.4, for instance, can be found at 28 CFR 41.4, or 45 CFR 85.7 can be found at 28 CFR 41.7.

A copy of the HHS Section 504 regulations (45 CFR Part 84) that apply to HHS grantees appears in Part C of this Appendix.

Contents of this section

This section consists of:

- current DOJ government-wide regulations (28 CFR 41);
- the text of the preamble to the original HEW regulations issued in the *Federal Register* in 1978.

PART 41—IMPLEMENTATION OF EXECUTIVE ORDER 12250, NONDISCRIMINATION ON THE BASIS OF HANDICAP IN FEDERALLY ASSISTED PROGRAMS

Subpart A—Federal Agency Responsibilities

Sec.

Subpart B—Standards for Determining Who Are Handicapped Persons

Subpart C—Guidelines for Determining Discriminatory Practices

GENERAL

EMPLOYMENT

PROGRAM ACCESSIBILITY

APPENDIX A—LEADERSHIP AND COORDINATION OF NONDISCRIMINATION LAWS

AUTHORITY: Executive Order 12250, 45 FR 72995; sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706).

SOURCE: 43 FR 2132, Jan. 13, 1978, unless otherwise noted. Redesignated and amended at 46 FR 40686, 40687, Aug. 11, 1981.

Subpart A—Federal Agency Responsibilities

§41.1 Purpose.

The purpose of this part is to implement Executive Order 12250, which requires the Department of Justice to coordinate the implementation of section 504 of the Rehabilitation Act of 1973.

[43 FR 2132, Jan. 13, 1978. Redesignated and amended at 46 FR 40686, 40687, Aug. 11, 1981]

§41.2 Application.

This part applies to each Federal department and agency that is empowered to extend Federal financial assistance.

§41.3 Definitions.

As used in this regulation, the term:

(a) "Executive Order" means Executive Order 12250, titled "Leadership and Coordination of Nondiscrimination Laws," issued November 2, 1980.

(b) "Section 504" means section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

(c) "Agency" means a Federal department or agency that is empowered to extend financial assistance.

(d) "Recipient" means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(e) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(f) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

[43 FR 2132, Jan. 13, 1978. Redesignated and amended at 46 FR 40686, 40687, Aug. 11, 1981]

§41.4 Issuance of agency regulations.

(a) Each agency shall issue, after notice and opportunity for comment, a regulation to implement section 504 with respect to the programs and activities to which it provides assistance. The regulation shall be consistent with this part.

(b) Each agency shall issue a notice of proposed rulemaking no later than 90 days after the effective date of this part. Each agency shall issue a final regulation no later than 135 days after the end of the period for comment on its proposed regulation: *Provided*, That the agency shall submit its proposed final regulation to the Assistant Attorney General, Civil Rights Division, Department of Justice, for review at least 45 days before it is to be issued.

(c) Each such agency regulation shall: (1) Define appropriate terms, consistent with the definitions set forth in § 41.3 and with the standards for determining who are handicapped persons set forth in Subpart B of this Part; and (2) prohibit discriminatory practices against qualified handicapped persons in employment and in the provision of aid, benefits, or services, consistent with the guidelines set forth in Subpart C of this Part. The regulation shall include, where appropriate, specific provisions adapted to the particular programs and activities receiving financial assistance from the agency.

[43 FR 2132, Jan. 13, 1978. Redesignated and amended at 46 FR 40686, 40687, Aug. 11, 1981]

§41.5 Enforcement.

(a) Each agency shall establish a system for the enforcement of section 504 and its implementing regulation with respect to the programs and activities to which it provides assistance. The system shall include: (1) The enforcement and hearing procedures that the agency has adopted for the enforcement of title VI of the Civil Rights Act of 1964, and (2) a requirement that recipients sign assurances of compliance with section 504.

(b) Each agency regulation shall also include requirements that recipients:

(1) Notify employees and beneficiaries of their rights under section 504, (2) conduct a self-evaluation of their compliance with section 504, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, and (3) otherwise consult with interested persons, including handicapped persons or organizations representing

HEW regulations (45 CFR §§85.1-85.58) were replaced by these Justice Department regulations (28 CFR §§41.1-41.28). See page III:B:1.

handicapped persons, in achieving compliance with section 504.

§41.6 Interagency cooperation.

(a) Where each of a substantial number of recipients is receiving assistance for similar or related purposes from two or more agencies or where two or more agencies cooperate in administering assistance for a given class of recipients, the agencies shall: (1) Coordinate compliance with section 504, and (2) designate one of the agencies as the primary agency for section 504 compliance purposes.

(b) Any agency conducting a compliance review or investigating a compliant of an alleged section 504 violation shall notify any other affected agency upon discovery of its jurisdiction and shall inform it of the findings made. Reviews or investigations may be made on a joint basis.

§41.7 Coordination with sections 502 and 503.

(a) Agencies shall consult with the Architectural and Transportation Barriers Compliance Board in developing requirements for the accessibility of new facilities and alterations, as required in §41.58, and shall coordinate with the Board in enforcing such requirements with respect to facilities that are subject to section 502 of the Rehabilitation Act of 1973, as amended, as well as to section 504.

(b) Agencies shall coordinate with the Department of Labor in enforcing requirements concerning employment discrimination with respect to recipients that are also federal contractors subject to section 503 of the Rehabilitation Act of 1973, as amended.

Subpart B—Standards for Determining Who Are Handicapped Persons

§41.31 Handicapped person.

(a) "Handicapped person" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

(b) As used in paragraph (a) of this section, the phrase:

(1) "Physical or mental impairment" means: (i) 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; or (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such 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, and drug addiction and alcoholism.

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

(3) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) "Is regarded as having an impairment" means: (i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient 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 (b)(1) of this section but is treated by a recipient as having such an impairment.

§41.32 Qualified handicapped person.

"Qualified handicapped person" means: (a) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and (b) with respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

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, benefits, 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 permissibly 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

HEW regulations (45 CFR §§85.1-85.58) were replaced by these Justice Department regulations (28 CFR §§41.1-41.28). See page III:B:1.

handicapped persons is not prohibited by this part.

(d) Recipients shall administer programs and activites 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, position 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 40686, 40687, 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 usable by handicapped persons.This paragraph does not necessarily require a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons.

(b) Where structural changes are necessary to make programs or activities in existing facilities accessible, such changes shall be made as soon as practicable, but in no event later than three years after the effective date of the agency regulation: *Provided*, That, if the program is a particular mode of transportation (e.g., a subway system) that can be made accessible only through extraordinarily expensive structural changes to, or replacement of, existing facilities and if other accessible modes of transportation are available, the federal agency responsible for enforcing section 504 with respect to that program may extend this period of time, but only for a reasonable and definite period, such period to be set forth in the agency's regulation.

(c) In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within a definite period to be established in each agency's regulation, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons.

§41.58 New construction.

(a) Except as provided in paragraph (b) of this section, new facilities shall be designed and constructed to be readily accessible to and usable by handicapped persons. Alterations to existing facilities shall, to the maximum extent feasible, be designed and constructed to be readily accessible to and usable by handicapped persons.

(b) The Department of Transportation may defer the effective date for requiring all new buses to be accessible if it concludes on the basis of its section 504 rulemaking process that it is not feasible to require compliance on the effective date of its regulation: *Provided*, That comparable, accessible services are available to handicapped persons in the interim and that the date is not deferred later than October 1, 1979.

APPENDIX A—LEADERSHIP AND COORDINATION OF NONDISCRIMINATION LAWS

EXECUTIVE ORDER 12250, Nov. 2, 1980

By the authority vested in me as President by the Constitution and statutes of the United States of America, including section 602 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-1), Section 902 of the Education Amendments of 1972 (20 U.S.C. 1682), and Section 301 of Title 3 of the United States Code, and in order to provide, under the leadership of the Attorney General, for the consistent and effective implementation of various laws prohibiting discriminatory practices in Federal programs and programs receiving Federal financial assistance, it is hereby ordered as follows:

1-1. *Delegation of Function.*

1-101. The function vested in the President by Section 602 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-1), relating to the approval of rules, regulations, and orders of general applicability, is hereby delegated to the Attorney General.

HEW regulations (45 CFR §§85.1-85.58) were replaced by these Justice Department regulations (28 CFR §§41.1-41.28). See page III:B:1.

1-102. The function vested in the President by Section 902 of the Education Amendments of 1972 (20 U.S.C. 1682), relating to the approval of rules, regulations, and orders of general applicability, is hereby delegated to the Attorney General.

1-2. *Coordination of Nondiscrimination Provisions.*

1-201. The Attorney General shall coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions of the following laws:

(a) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.).

(b) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.).

(c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794).

(d) Any other provision of Federal statutory law which provides, in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.

1-202. In furtherance of the Attorney General's responsibility for the coordination of the implementation and enforcement of the nondiscrimination provisions of laws covered by this Order, the Attorney General shall review the existing and proposed rules, regulations, and orders of general applicability of the Executive agencies in order to identify those which are inadequate, unclear or unnecessarily inconsistent.

1-203. The Attorney General shall develop standards and procedures for taking enforcement actions and for conducting investigations and compliance reviews.

1-204. The Attorney General shall issue guidelines for establishing reasonable time limits on efforts to secure voluntary compliance, on the initiation of sanctions, and for referral to the Department of Justice for enforcement where there is noncompliance.

1-205. The Attorney General shall establish and implement a schedule for the review of the agencies' regulations which implement the various nondiscrimination laws covered by this Order.

1-206. The Attorney General shall establish guidelines and standards for the development of consistent and effective record-keeping and reporting requirements by Executive agencies; for the sharing and exchange by agencies of compliance records, findings, and supporting documentation; for the development of comprehensive employee training programs; for the development of effective information programs; and for the development of cooperative programs with State and local agencies, including sharing of information, deferring of enforcement activities, and providing technical assistance.

1-207. The Attorney General shall initiate cooperative programs between and among agencies, including the development of sample memoranda of understanding, designed to improve the coordination of the laws covered by this Order.

1-3. *Implementation by the Attorney General.*

1-301. In consultation with the affected agencies, the Attorney General shall promptly prepare a plan for the implementation of this Order. This plan shall be submitted to the Director of the Office of Management and Budget.

1-302. The Attorney General shall periodically evaluate the implementation of the nondiscrimination provisions of the laws covered by this Order, and advise the heads of the agencies concerned on the results of such evaluations as to recommendations for needed improvement in implementation or enforcement.

1-303. The Attorney General shall carry out his functions under this Order, including the issuance of such regulations as he deems necessary, in consultation with affected agencies.

1-304. The Attorney General shall annually report to the President through the Director of the Office of Management and Budget on the progress in achieving the purposes of this Order. This report shall include any recommendations for changes in the implementation or enforcement of the nondiscrimination provisions of the laws covered by this Order.

1-305. The Attorney General shall chair the Interagency Coordinating Council established by Section 507 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794c).

1-4. *Agency Implementation.*

1-401. Each Executive agency shall cooperate with the Attorney General in the performance of the Attorney General's functions under this Order and shall, unless prohibited by law, furnish such reports and information as the Attorney General may request.

1-402. Each Executive agency responsible for implementing a nondiscrimination provision of a law covered by this Order shall issue appropriate implementing directives (whether in the nature of regulations or policy guidance). To the extent permitted by law, they shall be consistent with the requirements prescribed by the Attorney General pursuant to this Order and shall be subject to the approval of the Attorney General, who may require that some or all of them be submitted for approval before taking effect.

1-403. Within 60 days after a date set by the Attorney General, Executive agencies shall submit to the Attorney General their plans for implementing their responsibilities under this Order.

1-5. *General Provisions.*

1-501. Executive Order No. 11764 is revoked. The present regulations of the Attorney General relating to the coordination of enforcement of Title VI of the Civil Rights Act of 1964 shall continue in effect until revoked or modified (28 CFR 42.401 to 42.415).

1-502. Executive Order No. 11914 is revoked. The present regulations of the Secretary of Health and Human Services relating to the coordination of the implementation of Section 504 of the Rehabilitation Act of 1973, as amended, shall be deemed to have been issued by the Attorney General pursuant to this Order and shall continue in effect until revoked or modified by the Attorney General.

1-503. Nothing in this Order shall vest the Attorney General with the authority to coordinate the implementation and enforcement by Executive agencies of statutory provisions relating to equal employment.

1-504. Existing agency regulations implementing the nondiscrimination provisions of laws covered by this Order shall continue in effect until revoked or modified.

JIMMY CARTER

The White House,
November 2, 1980.

[47 FR 32421, July 27, 1982]

HEW regulations (45 CFR §§85.1-85.58) were replaced by these Justice Department regulations (28 CFR §§41.1-41.28). See page III:B:1.

Preamble to original HEW government-wide regulations (45 CFR Part 85) reprinted from the Jan. 13, 1978, *Federal Register.*

Coordination of Federal Agency Enforcement of Section 504 of the Rehabilitation Act of 1973

AGENCY: Department of Health, Education, and Welfare.

ACTION: Final rule.

SUMMARY: This rule implements Executive Order 11914, "Nondiscrimination With Respect to the Handicapped in Federally Assisted Programs," under which the Department of Health, Education, and Welfare is required to coordinate governmentwide enforcement of section 504 of the Rehabilitation Act of 1973, as amended. In particular, the rule sets forth enforcement procedures, standards for determining which persons are handicapped, and guidelines for determining what practices are discriminatory. These procedures, standards, and guidelines are to be followed by each federal agency that provides federal financial assistance in issuing regulations implementing section 504.

EFFECTIVE DATE: January 13, 1978.

FOR FURTHER INFORMATION, CONTACT:

Anne Beckman, Office for Civil Rights, Department of Health, Education, and Welfare, 330 Independence Avenue SW., Washington, D.C. 20201, 202-245-6118.

BACKGROUND

As part of the Rehabilitation Act of 1973 (Pub. L. 93-112), Congress enacted section 504, which provides that "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." The definition of "handicapped individual" applicable to section 504 is contained in section 111(a) of the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516).

On April 28, 1976, the President issued Executive Order 11914 (41 FR 17871) to provide for consistent governmentwide enforcement of section 504; the executive order is reprinted at Appendix A to this rule. The order directs the Secretary of Health, Education, and Welfare to coordinate the implementation of section 504 by all Federal departments and agencies that extend financial assistance to any program or activity. Specifically, section 1 directs the Secretary to establish standards for determining who are handicapped individuals and to establish guidelines for determining what are discriminatory practices under section 504 and to assist other agencies as necessary to assure the coordinated and consistent implementation of section 504. Sections 2 and 3 also contemplate that this Department will establish procedures to guide other Federal departments and agencies in implementing section 504.

In addition to setting forth the responsibilities of this Department, the executive order directs other agencies to issue regulations consistent with HEW standards and procedures, to furnish the Secretary with reports and information upon request, and to cooperate with this Department in their implementation of section 504.

Finally, the executive order, in section 3, contains general procedures and sanctions for securing compliance with section 504 and, in section 5, requires the consistent implementation of all of Title V of the Rehabilitation Act of 1973 as well as the Architectural Barriers Act of 1968 (Pub. L. 90-480).

On May 4, 1977, this Department issued its final regulation implementing section 504 as to recipients of financial assistance from HEW.

On June 24, 1977, the Department issued a proposed rule to carry out its responsibilities under the executive order by specifying procedures for the promulgation and enforcement of section 504 regulations by all agencies providing financial assistance, standards for determining who are handicapped individuals, and guidelines for determining what practices are discriminatory under section 504. Fifty comments were received during the 30-day public comment period. The Secretary's response to these comments and the explanation for changes in the proposed rule are set forth below in the summary of the final regulation.

SUMMARY OF RULES AND ANALYSIS OF COMMENTS

Subpart A of this regulation sets forth general definitions and uniform procedures for the enforcement of section 504.

Section 85.3(e) defines the term "federal financial assistance." Several commenters objected to the exclusion of contracts of insurance and guaranty from that definition because programs whose only federal assistance is in the form of federal loan guarantees, such as the Federal Deposit Insurance Corporation (FDIC) and Federal Housing Administration (FHA) programs, are thereby exempt from coverage. In light of this concern, the Department asked the Department of Justice for an opinion as to whether contracts of insurance and guaranty are covered by section 504. The Department of Justice has advised this Department, on the basis of its analysis of the legislative history of section 504, that Congress intended the reach of section 504 to be "co-extensive with that of (titles VI and IX), thus excluding programs of guarantee and insurance." The final regulation reflects that determination.

Despite some difference in the wording of the definitions of federal financial assistance in the regulations implementing section 504 and title VI, the substance of the two definitions does not differ. Several commenters misunderstood the exclusion of "ultimate beneficiaries" in § 85.3(d); an ultimate beneficiary is not the final "recipient," but the student, patient, or other individual who participates in the assisted program.

One comment asked whether the definition of facility in § 85.3(f) applies only to land-based facilities. Although the definition is not so limited, the Department agrees with the observation that different standards may be needed for vessels than for other facilities. The appropriate mechanism for the recognition of such differences, however, is in the regulations of the agencies that provide assistance to programs involving vessels.

Section 85.4 contains procedures for the promulgation of agency regulations. In accordance with section 2 of the executive order, such regulations are required to be consistent with the standards and guidelines contained in this regulation. Agencies are encouraged to examine Subparts A, B, and C of the HEW section 504 regulation to determine whether their regulations should include any of the more detailed provisions to be found there. In addition, each agency should examine the programs and activities to which it provides assistance to determine whether detailed requirements concerning any such program or activity should be included in its regulation, similar to those contained in Subparts D, E, and F of the HEW section 504 regulation.

A number of recipients objected to the requirement in paragraph (a) that each agency issue a separate section 504 regulation and would have preferred implementation through one regulation enforced by one agency—the system used for section 503. Although the provision for interagency cooperation set forth in § 85.6 should take care of many of the problems foreseen by these commenters, there are admitted advantages to the single agency system. This approach is precluded here, however, because section

HEW regulations (45 CFR §§85.1-85.58) were replaced by Justice Department regulations (28 CFR §§41.1-41.58). See page III:B:1.

504, unlike section 503, does not place rulemaking authority in a single agency and the executive order itself directs each federal agency to issue its own regulation. Furthermore, because section 504 covers the provision of services as well as employment, it does not lend itself as readily to a single regulation as does section 503: While employment presents fairly uniform issues from agency to agency, the problems that arise in various service programs differ widely.

Section 85.4(b) sets forth the schedule for issuing agency regulations. In response to comment, the time for preparation of a proposed rule has been extended to 90 days. Three agencies commented that more than 90 days would be required for this purpose. While the Department recognizes that the problems to be resolved by these agencies are complex, it believes that every effort should be made to meet this schedule.

As stated in the proposed regulation, the Secretary believes that the provision for review of each agency's draft final regulation by the Director of the HEW Office for Civil Rights before it is finally issued is an effective and appropriate method of promoting consistency of regulation under section 504 throughout the government. Although a few commenters suggested the need for some additional, formal mechanism for determining whether an agency regulation conforms to this regulation, we believe that public comment, together with review by the Office for Civil Rights, will suffice.

One change has been made in paragraph 4(c). The phrase "aid, benefits, or services" has been substituted for the word "services" so as to describe more adequately the nonemployment elements of various assisted programs and activities.

One comment requested a statement by the Department that this regulation creates no judicially enforceable rights. Such a statement, we believe, is inappropriate and unnecessary. Whether any legally enforceable rights are created by this regulation is a matter for courts to decide. We would only observe that the regulation applies to Federal agencies, not to recipients, and that it has no retroactive reach.

Comments led to three changes in section 85.5 (Enforcement). Adoption of title VI enforcement procedures is not a required element of the enforcement system; even those commenters who do not entirely support the title VI procedures favored their inclusion because of the advantages of a single complaint mechanism. The language of the consultation requirement has been made consistent with the corresponding language of the HEW section 504 regulation. A requirement that recipients conduct self-evaluations has also been added because of the benefits to be gained by agencies, recipients, and handicapped persons of a mechanism for effecting compliance without Federal intervention. More specific guidance for conducting an evaluation, as well as a specific time for its completion, should be provided in each agency's regulation.

Despite these additions, § 85.5 is still not intended to be exhaustive. Agencies may wish to consider other additions from the HEW section 504 regulation, such as the designation by a recipient of an employee to coordinate 504 enforcement. Although § 85.5 has not been amended to require agencies to conduct pre-grant compliance reviews, as suggested, the Department does agree that they are an effective means of ensuring compliance and therefore encourages agencies to conduct such reviews as a routine matter, especially with respect to major grants.

Section 85.6 contains provisions concerning interagency cooperation. Although commenters were pleased that the issue of coordination of enforcement among the various Federal agencies had been addressed, many felt that this section failed to resolve adequately problems of the recipient who receives grants from more than one agency: Multiple assurance forms, inconsistent regulations or enforcement procedures, multiple investigations. Several commenters also suggested that the final regulation incorporate some method for determining the primary enforcement agency (such as the agency that provides the largest grants). While the Department is sympathetic with recipients' concerns, it believes that these problems can be resolved by the agencies themselves without further regulation. As noted in the proposed regulation, agencies are encouraged to extend existing title VI delegations to section 504. Ensuring consistent regulations should alleviate the problem as well. If, however, these mechanisms prove to be inadequate, the Department will issue further rules on the subject.

One comment suggested the need for standardized referral procedures when complainants appeal to the wrong agency. Although no change has been made in the regulation, the Department feels the issue is an important one. Each agency should adopt internal procedures to ensure that misdirected complaints are referred to the proper agency, rather than being returned to complainants, and to ensure that complainants are promptly notified of the referral.

Section 85.7 contains provisions for coordination with sections 502 and 503 of the Rehabilitation Act; two minor clarifying changes have been made.

One commenter inquired as to the precise meaning of "consult" and "coordinate" as used in this section. The terms are not meant to specify any explicit procedures. The requirement for consultation with the Architectural and Transportation Barriers Compliance Board (ATBCB) in developing requirements for the accessibility of new construction and alteration is based simply on the Department's belief that agencies should take advantage of the Board's expertise in this area.

The coordination requirement is designed to avoid inconsistent or duplicative enforcement where the jurisdiction of sections 502 or 503 overlaps with that of section 504. The ATBCB itself suggested that each agency be required to enter into a memorandum of understanding with the Board. Requiring formal agreements for this purpose, we believe, is neither necessary nor advisable.

Two agencies suggested that all matters of employment discrimination against handicapped persons be coordinated by the Department of Labor (DOL) to avoid inconsistent requirements being imposed upon entities that are both federal recipients and federal contractors. We believe that the requirements of the two regulations are not inconsistent despite some variance in language. There must, of course, be close coordination of enforcement with DOL when a recipient is also a contractor. A general rule that DOL should be the primary enforcement agency in this situation would not, however, be appropriate. Where a corporation that is a federal contractor gets minimal assistance from another agency, DOL would be the natural lead agency. But where, for example, a university with a major HEW grant is also a federal contractor, HEW would more appropriately take the primary enforcement role, even with respect to employment.

Several suggestions were received concerning consultation and coordination with other agencies in areas of potential overlap. The Department is reluctant to build in any more of these requirements. The opportunity that each agency will have to comment on the regulation proposed by each of the other agencies should suffice to handle any other similar situations.

As noted in the proposal, the Department will, on a continuing basis, fulfill its responsibilities under the executive order to assist and consult with other agencies in their implementation of section 504 and to monitor compliance with the executive order.

Subpart B of this regulation contains the standards for determining who are "handicapped persons" and "qualified handicapped persons" within the meaning of section 504. Except for the addition noted below, the definition of handicapped person (§ 85.31) is identical to the one contained in § 84.3(j) of HEW's section 504

HEW regulations (45 CFR §§85.1-65.58) were replaced by Justice Department regulations (28 CFR §§41.1-41.58). See page III:B:1.

regulation. Further discussion of its provisions may be found in paragraph 3 of Appendix A of that regulation (42 FR at 22685-6). A final sentence has been added to the definition listing, for illustrative purposes, some of the diseases and impairments that are included in the term "physical or mental impairment." It should be noted that this definition of handicapped person does not supersede or interfere with the narrower definitions of the term established by statute for specific purposes, such as reduced transportation fares or eligibility for vocational rehabilitaion services. Agencies using such definitions may not, however, substitute them for the definition prescribe in this regulation in connection with their implementation of section 504.

It is again noted that drug addiction and alcoholism are included in the list of diseases and impairments. As stated in the proposal, the question of section 504's application to drug addicts and alcoholics was a difficult one on which the Secretary of HEW sought the advice of the Attorney General. In an opinion dated April 12, 1977, the Attorney General concluded that drug addiction and alcoholism are physical or mental impairments and are thus handicaps for the purpose of section 540 if they result in a substantial limitation of a "major life activity."

A detailed analysis of the implications of the inclusion of drug addicts and alcoholics within the scope of section 504 is set forth in paragraph 4 of Appendix A of the HEW regulation (42 FR at 22686). In response to concern again expressed in a number of comments, we emphasize that the fact that drug addiction and alcoholism may be handicaps does not mean that the behavioral manifestations of these conditions must be ignored in determining whether a person is qualified for services or employment. The statute applies only to qualified handicapped persons.

The definition of qualified handicapped person in §85.32 has been adapted from §84.3(k) of the HEW section 504 regulation. Other agencies may wish to supplement its provisions with additional guidance concerning qualifications for specific programs, as was done in §84.3(k) (2) and (3) of the HEW section 504 regulation. Several comments objected to the difference in wording between §85.32(a) of this regulation and section 60-741.2 of the Department of Labor section 503 regulation. No difference in substance is thereby intended; this Department believes that its definition more adequately emphasizes the prohibition against deeming a handicapped person to be unqualified on the basis of functions that are not necessary to the successful performance of the job in question.

A number of comments from the transportation field raised the question of whether such factors as safety may be considered in determining whether a handicapped person, especially one who is or has been alcoholic or emotionally ill, is qualified for a job. The Secretary again wishes to reassure recipients that such considerations are appropriate and are not considered a violation of section 504, so long as they are based on facts relating to the individual applicant's qualifications, rather than on assumptions or stereotypes.

Subpart C of this regulation, sets forth guidelines for determining discriminatory practices; these are, in general, minimum requirements. Except where obvious discrepencies in implementation would result, other agencies may exceed these standards if they wish. The subpart is divided into three parts: General, based on §84.4 of the HEW section 504 regulation; Employment, based on Subpart B of the HEW section 504 regulation, and Program Accessibility, based on Subpart C of the HEW section 504 regulation. A more detailed discussion of these subparts than is contained below may be found in Appendix A of the HEW regulation.

The general prohibitions against discrimination on the basis of handicap set forth in §85.51 incorporate basic principles that the Department determined, in developing its own regulation, to be inherent in section 504. First, section 504, like other nondiscrimination statutes, prohibits not only those practices that are overtly discriminatory but also those that have the effect of discriminating. And it is equal opportunity, not merely equal treatment, that is essential to the elimination of discrimination on the basis of handicap. Thus, in some situations, identical treatment of handicapped and nonhandicapped persons is not only insufficient but is itself discriminatory. On the other hand, separate or different treatment can be permitted only where necessary to ensure equal opportunity and truly effective benefits and services. Federally assisted programs and activities must thus be provided in the most integrated setting appropriate to the needs of participating handicapped persons.

Several commenters asked about the effect of §85.51 on the previously issued regulation of the Department of Transportation (DOT) implementing the Urban Mass Transportation Act (UMT Act) with respect to handicapped persons. This Department has not reviewed the UMTA regulation because it was issued before the promulgation of these guidelines. In the course of developing its regulation to implement section 504, DOT will undoubtedly examine its prior regulations with a view toward incorporating or revising their underlying concepts in its 504 regulation. The DOT section 504 regulation will be subject to public comment and to reveiw by this Department.

Furthermore, the Department's interpretation of §85.51 on matters of physical accessibility is set forth in §§85.56-58; it is these sections that, in general, should be looked to for guidance on this subject. This observation is also relevant to the many questions raised by commenters concerning the application of various provisions of §85.51 to specific transportation situations. In response to comment, the Department wishes to make clear that it does not construe this section, nor §§85.56-58, to preclude in all circumstances the provision of specialized services as a substitute for, or supplement to, totally accessible services, nor do these sections require door-to-door transportation service. Neither does paragraph (b)(4) of this section require buses to move their regular route stops to the doors of handicapped riders.

Section 85.51 (b)(3) prohibits recipients from utilizing criteria or methods of administration that would have the effect of subjecting handicapped persons to discrimination on the basis of handicap. The main application of this provision is to state agencies that recieve federal funds and then distribute the funds to other entities. These state agencies are obligated to develop methods of administering the distribution of federal funds so as to ensure that handicapped persons are not subjected to discrimination on the basis of handicap either by the second-tier recipients or by the manner in which the funds are distributed. The prohibitions of this paragraph, as well as of paragraph (b)(1), apply not only to direct actions of a recipient but also to actions committed through contractual agreements or similar arrangements. This provision is based on the premise that a recipient should not be able to do indirectly that which it cannot do directly.

Sections 85.52-55 contain the basic requirements for the elimination of discrimination on the basis of handicap in employment. These sections should be augmented, where possible, with provisions appropriate to the programs assisted by each agency. Specifically, §85.53 could be supplemented, as is the corresponding §84.12 of the HEW section 504 regulation, with examples of actions constituting reasonable accommodation and with factors to be considered in determining undue hardship; and §85.54, with provisions adapted from the more specific requirements of the parallel §84.13 of the HEW section 504 regulation.

One comment raised an issue of interest to those agencies that decide to augment §85.53 with examples of reasonable accommodation. Because of the tendency of some readers to

HEW regulations (45 CFR §§85.1-85.58) were replaced by Justice Department regulations (28 CFR §§41.1-41.58). See page III:B:1.

equate this requirement with physical accommodations, any list of examples should include other types of actions, such as job restructuring and modified work schedules.

One comment to §85.52, raised in the context of the transportation industry but of general applicability, inquired about the effect of this section on local, state, and federal laws that govern, in the interest of safety, driver eligibility. Local and state laws affecting the eligibility of handicapped persons for employment may continue to be applied, but only if they set standards that are job related and that do not unjustifiably disqualify such persons for particular jobs. Federal regulations as well should be reviewed to determine whether they meet this standard.

In response to comment, a new paragraph (b), taken from the HEW section 504 regulation, has been added to this section. It is designed to emphasize the prohibition on such practices as classifying certain jobs as being for handicapped persons.

In §85.54, the word "nonjob-related" has been deleted as redundant. A test or other selection criterion "discriminates" if it screens out or tends to screen out handicapped persons but is not job related.

Although §85.55, like §84.14 of the HEW section 504 regulation, generally bans preemployment medical examinations and inquiries concerning handicap, certain qualifications to this general prohibition, found in §84.14 and cross-referenced in §85.55, should be noted. First, while employers may not, during the application process, inquire about the existence of a specific handicap (for example, epilepsy), they may ask about the applicant's ability to perform duties necessary to the job in question. Second, they may make voluntary inquiries as to handicap if they are subject to remedial or affirmative action obligations or if they are undertaking voluntary action to increase their employment of handicapped persons. Third, they may condition an offer of employment on the successful completion of a medical examination: *Provided*, That the examination follows the requirements of §84.14(c) and that no offer is withdrawn on the basis of medical conditions that are not job related.

Several comments objected to the difference between the positions taken in the section 503 regulation and §85.55 of this regulation on the question of preemployment inquiries and medical examinations. As discussed above, §85.55 requires physical examinations and inquiries as to handicap to be postponed until after the hiring decision (which, again, may be conditioned on the result of the examination), whereas the section 503 regulation allows such examinations and inquiries to be made before an offer of employment.

The issuance of the DOL section 503 regulation preceded that of the HEW section 504 regulation by several years. During that time, the Department received extensive comment on the need to limit inquiries as to handicap in order to reduce the potential for discrimination, especially with respect to persons with nonvisible handicaps. We believe that the standard outlined above, although different from that of the DOL section 503 regulation, is necessary to achieve that objective; one virtue of this standard is that it makes it possible to determine whether the reason for not hiring a handicapped person is because of handicap. We also believe that legitimate purposes for obtaining such information are fulfilled as well at this later stage in the hiring process.

The misunderstanding of this section apparent in many comments makes it important to emphasize again that this provision does not prohibit taking job-related conditions into account in making employment decisions, nor does it preclude a recipient from obtaining information as to such conditions. It merely affects the time at which and the manner in which the information may be obtained.

Sections 85.56-58 concern "program accessibility," a term that summarizes the concept of prohibiting the exclusion of handicapped persons from programs by virtue of architectural barriers to such facilities as buildings, vehicles, and walks, while not requiring that existing facilities be completely barrier-free. Although new facilities are to be designed and constructed so as to be physically accessible to handicapped persons, structural modifications of existing facilities need be undertaken only where other methods are inadequate to assure that a program is available to handicapped persons. This final regulation has been amended to take into account the special problems of making various modes of transportation "program accessible," and the Department recognizes that the implementation of the concept of program accessibility will necessarily vary in other programs. As stated in the proposal, however, the Department believes that the basic principles contained in §§85.56-58, as amended, are appropriate governmentwide and are essential to the effective and consistent implementation of section 504.

Section 85.56 establishes the general standard for nondiscriminatory physical access to federally assisted programs and activities under section 504. It does not prohibit architectural barriers; it does prohibit exclusion of handicapped people from federally assisted programs and activities by virtue of such barriers. Sections 85.57-8 describe the means by which this standard is to be reached.

Section 85.57 has been amended and divided into three paragraphs. A new sentence has been added to paragraph (a) to rectify the misunderstanding, evident in some comments, that each existing facility must be altered.

Agencies are urged to set forth in their regulations illustrative types of actions that recipients may use as alternatives to structural changes to existing facilities. If they do so, agencies should also include the requirement, intrinsic to section 504, that priority be given to methods that offer programs and activities to handicapped persons in the most integrated setting appropriate. (See §84.22(b) of the HEW section 504 regulation.) Agencies may also wish to consider supplementing §85.57 with other details from section 84.22 of the HEW section 504 regulation.

In response to comment, the Department wishes to make clear that §85.57 does not preclude other agencies from allowing recipients to choose among appropriate alternative methods of achieving program accessibility, so long as the agency itself sets an acceptable standard for what constitutes program accessibility.

Several transportation comments proposed that the word "program," for purposes of program accessibility, be interpreted to mean the entire transportation system of a certain geographic area, as opposed to particular modes of transportation (bus, rail) in the area. The Department rejects this concept as a general matter.

We recognize, however, that there are special problems to achieving program accessibility with the three-year time period for certain modes of transportation. Paragraph (b) has, therefore, been amended to allow more than three years for compliance for any mode of transportation in which program accessibility can be achieved within that period only through extensive alterations entailing extraordinary costs. Such exceptions may be allowed only where alternate, accessible modes of transportation are available. The specific period of time for compliance is to be established by the federal agency administering the transportation program (the Department of Transportation, in practically all cases); it may vary from mode to mode. The Department believes that this departure from the general scheme is justified by the lack of acceptable alternatives to extremely expensive alterations in the provision of some transportation services.

The Department recognizes that special problems may also be encountered in achieving program accessibility in existing public housing projects within the three-year schedule. Because the program accessibility stan-

HEW regulations (45 CFR §§85.1-85.58) were replaced by Justice Department regulations (28 CFR §§41.1-41.58). See page III:B:1.

dard itself requires only that a small percentage of units be accessible (and that there be access to the project itself), the Department believes that the standard can be met within the prescribed schedule. We are prepared to consult with the Department of Housing and Urban Development as compliance progresses and will reexamine the situation if circumstances so warrant.

Another issue raised during the comment period is the question of the effect of §85.57 upon the requirements of the Architectural Barriers Act of 1968, Pub. L. 90-480. The relevant portion of that Act requires that, after 1968, all new construction and alteration receiving direct Federal financial assistance be accessible. One commenter feared that recipients who had undertaken construction subject to the Architectural Barriers Act but who had failed to comply with the Act might feel that compliance with the Architectural Barriers Act would be excused if its program, on the whole, were accessible and thus in compliance with §85.57. Such is not the case. The Department does not intend, and has no authority, to interfere in any way with the requirements of the Architectural Barriers Act.

Two comments requested that an exception be added to §85.57 for modifications of historic structures. While we agree that it is important to preserve historical structures, we believe that the flexibility of the program accessibility standard will permit recipients, with appropriate technical assistance and advice, to make their programs accessible without impairing the integrity of historic buildings.

Paragraph (c), added in response to comment, requires that transition plans be developed in cases where structural modifications are necessary to achieve program accessibility. The schedule for completion of these plans, as well as any further requirements deemed appropriate, is left to the determination of each regulating agency. The plan is to be developed with the aid of handicapped persons or their organizations.

Section 85.58 requires new facilities and, to the maximum extent feasible, alterations in existing facilities to be readily accessible. No accessibility standards have been specified here; but agencies should note that the HEW section 504 regulation requires HEW recipients either to meet the standards developed by the American National Standards Institute, Inc. (ANSI), or to provide equivalent accessibility. Each agency should, in the interest of governmentwide consistency, carefully consider adoption of the ANSI standards or their equivalent for any of its programs to which the standards are applicable.

A difficult problem that has arisen during the comment period with respect to §85.58 is its effect upon buses ordered in the interval between the final issuance of individual agency 504 regulations and the effective date of the Department of Transportation's ruling concerning Transbus. (That ruling requires that all buses acquired with the assistance of the Urban Mass Transportation Administration (UMTA), ordered after September 30, 1979, meet the specifications for Transbus—a low-floor, ramped bus.) Because of the complexity of the bus accessibility issue, the final regulation has been amended to allow the Department of Transportation (DOT) to defer the effective date for requiring all new buses to be accessible if DOT concludes during its section 504 rulemaking process that it is not possible to do so by the effective date of its own section 504 regulation and if comparable, accessible services are available to handicapped persons in the meantime. The date may not, however, be deferred beyond the present effective date of the Transbus decision—October 1, 1979.

Because this Department agrees that Transbus is the most effective means of providing handicapped persons with accessible bus transportation, it encourages the Department of Transportation to take all possible steps to expedite the purchase of Transbus by its recipients.

The effective date of this regulation is January 13, 1978. Because the regulation applies only to other federal agencies rather than to the public and because the governmentwide implementation of section 504 should proceed without further delay, the Department believes that this departure from the normal 30-day waiting period is warranted.

NOTE.—The Department of Health, Education, and Welfare has determined that this document does not contain a major proposal requiring preparation of an economic impact analysis (EIA) statement under Executive Orders 11821 and 11949 and OMB Circular A-107.

In consideration of the foregoing, Part 85 is hereby added to Title 45 of the Code of Federal Regulations to read as set forth below.

Dated: January 3, 1978.

JOSEPH A. CALIFANO, Jr.,
Secretary.

HEW regulations (45 CFR §§85.1-85.58) were replaced by Justice Department regulations (28 CFR §§41.1-41.58). See page III:B:1.

TITLE 45 —PUBLIC WELFARE; REVISED AS OF OCTOBER 1, 1989 SUBTITLE A—DEPARTMENT OF HEALTH AND HUMAN SERVICES, GENERAL ADMINISTRATION

PART 84 —NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—General Provisions

Sec.

Subpart B—Employment Practices

Subpart C—Program Accessibility

Subpart D—Preschool, Elementary, and Secondary Education

Supart E—Postsecondary Education

Subpart F—Health, Welfare, and Social Services

Subpart G—Procedures

APPENDIX A—ANALYSIS OF FINAL REGULATION

AUTHORITY: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706); sec. 606, Education of the Handicapped Act (20 U.S.C. 1405), as amended by Pub. L. 94-142, 89 Stat. 795; sec. 321, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 84 Stat. 182 (42 U.S.C. 4581), as amended; sec. 407, Drug Abuse Office and Treatment Act of 1972, 86 Stat. 78 (21 U.S.C. 1174) as amended.

Subpart A—General Provisions

§84.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§84.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Health and Human Services and to each program or activity that receives or benefits from such assistance.

§84.3 Definitions.

As used in this part, the term: (a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

(b) "Section 504" means section 504 of the Act.

(c) "Education of the Handicapped Act" means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94-142, 20 U.S.C. 1401 et seq.

(d) "Department" means the Department of Health and Human Services.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) "Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) "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, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit

major life activities but that is treated by a recipient as constituting such a limitation; (B) 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 (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of 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.

(l) "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 nondiscrimination 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 recipient exercises control over the recipient that has discriminated, the Director, where appropriate, may require either or both recipients to take remedial action.

(3) The Director may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) Voluntary action. A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Director upon request: (i) a list of the interested persons consulted (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

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

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§84.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to §84.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting or notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§84.9 Administrative requirements for small recipients.

The Director may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§84.7 and 84.8, in whole or in part, when the Director finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§84.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§84.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs assisted under that Act.

(3) 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.

(4) 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 subparagraph 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.

(b) *Specific activities.* The provisions of this subpart apply to:

(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, position 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.
(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§84.12 Reasonable accommodation.

(a) 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.
(b) Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.
(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:
(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;
(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and
(3) The nature and cost of the accommodation needed.
(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§84.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.
(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§84.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.
(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to §84.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to §84.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided*, That:
(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and
(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.
(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.
(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:
(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;
(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and
(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

§84.15-84.20 [Reserved]

Subpart C—Program Accessibility

§84.21 Discrimination prohibited.

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 to which this part applies.

§84.22 Existing facilities.

(a) *Program accessibility.* A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.
(b) *Methods.* A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of §84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

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

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility 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

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

§84.23 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part 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 handicapped persons.

(c) *Conformance with Uniform Federal Accessibility Standards.* (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR Subpart 101-19.6) shall be deemed to comply with the requirements of this section with respect to those building. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usabilty of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

§84.24-84.30 [Reserved]

Subpart D—Preschool, Elementary, and Secondary Education

§84.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§84.32 Location and notification.

A recipient that operates a public elementary or secondary education program shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

§84.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§84.34, 84.35, and 84.36.

(2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person in or refer such person to a program other than the one that it operates as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) *Free education* — (1) General. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation.* If a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient.

(3) *Residential placement.* If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and §84.34, a free appropriate public education to a handicapped person and the

person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made such a program available or otherwise regarding the question of financial responsibility are subject to the due process procedures of §84.36.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

§84.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in §84.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§84.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that: (1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with §84.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

§84.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

§84.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of §84.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§84.38 Preschool and adult education programs.

A recipient to which this subpart applies that operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

§84.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in §84.33(b)(1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of §§84.35 and 84.36. Each recipient to which this section applies is subject to the provisions of §§84.34, 84.37, and 84.38.

§84.40 [Reserved]

Subpart E—Postsecondary Education

§84.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§84.42 Admissions and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Director to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to §84.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to §84.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided*, That: (1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§84.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, an education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§84.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual

impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§84.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§84.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate Subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates Subpart B.

§84.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of §84.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are non-handicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

§§84.48 — 84.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

§84.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§84.52 Health, welfare, and other social services.

(a) *General.* In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in §84.4(b)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Director may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

§84.53 Drug and alcohol addicts.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

§84.54 Education of institutionalized persons.

A recipient to which this subpart applies and that operates or supervises a program or activity for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in §84.3(k)(2), in its program or activity is provided an appropriate education, as defined in §84.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under Subpart D.

§84.55 Procedures relating to health care for handicapped infants.

(a) *Infant Care Review Committees.* The Department encourages each recipient health care provider that provides health care services to infants in programs receiving Federal financial assistance to establish an Infant Care Review Committee (ICRC) to assist the provider in delivering health care and related services to infants and in complying with this part. The purpose of the committee is to assist the health care provider in the development of standards, policies and procedures for providing treatment to handicapped infants and in making decisions concerning medically beneficial treatment in specific cases. While the Department recognizes the value of ICRC's in assuring appropriate medical care to infants, such committees are not required by this section. An ICRC should be composed of individuals representing a broad range of perspectives, and should include a practicing physician, a representative of a disability organization, a practicing nurse, and other individuals. A suggested model ICRC is set forth in paragraph (f) of this section.

(b) *Posting of informational notice.* (1) Each recipient health care provider that provides health care services to infants in programs or activities receiving Federal financial assistance shall post and keep posted in appropriate places an informational notice. (2) The notice must be posted at location(s) where nurses and other medical professionals who are engaged in providing health care and related services to infants will see it. To the extent it does not impair accomplishment of the requirement that copies of the notice be posted where such personnel will see it, the notice need not be posted in area(s) where parents of infant patients will see it.

(3) Each health care provider for which the content of the following notice (identified as Notice A) is truthful may use Notice A. For the content of the notice to be truthful: (i) The provider must have a policy consistent with that stated in the notice; (ii) the provider must have a procedure for review of treatment deliberations and decisions to which the notice applies, such as (but not limited to) an Infant Care Review Committee; and (iii) the statements concerning the identity of callers and retaliation are truthful.

Notice A:

PRINCIPLES OF TREATMENT OF DISABLED INFANTS

It is the policy of this hospital, consistent with Federal law, that, nourishment and medically beneficial treatment (as determined with respect for reasonable medical judgments) should not be withheld from handicapped infants solely on the basis of their present or anticipated mental or physical impairments.

This Federal law, section 504 of the Rehabilitation Act of 1973, prohibits discrimination on the basis of handicap in programs or activities receiving Federal financial assistance. For further information, or to report suspected noncompliance, call:

[Identify designated hospital contact point and telephone number] or

[Identify appropriate child protective services agency and telephone number] or

U.S. Department of Health and Human Services (HHS): 800-368-1019 (Toll-free; available 24 hours a day; TDD capability).

The identity of callers will be held confidential. Retaliation by this hospital against any person for providing information about possible noncompliance is prohibited by this hospital and Federal regulations.

(4) Health care providers other than those described in paragraph (b)(3) of this section must post the following notice (identified as Notice B):

Notice B:

PRINCIPLES OF TREATMENT OF DISABLED INFANTS

Federal law prohibits discrimination on the basis of handicap.Under this law, nourishment and medically beneficial treatment (as determined with respect for reasonable medical judgments) should not be withheld from handicapped infants solely on the basis of their present or anticipated mental or physical impairments.

This Federal law, section 504 of the Rehabilitation Act of 1973, applies to programs or activities receiving Federal financial assistance. For further information, or to report suspected noncompliance, call:

[Identify appropriate child protective services agency and telephone number] or

U.S. Department of Health and Human Services (HHS): 800-368-1019 (Toll-free; available 24 hours a day: TDD capability)

The identity of callers will be held confidential. Federal regulations prohibit retaliation by this hospital against any person who provides information about possible violations.

(5) The notice may be no smaller than 5 by 7 inches, and the type size no smaller than that generally used for similar internal communications to staff. The recipient must insert the specified information on the notice it selects. Recipient hospitals in Washington, D.C. must list 863-0100 as the telephone number for HHS. No other alterations may be made to the notice. Copies of the notices may be obtained from the Department of Health and Human Services upon request, or the recipient may produce its own notices in conformance with the specified wording.

(c) *Responsibilities of recipient state child protective services agencies.* (1) Within 60 days of the effective date of this section, each recipient state child protective services agency shall establish and maintain in written form methods of administration and procedures to assure that the agency utilizes its full authority pursuant to state law to prevent instances of unlawful medical neglect of handicapped infants. These methods of administration and procedures shall include:

(i) A requirement that health care providers report on a timely basis to the state agency circumstances which they determine to constitute known or suspected instances of unlawful medical neglect of handicapped infants;

(ii) A method by which the state agency can receive reports of suspected unlawful medical neglect of handicapped infants from health care providers, other individuals, and the Department on a timely basis;

(iii) Immediate review of reports of suspected unlawful medical neglect of handicapped infants and, where appropriate, on-site investigation of such reports;

(iv) Provision of child protective services to such medically neglected handicapped infants, including, where appropriate, seeking a timely court order to compel the provision of necessary nourishment and medical treatment; and

(v) Timely notification to the responsible Department official of each report of suspected unlawful medical neglect involving the withholding, solely on the basis of present or anticipated physical or mental impairments, of treatment or nourishment from a handicapped infant who, in spite of such impairments, will medically benefit from the treatment or nourishment, the steps taken by the state agency to investigate such report, and the state agency's final disposition of such report.

(2) Whenever a hospital at which an infant who is the subject of a report of suspected unlawful medical neglect is being treated has an Infant Care Review Committee (ICRC) the Department encourages the state child protective services agency to consult with the ICRC in carrying out the state agency's authorities under its state law and methods of administration. In developing its methods of administration and procedures, the Department encourages child protective services agencies to adopt guidelines for investigations similar to those of the Department regarding the involvement of ICRC's.

(d) *Expedited access to records.* Access to pertinent records and facilities of a recipient pursuant to 45 CFR 80.6(c) (made applicable to this part by 45 CFR 84.61) shall not be limited to normal business hours when, in the judgment of the responsible Department official, immediate access is necessary to protect the life or health of a handicapped individual.

(e) *Expedited action to effect compliance.* The requirement of 45 CFR 80.8(d)(3) pertaining to notice to recipients prior to the initiation of action to effect compliance (made applicable to this part by 45 CFR 84.61) shall not apply when, in the judgment of the responsible Department official,

immediate action to effect compliance is necessary to protect the life or health of a handicapped individual. In such cases the recipient will, as soon as practicable, be given oral or written notice of its failure to comply, of the action to be taken to effect compliance, and its continuing opportunity to comply voluntarily.

(f) *Model Infant Care Review Committee.* Recipient health care providers wishing to establish Infant Care Review Committees should consider adoption of the following model. This model is advisory. Recipient health care providers are not required to establish a review committee or, if one is established, to adhere to this model. In seeking to determine compliance with this part, as it relates to health care for handicapped infants, by health care providers that have an ICRC established and operated substantially in accordance with this model, the Department will, to the extent possible, consult with the ICRC.

(1) *Establishment and purpose.* (i) The hospital establishes an Infant Care Review Committee (ICRC) or joins with one or more other hospitals to create a joint ICRC. The establishing document will state that the ICRC is for the purpose of facilitating the development and implementation of standards, policies and procedures designed to assure that, while respecting reasonable medical judgments, treatment and nourishment not be withheld, solely on the basis of present or anticipated physical or mental impairments, from handicapped infants who, in spite of such impairments, will benefit medically from the treatment or nourishment.

(ii) The activities of the ICRC will be guided by the following principles:

(A) The interpretative guidelines of the Department relating to the applicability of this part to health care for handicapped infants.

(B) As stated in the "Principles of Treatment of Disabled Infants" of the coalition of major medical and disability organizations, including the American Academy of Pediatrics, National Association of Children's Hospitals and Related Institutions, Association for Retarded Citizens, Down's Syndrome Congress, Spina Bifida Association, and others:

When medical care is clearly beneficial, it should always be provided. When appropriate medical care is not available, arrangements should be made to transfer the infant to an appropriate medical facility. Consideration such as anticipated or actual limited potential of an individual and present or future lack of available community resources are irrelevant and must not determine the decisions concerning medical care. The individual's medical condition should be the sole focus of the decision. These are very strict standards.

It is ethically and legally justified to withhold medical or surgical procedures which are clearly futile and will only prolong the act of dying. However, supportive care should be provided, including sustenance as medically indicated and relief of pain and suffering. The needs of the dying person should be respected. The family also should be supported in its grieving.

In cases where it is uncertain whether medical treatment will be beneficial, a person's disability must not be the basis for a decision to withhold treatment. At all times during the process when decisions are being made about the benefit or futility of medical treatment, the person should be cared for in the medically most appropriate ways. When doubt exists at any time about whether to treat, a presumption always should be in favor of treatment.

(C) As stated by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research:

This [standard for providing medically beneficial treatment] is a very strict standard in that it excludes consideration of the negative effects of an impaired child's life on other persons, including parents, siblings, and society. Although abiding by this standard may be difficult in specific cases, it is all too easy to undervalue the lives of handicapped infants; the Commission finds it imperative to counteract this by treating them no less vigorously than their healthy peers or than older children with similar handicaps would be treated.

(iii) The ICRC will carry out its purposes by:

(A) Recommending institutional policies concerning the withholding or withdrawal of medical or surgical treatments to infants, including guidelines for ICRC action for specific categories of life-threatening conditions affecting infants;

(B) Providing advice in specific cases when decisions are being considered to withhold or withdraw from infant life-sustaining medical or surgical treatment; and

(C) Reviewing retrospectively on a regular basis infant medical records in situations in which life-sustaining medical or surgical treatment has been withheld or withdrawn.

(2) *Organization and staffing.* The ICRC will consist of at least 7 members and include the following:

(i) A practicing physician (e.g., a pediatrician, a neonatologist, or a pediatric surgeon),

(ii) A practicing nurse,

(iii) A hospital administrator,

(iv) A representative of the legal profession,

(v) A representative of a disability group, or a developmental disability expert,

(vi) A lay community member, and

(vii) A member of a facility's organized medical staff, who shall serve as chairperson. In connection with review of specific cases, one member of the ICRC shall be designated to act as "special advocate" for the infant, as provided in paragraph (f)(3)(ii)(E) of the section. The hospital will provide staff support for the ICRC, including legal counsel. The ICRC will meet on a regular basis, or as required below in connection with review of specific cases. It shall adopt or recommend to the appropriate hospital official or body such administrative policies as terms of office and quorum requirements. The ICRC will recommend procedures to ensure that both hospital personnel and patient families are fully informed of the existence and functions of the ICRC and its availability on a 24-hour basis.

(3) *Operation of ICRC — (i) Prospective policy development.* (A) The ICRC will develop and recommend for adoption by the hospital institutional policies concerning the withholding or withdrawal of medical treatment for infants with life-threatening conditions. These will include guidelines for management of specific types of cases or diagnoses, for example, Down's syndrome and spina bifida, and procedures to be followed in such recurring circumstances as, for example, brain death and parental refusal to consent to life-saving treatment. The hospital, upon recommendation of the ICRC, may require attending physicians to notify the ICRC of the presence in the facility of an infant with a diagnosis specified by the ICRC, e.g., Down's syndrome and spina bifida.

(B) In recommending these policies and guidelines, the ICRC will consult with medical and other authorities on issues involving disabled individuals, e.g., neonatologists, pediatric surgeons, county and city agencies which provide services for the disabled, and disability advocacy organizations. It will also consult with appropriate committees of the medical staff, to ensure that the ICRC policies and guidelines build on existing staff by-laws, rules and regulations concerning consultations and staff membership requirements. The ICRC will also inform and educate hospital staff on the policies and guidelines it develops.

(ii) *Review of specific cases.* In addition to regularly scheduled meetings, interim ICRC meetings will take place under specified circumstances to permit review of individual cases. The hospital will, to the extent possible, require in each case that life-sustaining treatment be continued, until the ICRC can review the case and provide advice.

(A) Interim ICRC meetings will be convened within 24 hours (or less if indicated) when there is disagreement between the family of an infant and the infant's physician as to the withholding or withdrawal of treatment, when a preliminary decision to withhold or withdraw life-sustaining treatment has been made in certain categories of cases identified by the ICRC, when there is disagreement between members of the hospital's medical and/or nursing staffs, or when otherwise appropriate.

(B) Such interim ICRC meetings will take place upon the request of any members of the ICRC or hospital staff or parent or guardian of the infant. The ICRC will have procedures to preserve the confidentiality of the identity of persons making such requests, and such persons shall be protected from reprisal. When appropriate, the ICRC or a designated member will inform the requesting individual of the ICRC's recommendation.

(C) The ICRC may provide for telephone and other forms of review when the timing and nature of the case, as identified in policies developed by the ICRC, make the convening of an interim meeting impracticable.

(D) Interim meetings will be open to the affected parties. The ICRC will ensure that the interests of the parents, the physician, and the child are fully considered; that family members have been fully informed of the patient's condition and prognosis; that they have been provided with a listing which describes the services furnished by parent support groups and public and private agencies in the geographic vicinity to infants with conditions such as that before the ICRC; and that the ICRC will facilitate their access to such services and groups.

(E) To ensure a comprehensive evaluation of all options and factors pertinent to the committee's deliberations, the chairperson will designate one member of the ICRC to act, in connection with that specific case, as special advocate for the infant. The special advocate will seek to ensure that all considerations in favor of the provision of life-sustaining treatment are fully evaluated and considered by the ICRC.

(F) In cases in which there is disagreement on treatment between a physician and an infant's family, and the family wishes to continue life-sustaining treatment, the family's wishes will be carried out, for as long as the family wishes, unless such treatment is medically contraindicated. When there is physician/family disagreement and the family refuses consent to life-sustaining treatment, and the ICRC, after due deliberation, agrees with the family, the ICRC will recommend that the treatment be withheld. When there is physician/family disagreement and the family refuses consent, but the ICRC disagrees with the family, the ICRC will recommend to the hospital board or appropriate official that the case be referred immediately to an appropriate court or child protective agency, and every effort shall be made to continue treatment, preserve the status quo, and prevent worsening of the infant's condition until such time as the court or agency renders a decision or takes other appropriate action. The ICRC will also follow this procedure in cases in which the family and physician agree that life-sustaining treatment should be withheld or withdrawn, but the ICRC disagrees.

(iii) *Retrospective record review.* The ICRC, at its regularly-scheduled meeting, will review all records involving withholding or termination of medical or surgical treatment to infants consistent with hospital policies developed by the ICRC, unless the case was previously before the ICRC pursuant to paragraph (f)(3)(ii) of this section. If the ICRC finds that a deviation was made from the institutional policies in a given case, it shall conduct a review and report the findings to appropriate hospital personnel for appropriate action.

(4) *Records.* The ICRC will maintain records of all of its deliberations and summary descriptions of specific cases considered and the disposition of those cases. Such records will be kept in accordance with institutional policies on confidentiality of medical information. They will be made available to appropriate government agencies, or upon court order, or as otherwise required by law.

§§84.56-84.60 [Reserved]

Subpart G—Procedures

§84.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§80.6-80.10 and Part 81 of this Title.

§§84.62-84.99 [Reserved]

NOTE: Incorporation by reference provisions approved by the Director of the Federal Register, May 27, 1975. Incorporated documents are on file at the Office of the Federal Register.

APPENDIX A—ANALYSIS OF FINAL REGULATION

SUBPART A — GENERAL PROVISIONS

Definitions — 1. *"Recipient"*. Section 84.23 contains definitions used throughout the regulation. Most of the comments concerning §84.3(f), which contains the definition of "recipient," commended the inclusion of recipient whose sole source of Federal financial assistance is Medicaid. The Secretary believes that such Medicaid providers should be regarded as recipients under the statute and the regulation and should be held individually responsible for administering services in a nondiscriminatory fashion. Accordingly, §84.3(f) has not been changed. Small Medicaid providers, however, are exempt from some of the regulation's administrative provisions (those that apply to recipients with fifteen or more employees). And such recipients will be permitted to refer patients to accessible facilities in certain limited circumstances under revised §84.22(b). The Secretary recognizes the difficulties involved in federal enforcement of this regulation with respect to thousands of individual Medicaid providers. As in the case of title VI of the Civil Rights Act of 1964, the Office for Civil Rights will concentrate its compliance efforts on the state Medicaid agencies and will look primarily to them to ensure compliance by individual providers.

One other comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and Title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of §84.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. *"Federal financial assistance"*. In §84.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that section 504, unlike title VI and title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended section 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that section 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under title VI, we think it unlikely that Congress intended section 504 to apply to such contracts.

In its May 1976 Notice of Intent, the Department suggested that the arrangement under which individual practitioners, hospitals, and other facilities receive reimbursement for providing services to beneficiaries under Part B of title XVIII of the Social Security Act (Medicare) constitutes a contract of insurance or guaranty and thus falls within the exemption from the regulation. This explanation oversimplified the Department's view of whether Medicare Part B constitutes Federal financial assistance. The Department's position has consistently been that, whether or not Medicare Part B arrangements involve a contract of insurance or guaranty, no Federal financial assistance flows from the Department to the doctor or other practitioner under the program, since

Medicare B—like other social security programs—is basically a program of payments to direct beneficiaries.

3. *"Handicapped person."* Section 84.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j)(2)(i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such 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, and, as discussed below, drug addiction and alcoholism.

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the proposed regulation of the phrase "substantially limits." The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended. Paragraph (15) of section 602 uses the term "specific learning disabilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j)(2)(i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of "record" in paragraph (j)(2)(iii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities.It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. *Drug addicts and alcoholics.* As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on this question and recognizes that application of section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in enacting section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the

same basis it judges all other applicants and employees.Thus, a recipient may consider — for all applicants including drug addicts and alcoholics — past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the workplace, provided that such rules are enforced against all employees.

With respect to services, there is evidence that drug addicts and alcoholics are often denied treatment at hospitals for conditions unrelated to their addiction or alcoholism. In addition, some addicts and alcoholics have been denied emergency treatment. These practices have been specifically prohibited by section 407 of the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174) and section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended. These statutory provisions are also administered by the Department's Office for Civil Rights and are implemented in §84.53 of this regulation.

With respect to other services, the implications of coverage of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

5. *"Qualified handicapped person."* Paragraph (k) of §84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

Section 84.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of §84.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 84.3(k)(2) (formerly §84.3(k)(3)) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of §84.6(a)(3), however, persons beyond the age limits prescribed in §84.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 84.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which state law mandates the provision of educational services of handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act — generally, 3-18 as of September 1978, and 3-21 as of September 1980 are incorporated by reference in this paragraph.

Section 84.3(k)(3) formerly §84.3(k)(2)) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

6. *General prohibitions against discrimination.* Section 84.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department. Paragraph (b)(1)(i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term "equally effective," defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau v. Nichols*, 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting appropriated to the person's needs" is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to §84.4, requiring recipients to give qualified handicapped persons the option of

participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§84.38 and 84.47 in connection with physical education and athletics programs.

Section 84.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret §84.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is not the case. The paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of §84.23.

7. *Assurances of compliance.* Section 84.5(a) requires a recipient to submit to the Director an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. To facilitate the submission of assurances by thousands of Medicaid providers, the Department will follow the title VI procedures of accepting, in lieu of assurances, certification on Medicaid vouchers. Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8. *Private rights of action.* Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of Government. There is, however, case law holding that such a right exists. *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977); see *Hairston v. Drosick*, Civil No. 75-0691 (S.D. W. Va., Jan. 14, 1976); *Gurmankin v. Castanzo*, 411 F. Supp. 982 (E.D. Pa. 1976); cf. *Lau v. Nichols*, supra.

9. *Remedial action.* Where there has been a finding of discrimination, §84.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient.Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraphs (a) (1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. *Voluntary action.* In §84.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use of the latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

11. *Self-evaluation.* Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c)(1)(ii) and (iii).

Paragraph (c)(2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made more specific; records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12. *Grievance procedure.* Section 84.7 (formerly §84.8) requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that grievance procedures are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of §84.8 could be coordinated with comparable action required by the title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 84.8 (formerly §84.9) sets forth requirements for dissemination of statements of nondiscrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under section 504 and this regulation. In §84.8 the Department has

sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paper work burdens on them and unduly stretch the enforcement resources of the Department.

Section 84.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under section 504. The last sentence of §84.8(a) has been revised to list possible, rather than required, means of notification. Section 84.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, §84.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Former §84.9(b)(2), which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new §84.9 the Director may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 84.10(a) states that compliance with the regulation is not excused by state or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation.The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession does not excuse a recipient from complying with the regulation. Thus, a law school could not deny admission to a blind applicant because blind lawyers may find it more difficult to find jobs that do nonhandicapped lawyers.

Subpart B — Employment Practices

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of Federal financial assistance administered by the Department. This subpart is consistent with the employment provisions of the Department's regulation implementing title IX of the Education Amendments of 1972 (45 CFR Part 86) and the regulation of the Department of Labor under section 503 of the Rehabilitation Act, which requires certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. All recipients subject to title IX are also subject to this regulation. In addition, many recipients subject to this regulation receive Federal procurement contracts in excess of $2,500 and are therefore also subject to section 503.

15. *Discriminatory practices.* Section 84.11 sets forth general provisions with respect to discrimination in employment. A new paragraph (a)(2) has been added to clarify the employment obligations of recipients that receive Federal funds under Part B of the Education of the Handicapped Act, as amended (EHA). Section 606 of the EHA obligates elementary or secondary school systems that receive EHA funds to take positive steps to employ and advance in employment qualified handicapped persons.This obligation is similar to the nondiscrimination requirement of section 504 but requires recipients to take additional steps to hire and promote handicapped persons. In enacting section 606 Congress chose the words "positive steps" instead of "affirmative action" advisedly and did not intend section 606 to incorporate the types of activities required under Executive Order 11246 (affirmative action on the basis of race, color, sex, or national origin) or under sections 501 and 503 of the Rehabilitation Act of 1973.

Paragraph (b) of §84.11 sets forth the specific aspects of employment covered by the regulation. Paragraph (c) provides that inconsistent provisions of collective bargaining agreements do not excuse noncompliance.

16. *Reasonable accommodation.* The reasonable accommodation requirement of §84.12 generated a substantial number of comments. The Department remains convinced that its approach is both fair and effective. Moreover, the Department of Labor reports that it has experienced little difficulty in administering the requirements of reasonable accommodation. The provision therefore remains basically unchanged from the proposed regulation.

Section 84.12 requires a recipient to make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job, where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.

Section 84.12(b) lists some of the actions that constitute reasonable accommodation. The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed.

Reasonable accommodation includes modification of work schedules, including part-time employment, and job restructuring. Job restructuring may entail shifting nonessential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons. If such accommodations would cause undue hardship to the employer, they need not be made.

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship.The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services. The reasonable accommodation standard in §84.12 is similar to the obligation imposed upon Federal contractors in the regulation implementing section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor. Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose is the same, and the Federal Government's policy in implementing the two sections will be uniform. The Department adopted the factors listed in paragraph (c) instead of the "business necessity" standard of the Labor regulation because that term seemed

inappropriate to the nature of the programs operated by the majority of institutions subject to this regulation, e.g., public school systems, hospitals, colleges and universities, nursing homes, day-care centers, and welfare offices. The factors listed in paragraph (c) are intended to make the rationale underlying the business necessity standard applicable to and understandable by recipients of HHS funds.

17. *Tests and selection criteria.* Revised §84.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available. This paragraph is an application of the principle established under title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of "disproportionate, adverse effect" difficult and burdensome. Under the altered, more workable provision, once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related. A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related. In addition, §84.13(a) has been revised to place the burden on the Director, rather than the recipient, to identify alternate tests.

Section 84.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills that may not themselves be necessary to the job in question but that may make the handicapped person unable to pass the test. The recipient must select and administer tests so as best to ensure that the test will measure the handicapped person's ability to perform on the job rather than the person's ability to see, hear, speak, or perform manual tasks, except, of course, where such skills are the factors that the test purports to measure. For example, a person with a speech impediment may be perfectly qualified for jobs that do not or need not, with reasonable accommodation, require ability to speak clearly.Yet, if given an oral test, the person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but instead will reflect impaired speech.

18. *Preemployment inquiries.* Section 84.14, concerning preemployment inquiries, generated a large number of comments. Commenters representing handicapped persons strongly favored a ban on preemployment inquiries on the ground that such inquiries are often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests of employers. Some recipients, on the other hand, argued that preemployment inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping condition, and accommodations that might required.

The Secretary has concluded that a general prohibition of preemployment inquiries is appropriate. However, a sentence has been added to paragraph (a) to make clear that an employer may inquire into an applicant's ability to perform job-related tasks but may not ask if the person has a handicap. For example, an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license (if that is a necessary qualification for the position in question). Similarly, employers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees.

Section 84.14(B) allows preemployment inquiries only if they are made in conjunction with required remedial action to correct past discrimination, with voluntary action to overcome past conditions that have limited the participation of handicapped persons, or with obligations under section 503 of the Rehabilitation Act of 1973. In these instances, paragraph (b) specifies certain safeguards that must be followed by the employer.

Finally, the revised provision allows an employer to condition offers of employment to handicapped persons on the results of medical examinations, so long as the examinations are administered to all employees in a nondiscriminatory manner and the results are treated on a confidential basis.

19. *Specific acts of Discrimination.* Sections 84.15 (recruitment), 84.16 (compensation), 84.17 (job classification and structure) and 84.18 (fringe benefits) have been deleted from the regulation as unnecessarily duplicative of §84.11 (discrimination prohibited). The deletion of these sections in no way changes the substantive obligations of employers subject to this regulation from those set forth in the July 16 proposed regulation. These deletions bring the regulation closer in form to the Department of Labor's section 503 regulation.

Proposed §84.18, concerning fringe benefits, had allowed for differences in benefits or contributions between handicapped and nonhandicapped persons in situations only where such differences could be justified on an actuarial basis. Section 84.11 simply bars discrimination in providing fringe benefits and does not address the issue of actuarial differences.The Department believes that currently available data and experience do not demonstrate a basis for promulgating a regulation specifically allowing for differences in benefits or contributions.

SUBPART C — PROGRAM ACCESSIBILITY

In general, Subpart C prohibits the exclusion of qualified handicapped persons from federally assisted programs or activities because a recipient's facilities are inaccessible or unusable.

20. *Existing facilities.* Section 84.22 maintains the same standard for nondiscrimination in regard to existing facilities as was included in the proposed regulation.The section states that a recipient's program or activity, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Paragraphs (a) and (b) make clear that a recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible. Accessibility to the recipient's program or activity may be achieved by a number of means, including redesign of equipment, reassignment of classes or other services to accessible buildings, and making aides available to beneficiaries. In choosing among methods of compliance, recipients are required to give priority consideration to methods that will be consistent with provision of services in the most appropriate integrated setting. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

Under §84.22, a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required. A university may not exclude a handicapped student from a specifically requested course offering because it is not offered in an accessible location, but it need not make every section of that course accessible.

Commenters representing several institutions of higher education have suggested that it would be appropriate for one postsecondary institution in a geographical area to be made accessible to handicapped persons and for other colleges and universities in that area to participate in that school's program, thereby developing an educational consortium for the postsecondary education of handicapped

students. The Department believes that such a consortium, when developed and applied only to handicapped persons, would not constitute compliance with §84.22, but would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and would, therefore, be inconsistent with the basic objectives of the statute.

Nothing in this regulation, however, should be read as prohibiting institutions from forming consortia for the benefit of all students. Thus, if three colleges decide that it would be cost-efficient for one college to offer biology, the second physics, and the third chemistry to all students at the three colleges, the arrangement would not violate section 504. On the other hand, it would violate the regulation if the same institutions set up a consortium under which one college undertook to make its biology lab accessible, another its physics lab, and a third its chemistry lab, and under which mobility-impaired handicapped students (but not other students) were required to attend the particular college that is accessible for the desired courses.

Similarly, while a public school district need not make each of its buildings completely accessible, it may not make only one facility or part of a facility accessible if the result is to segregate handicapped students in a single setting.

All recipients that provide health, welfare, or other social services may also comply with §84.22 by delivering services at alternate accessible sites or making home visits. Thus, for example, a pharmacist might arrange to make home deliveries of drugs. Under revised §84.22(c), small providers of health, welfare, and social services (those with fewer than fifteen employees) may refer a beneficiary to an accessible provider of the desired service, but only if no means of meeting the program accessibility requirement other than a significant alteration in existing facilities is available. The referring recipient has the responsibility of determining that the other provider is in fact accessible and willing to provide the service. The Secretary believes that "last resort" referral provision is appropriate to avoid imposition of additional costs in the health care area, to encourage providers to remain in the Medicaid program, and to avoid imposing significant costs on small, low-budget providers such as day-care centers or foster homes.

*A recent change in the tax law may assist some recipients in meeting their obligations under this section. Under section 2122 of the Tax Reform Act of 1976, recipients that pay federal income tax are eligible to claim a tax deduction of up to $25,000 for architectural and transportation modifications made to improve accessibility for handicapped persons. Many physicians and dentists, among others, may be eligible for this tax deduction. See 42 FR 17870 (April 4, 1977), adopting 26 CFR 7.190.

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. The Secretary believes that the standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers. The Department is ready at all times to provide technical assistance to recipients in meeting their program accessibility responsibilities. For this purpose, the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirement.

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility.It should be emphasized that the three-year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with §84.22(d).

The regulation continues to provide, as did the proposed version, that a recipient planning to achieve program accessibility by making structural changes must develop a transition plan for such changes within six months of the effective date of the regulation. A number of commenters suggested extending that period to one year. The secretary believes that such an extension is unnecessary and unwise. Planning for any necessary structural changes should be undertaken promptly to ensure that they can be completed within the three-year period. The elements of the transition plan as required by the regulation remain virtually unchanged from the proposal but §84.22(d) now includes a requirement that the recipient make the plan available for public inspection.

Several commenters expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The regulation will not be applied to permit such a result. See §84.4(c)(2)(iv), prohibiting unnecessarily separate treatment; §84.35, requiring that students in elementary and secondary schools be educated in the most integrated setting appropriate to their needs; and new §84.43(d), applying the same standard to postsecondary education.

We have received some comments from organizations of handicapped persons on the subject of requiring, over an extended period of time, a barrier-free environment — that is, requiring the removal of all architectural barriers in existing facilities. The Department has considered these comments but has decided to take no further action at this time concerning these suggestions, believing that such action should only be considered in light of experience in implementing the program accessibility standard.

21. *New construction.* Section 84.23 requires that all new facilities, as well as alterations that could affect access to and use of existing facilities, be designed and constructed in a manner so as to make the facility accessible to and usable by handicapped persons. Section 84.23(a) has been amended so that it applies to each newly constructed facility if the construction was commenced after the effective date of the regulation. The words "if construction has commenced" will be considered to mean "if groundbreaking has taken place." Thus, a recipient will not be required to alter the design of a facility that has progressed beyond groundbreaking prior to the effective date of the regulation.

Paragraph (b) requires certain alterations to conform to the requirement of physical accessibility in paragraph (a). If an alteration is undertaken to a portion of a building the accessibility of which could be improved by the manner in which the alteration is carried out, the alteration must be made in that manner. Thus, if a doorway or wall is being altered, the door or other wall opening must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration consists of altering ceilings, the provisions of this section are not applicable because this alteration cannot be done in a way that affects the accessibility of that portion of the building. The phrase "to the maximum extent feasible" has been added to allow for the occasional case in which the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate the building in a manner that results in its being entirely barrier-free. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

*[Editor's Note: Congress reduced the accessibility tax deduction to $15,000 in the Omnibus Budget Reconciliation Act of 1990. That law also created an annual tax credit of up to $5,000 for small businesses that remove barriers to comply with the Americans with Disabilities Act.]

*As proposed, §84.23(c) required compliance with the American National Standards Institute (ANSI) standard on building accessibility as the minimum necessary for compliance with the accessibility requirement of §§84.23 (a) and (b).The reference to the ANSI standard created some ambiguity, since the standard itself provides for waivers where other methods are equally effective in providing accessibility to the facility. Moreover, the Secretary does not wish to discourage innovation in barrier-free construction by requiring absolute adherence to a rigid design standard. Accordingly, §84.23 (c) has been revised to permit departures from particular requirements of the ANSI standard where the recipient can demonstrate that equivalent access to the facility is provided. Section 84.23(d) of the proposed regulation, providing for a limited deferral of action concerning facilities that are subject to section 502 as well as section 504 of the Act, has been deleted.The Secretary believes that the provision is unnecessary and inappropriate to this regulation.The Department will, however, seek to coordinate enforcement activities under this regulation with those of the Architectural and Transportation Barriers Compliance Board.

SUBPART D — PRESCHOOL, ELEMENTARY, AND SECONDARY EDUCATION

Subpart D sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. In this context, the term "adult education" refers only to those educational programs and activities for adults that are operated by elementary and secondary schools.

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, §§84.32 and 84.33 apply only to public programs and §84.39 applies only to private programs; §§84.35 and 84.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart B generally conforms to the standards established for the education of handicapped persons in *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 344 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and *Lebanks v. Spears*, 60 F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Public Law 94-142 (the EHA).

The basic requirements common to those cases, to the EHA, and to this regulation are (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguard be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children. These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular educational setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents or guardian. Thus, a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense.

It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process procedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.

22. *Location and notification.* Section 84.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by section 504 and this regulation. This section has been shortened without substantive change.

23. *Free appropriate public education.* Former §§84.34 ("Free education") and 84.36(a) ("Suitable education") have been consolidated and revised in new §84.33. Under §84.34(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Section 84.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be consistent with the requirements of §84.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new §84.33(b)(2) has been added, which allows this requirement to be met through the full implementation of an individualized education program developed in accordance with the standards of the EHA.

Paragraph (c) of §84.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may make use of the procedures established in §84.36.) Under this paragraph, a recipient's obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also

*[Editor's Note: On Dec. 19, 1990, (55 F.R. 52142) HHS adopted a common rule amending §84.23(c) to reference the Uniform Federal Accessibility Standards (UFAS) as the standards grantees may use to comply with section 504. The regulations contained in the *Handbook* reflect this change.]

be provided.Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

If the recipient places a student, because of his or her handicap, in a program that necessitates his or her being away from home, the payments must also cover room and board and nonmedical care (including custodial and supervisory care). When residential care is necessitated not by the student's handicap but by factors such as the student's home conditions, the recipient is not required to pay the cost of room and board.

Two new sentences have been added to paragraph (c)(1) to make clear that a recipient's financial obligations need not be met solely through its own funds. Recipients may rely on funds from any public or private source including insurers and similar third parties.

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to §84.33. Section 84.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of §84.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

24. *Educational setting.* Section 84.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting.

Although under §84.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by §84.34.

Among the factors to be considered in placing a child is the need to place the child as close to home as possible. A new sentence has been added to paragraph (a) requiring recipients to take this factor into account. As pointed out in several comments, the parents' right under §84.36 to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educational program may exist closer to home; this issue may be raised by the parent or guardian under §84.34 and 84.36.

New paragraph (b) specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children.

Section 84.34(c) (formerly §84.38) requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. A number of comments objected to this section on the basis that it encourages the creation and maintenance of such facilities. This is not the intent of the provision. A separate facility violates section 504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students. In those instances in which such facilities are necessary (as might be the case, for example, for severely retarded persons), this provision requires that the educational services provided be comparable to those provided in the facilities of the recipient that are not identifiable as being for handicapped persons.

25. *Evaluation and placement.* Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, section 84.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures, delineated in §§84.35 and 84.36, are concerned with testing and other evaluation methods and with procedural due process rights.

Section 84.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. "Any action" includes denials of placement.

Paragraphs (b) and (c) of §84.35 establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being handicapped, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials.This problem has been extensively documented in "Issues in the Classification of Children," a report by the Project on Classification of Exceptional Children, in which the HHS Interagency Task Force participated. The provisions of these paragraphs are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests.

Paragraph (b) has been shortened but not substantively changed. The requirement in former subparagraph (1) that recipients provide and administer evaluation materials in the native language of the student has been deleted as unnecessary, since the same requirement already exists under title VI and is more appropriately covered under that statute. Subparagraphs (1) and (2) are, in general, intended to prevent misinterpretation and similar misuse of test scores and, in particular, to avoid undue reliance on general intelligence tests. Subparagraph (3) requires a recipient to administer tests to a student with impaired sensory, manual, or speaking skills in whatever manner is necessary to avoid distortion of the test results by the impairment. Former subparagraph (4) has been deleted as unnecessarily repetitive of the other provisions of this paragraph.

Paragraph (c) requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized. In particular, it requires that all significant factors relating to the learning process, including adaptive behavior, be considered. (Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.) Information from all sources must be documented and considered by a group of persons, and the procedure must ensure that the child is placed in the most integrated setting appropriate.

The proposed regulation would have required a complete individual reevaluation of the student each year. The Department has concluded that it is inappropriate in the section 504 regulation to require full reevaluations on such a rigid schedule. Accordingly, §84.35(c) requires periodic reevaluations and specifies that reevaluations in accordance with the EHA will constitute compliance. The proposed regulation implementing the EHA allows reevaluation at three year intervals except under certain specified circumstances.

Under §84.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special education or related services.This section has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed section 504

regulation, are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

26. *Nonacademic services.* Section 84.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation. Because these services and activities are part of a recipient's education program, they must, in accordance with the provisions of §84.34, be provided in the most integrated setting appropriate.

Revised paragraph (c)(2) does permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities. Most handicapped students are able to participate in one or more regular physical education and athletics activities.For example, a student in a wheelchair can participate in regular archery course, as can a deaf student in a wrestling course.

Finally, the one-year transition period provided in former §84.37(a)(3) was deleted in response to the almost unanimous objection of commenters to that provision.

27. *Preschool and adult education.* Section 84.38 prohibits discrimination on the basis of handicap in preschool and adult education programs. Former paragraph (b), which emphasized that compensatory programs for disadvantaged children are subject to section 504, has been deleted as unnecessary, since it is comprehended by paragraph (a).

28. *Private education.* Section 84.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been changed in two significant respects: first, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs; second, under §84.39(b), they may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.

Paragraph (a) of §84.39 is intended to make clear that recipients that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for mentally retarded persons is neither required to admit such a person into its program nor to arrange or pay for the provision of the person's education in another program. A private recipient without a special program for blind students, however, would not be permitted to exclude, on the basis of blindness, a blind applicant who is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.

Subpart E — Postsecondary Education

Subpart E prescribes requirements for nondiscrimination in recruitment, admission, and treatment of students in postsecondary education programs and activities, including vocational education.

29. *Admission and recruitment.* In addition to a general prohibition of discrimination on the basis of handicap in §84.42(a), the regulation delineates, in §84.42(b), specific prohibitions concerning the establishment of limitations on admission of handicapped students, the use of tests or selection criteria, and preadmission inquiry. Several changes have been made in this provision.

Section 84.42(b) provides that postsecondary educational institutions may not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless it has been validated as a predictor of academic success and alternate tests or criteria with a less disproportionate, adverse effect are shown by the Department to be available. There are two significant changes in this approach from the July 16 proposed regulation.

First, many commenters expressed concern that §84.42(b)(2)(ii) could be interpreted to require a "global search" for alternate tests that do not have a disproportionate, adverse impact on handicapped persons. This was not the intent of the provision and, therefore, it has been amended to place the burden on the Director of the Office for Civil Rights, rather than on the recipient, to identify alternate tests.

Second, a new paragraph (d), concerning validity studies, has been added. Under the proposed regulation, overall success in an education program, not just first-year grades, was the criterion against which admissions tests were to be validated. This approach has been changed to reflect the comment of professional testing services that use of first year grades would be less disruptive of present practice and that periodic validity studies against overall success in the education program would be sufficient check on the reliability of first-year grades.

Section 84.42(b)(3) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual, or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the aptitude and achievement of persons who are not able to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Section 84.42(b)(3)(iii) has been amended to require that admissions tests be administered in facilities that, on the whole, are accessible. In this context, "on the whole" means that not all of the facilities need be accessible so long as a sufficient number of facilities are available to handicapped persons.

Revised §84.42(b)(4) generally prohibits preadmission inquiries as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of §84.14 on preemployment inquiries. The regulation does, however, allow inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation.

New paragraph (c) parallels the section on preemployment inquiries and allows postsecondary institutions to inquire about applicants' handicaps before admission, subject to certain safeguards, if the purpose of the inquiry is to take remedial action to correct past discrimination or to take voluntary action to overcome the limited participation of handicapped persons in postsecondary educational institutions.

Proposed §84.42(c), which would have allowed different admissions criteria in certain cases for handicapped persons, was widely misinterpreted in comments from both handicapped persons and recipients. We have concluded that the section is unnecessary, and it has been deleted.

30. *Treatment of students.* Section 84.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education program or activity as a whole is nondiscriminatory.For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers in elementary or secondary schools not operated by the college. Under the "as a whole" wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality of choice in student teaching assignments afforded nonhandicapped students.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course,

course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptions by the recipient that no job would be available in the area in question for a person with that handicap.

New paragraph (d) requires postsecondary institutions to operate their programs and activities so that handicapped students are provided services in the most integrated setting appropriate. Thus, if a college had several elementary physics classes and had moved one such class to the first floor of the science building to accommodate students in wheelchairs, it would be a violation of this paragraph for the college to concentrate handicapped students with no mobility impairments in the same class.

31. *Academic adjustments*. Paragraph (a) of §84.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

Paragraph (b) provides that postsecondary institutions may not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or braillers in classrooms and dog guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright.

Paragraph (c) of this section, concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§84.42(b)) and will be similarly interpreted.

Under §84.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times. Thus, readers need not be available in the recipient's library at all times so long as the schedule of times when a reader is available is established, is adhered to, and is sufficient. Of course, recipients are not required to maintain a complete braille library.

32. *Housing*. Section 84.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons, pointed out that some handicapped persons can live in any college housing and need not wait to the end of the transition period in Subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a recipient assists in making off-campus housing available to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§86.32 of the title IX regulation), they may use the procedures developed under title IX in order to comply with §84.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

33. *Health and insurance*. Section 84.46 of the proposed regulation, providing that recipients may not discriminate on the basis of handicap in the provision of health related services, has been deleted as duplicative of the general provisions of section 84.43. This deletion represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized service and aids to handicapped persons in health programs. If, for example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation to handicapped persons is to treat such disorders for them.

34. *Financial assistance*. Section 84.46(a) (formerly §84.47), prohibiting discrimination in providing financial assistance, remains substantively the same. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such assistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. Awards that are made under wills, trusts, or similar legal instruments in a discriminatory manner are permissible, but only if the overall effect of the recipient's provision of financial assistance is not discriminatory on the basis of handicap.

It will not be considered discriminatory to deny, on the basis of handicap, an athletic scholarship to a handicapped person if the handicap renders the person unable to qualify for the award. For example, a student who has a neurological disorder might be denied a varsity football scholarship on the basis of his inability to play football, but a deaf person could not, on the basis of handicap, be denied a scholarship for the school's diving team.The deaf person could, however, be denied a scholarship on the basis of comparative diving ability.

Commenters on §84.46(b), which applies to assistance in obtaining outside employment for students, expressed similar concerns to those raised under §84.43(b), concerning cooperative programs.This paragraph has been changed in the same manner as §84.43(b) to include the "as a whole" concept and will be interpreted in the same manner as §84.43(b).

35. *Nonacademic services*. Section 84.47 (formerly §84.48) establishes nondiscrimination standards for physical education and athletics counseling and placement services, and social organizations. This section sets the same standards as does §84.38 of Subpart D, discussed above, and will be interpreted in a similar fashion.

Subpart F — Health, Welfare, and Social Services

Subpart F applies to recipients that operate health, welfare, and social service programs. The Department received fewer comments on this subpart than on others.

Although many commented that Subpart F lacked specificity, these commenters provided neither concrete suggestions nor additions. Nevertheless, some changes have been made, pursuant to comment, to clarify the obligations of recipients in specific areas. In addition, in an effort to reduce duplication in the regulation, the section governing recipients providing health services (proposed §84.52) has been consolidated with the section regulating providers of welfare and social services (proposed §84.53). Since the separate provisions that appeared in the proposed regulation were almost identical, no substantive change should be inferred from their consolidation.

Several commenters asked whether Subpart F applies to vocational rehabilitation agencies whose purpose is to assist in the rehabilitation of handicapped persons. To the extent that such agencies receive financial assistance from the Department, they are covered by Subpart F and all other relevant subparts of the regulation. Nothing in this regulation, however, precludes such agencies from servicing only handicapped persons. Indeed, §84.4(c) permits recipients to offer services or benefits that are limited by federal law to handicapped persons or classes of handicapped persons.

Many comments suggested requiring state health, welfare, and social service agencies to take an active role in the enforcement of section 504 with regard to local health and social service providers. The Department believes that the possibility for federal-state cooperation in the administration and enforcement of section 504 warrants further consideration.Moreover, the Department will rely largely on state Medicaid agencies, as it has under title VI, for monitoring compliance by individual Medicaid providers.

A number of comments also discussed whether section 504 should be read to require payment of compensation to institutionalized handicapped patients who perform services for the institution in which they reside. The Department of Labor has recently issued a proposed regulation under the Fair Labor Standards Act (FLSA) that covers the question of compensation for institutionalized persons. 42 FR 15224 (March 18, 1977).This Department will seek information and comment from the Department of Labor concerning that agency's experience administering the FLSA regulation.

36. *Health, welfare, and other social service providers.* As already noted, §84.53 has been combined with proposed §84.53 into a single section covering health, welfare, and other social services. Section 84.52(a) has been expanded in several respects. The addition of new paragraph (a)(2) is intended to make clear the basic requirement of equal opportunity to receive benefits or services in the health, welfare, and social service areas. The paragraph parallels §§84.4(b)(ii) and 84.43(b). New paragraph (a)(3) requires the provision of effective benefits or services, as defined in §84.4(b)(2) (i.e., benefits or services which "afford handicapped persons equal opportunity to obtain the same result (or) to gain the same benefit * * *").

Section 84.52(a) also includes provisions concerning the limitation of benefits or services to handicapped persons and the subjection of handicapped persons to different eligibility standards. (These provisions were previously included in the welfare recipient section (§84.53(a)).) One common misconception about the regulation is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

Commenters had raised the question of whether the prohibition against different standards of eligibility might preclude recipients from providing special services to handicapped persons or classes of handicapped persons. The regulation will not be so interpreted, and the specific section in question has been eliminated. Section 84.4(c) makes clear that special programs for handicapped persons are permitted.

A new paragraph (a)(5) concerning the provision of different or separate services or benefits has been added. This provision prohibits such treatment unless necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

Section 84.52(a)(2) of the proposed regulation has been omitted as duplicative of revised §84.22 (b) and (c) in Subpart C. As discussed above, these sections permit health care providers to arrange to meet patients in accessible facilities and to make referrals in carefully limited circumstances.

Section 84.52(a)(3) of the proposed regulation has been redesignated §84.52(b) and has been amended to cover written material concerning waivers of rights or consent to treatment as well as general notices concerning health benefits or services. The section requires the recipient to ensure that qualified handicapped persons are not denied effective notice because of their handicap. For example, recipients could use several different types of notice in order to reach persons with impaired vision or hearing, such as brailled messages, radio spots, and tactile devices on cards or envelopes to inform blind persons of the need to call the recipient for further information.

Sections 84.52(a)(4), 84.52(a)(5), and 84.52(b) have been omitted from the regulation as unnecessary. They are clearly comprehended by the more general sections banning discrimination.

Section 84.52(c) is a new section requiring recipient hospitals to establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care. Although it would be appropriate for a hospital to fulfill its responsibilities under this section by having a full-time interpreter for the deaf on staff, there may be other means of accomplishing the desired result of assuring that some means of communication is immediately available for deaf persons needing emergency treatment.

Section 84.52(d), also a new provision, requires recipients with fifteen or more employees to provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills. Further, the Director may require a small provider to furnish auxiliary aids where the provision of aids would not adversely affect the ability of the recipient to provide its health benefits or service. Thus, although a small nonprofit neighborhood clinic might not be obligated to have available an interpreter for deaf persons, the Director may require provision of such aids as may be reasonably available to ensure that qualified handicapped persons are not denied appropriate benefits or services because of their handicaps.

37. *Treatment of Drug Addicts and Alcoholics.* Section 84.53 is a new section that prohibits discrimination in the treatment and admission of drug and alcohol addicts to hospitals and outpatient facilities. This section is included pursuant to section 407, Public Law 92-255, the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174), as amended, and section 321, Public Law 91-616, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended, and section 321, Public Law 93-282. Section 504 itself also prohibits such discriminatory treatment and, in addition, prohibits similar discriminatory treatment by other types of health providers. Section 84.53 prohibits discrimination against drug abusers by operators of outpatient facilities, despite the fact that section 407 pertains only to hospitals, because of the broader application of section 504. This provision does not mean that all hospitals and outpatient facilities must treat drug addiction and alcoholism. It simply means, for example, that a cancer clinic may not refuse to treat cancer patients simply because they are also alcoholics.

38. *Education of institutionalized persons.* The regulation retains §84.54 of the proposed regulation that requires that an appropriate education be provided to qualified handicapped persons who are confined to residential institutions or day care centers.

Subpart G — Procedures

In §84.61, the Secretary has adopted the title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedural regulation applicable to all of the civil rights statutes and executive orders administered by the Department.

APPENDIX B-ENFORCEMENT PROCEDURES

*Sections 80.6-80.10 and Part 81 of Title 45 of the Code of Federal Regulations are reprinted here without change for the convenience of the reader.

APPENDIX C—GUIDELINES RELATING TO HEALTH CARE FOR HANDICAPPED INFANTS

(a) *Interpretative guidelines relating to the applicability of this part to health care for handicapped infants.* The following are interpretative guidelines of the Department set forth here to assist recipients and the public in understanding the Department's interpretation of section 504 and the regulations contained in this part as applied to matters concerning health care for handicapped infants. These interpretative guidelines are illustrative; they do not independently establish rules of conduct.

(1) With respect to programs and activities receiving Federal financial assistance, health care providers may not, solely on the basis of present or anticipated physical or mental impairments of an infant, withhold treatment or nourishment from the infant who, in spite of such impairments, will medically benefit from the treatment or nourishment.

(2) Futile treatment or treatment that will do no more than temporarily prolong the act of dying of a terminally ill infant is not considered treatment that will medically benefit the infant.

(3) In determining whether certain possible treatments will be medically beneficial to an infant, reasonable medical judgments in selecting among alternative courses of treatment will be respected.

(4) Section 504 and the provisions of this part are not applicable to parents (who are not recipients of Federal financial assistance). However, each recipient health care provider must in all aspects of its health care programs receiving Federal financial assistance provide health care and related services in a manner consistent with the requirements of section 504 and this part. Such aspects includes decisions on whether to report, as required by State law or otherwise, to the appropriate child protective services agency a suspected instance of medical neglect of a child, or to take other action to seek review or parental decisions to withhold consent for medically indicated treatment. Whenever parents make a decision to withhold consent for medically beneficial treatment or nourishment, such recipient providers may not, solely on the basis of the infant's present or anticipated future mental or physical impairments, fail to follow applicable procedures on reporting such incidents to the child protective services agency or to seek judicial review.

(5) The following are examples of applying these interpretative guidelines. These examples are stated in the context of decisions made by recipient health care providers. Were these decisions made by parents, the guideline stated in section (a)(4) would apply. These examples assume no facts or complications other than those stated. Because every case must be examined on its individual facts, these are merely illustrative examples to assist in understanding the framework for applying the nondiscrimination requirements of section 504 and this part.

(i) Withholding of medically beneficial surgery to correct an intestinal obstruction in an infant with Down's Syndrome when the withholding is based upon the anticipated future mental retardation of the infant and there are no medical contraindications to the surgery that would otherwise justify withholding the surgery would constitute a discriminatory act, violative of section 504.

(ii) Withholding of treatment for medically correctable physical anomalies in children born with spina bifida when such denial is based on anticipated mental impairment paralysis or incontinence of the infant, rather than on reasonable medical judgments that treatment would be futile, too unlikely of success given complications in the particular case, or otherwise not of medical benefit to the infant, would constitute a discriminatory act, violative of section 504.

(iii) Withholding of medical treatment for an infant born with anencephaly, who will inevitably die within a short period of time, would not constitute a discriminatory act because the treatment would be futile and do no more than temporarily prolong the act of dying.

(iv) Withholding of certain potential treatments from a severely premature and low birth weight infant on the grounds of reasonable medical judgments concerning the improbability of success or risks of potential harm to the infant would not violate section 504.

(b) *Guidelines for HHS investigations relating to health care for handicapped infants.* The following are guidelines of the Department in conducting investigations relating to health care for handicapped infants. They are set forth here to assist recipients and the public in understanding applicable investigative procedures. These guidelines do not establish rules of conduct, create or affect legally enforceable rights of any person, or modify existing rights, authorities or responsibilities pursuant to this part. These guidelines reflect the Department's recognition of the special circumstances presented in connection with complaints of suspected life-threatening noncompliance with this part involving health care for handicapped infants. These guidelines do not apply to other investigations pursuant to this part, or other civil rights statutes and rules. Deviations from these guidelines may occur when, in the judgment of the responsible Department official, other action is necessary to protect the life or health of a handicapped infant.

(1) Unless impracticable, whenever the Department receives a complaint of suspected life-threatening noncompliance with this part in connection with health care for a handicapped infant in a program or activity receiving Federal financial assistance, HHS will immediately conduct a preliminary inquiry into the matter by initiating telephone contact with the recipient hospital to obtain information relating to the condition and treatment of the infant who is the subject of the complaint. The preliminary inquiry, which may include additional contact with the complainant and a requirement that pertinent records be provided to the Department, will generally be completed within 24 hours (or sooner if indicated) after receipt of the complaint.

(2) Unless impracticable, whenever a recipient hospital has an Infant Care Review Committee, established and operated substantially in accordance with the provisions of 45 CFR 84.55(f), the Department will, as part of its preliminary inquiry, solicit the information available to, and the analysis and recommendations of, the ICRC. Unless, in the judgment of the responsible Department official, other action is necessary to protect the life or health of a handicapped infant, prior to initiating an on-site investigation, the Department will await receipt of this information from the ICRS for 24 hours (or less if indicated) after receipt of the complaint. The Department may require a subsequent written report of the ICRC's findings, accompanied by pertinent records and documentation.

(3) On the basis of the information obtained during preliminary inquiry, including information provided by the hospital (including the hospital's ICRC, if any), information provided by the complainant, and all other information obtained, the Department will determine whether there is a need for an on-site investigation of the complaint. Whenever the Department determines that doubt remains that the recipient hospital or some other recipient is in compliance with this part or additional documentation is desired to substantiate a conclusion, the Department will initiate an on-site investigation or take some other appropriate action. Unless impracticable, prior to initiating an on-site investigation, the Department's medical consultant (referred to in paragraph 6) will contact the hospital's ICRC or appropriate medical personnel of the recipient hospital.

(4) In conducting on-site investigations, when a recipient hospital has an ICRC

*See page C:25.

established and operated substantially in accordance with the provisions of 45 CFR 84.55(f), the investigation will begin with, or include at the earliest practicable time, a meeting with the ICRC or its designees. In all on-site investigations, the Department will make every effort to minimize any potential inconvenience or disruption, accommodate the schedules of health care professionals and avoid making medical records unavailable. The Department will also seek to coordinate its investigation with any related investigations by the state child protective services agency so as to minimize potential disruption.

(5) It is the policy of the Department to make no comment to the public or media regarding the substance of a pending preliminary inquiry or investigation.

(6) The Department will obtain the assistance of a qualified medical consultant to evaluate the medical information (including medical records) obtained in the course of a preliminary inquiry or investigation. The name, title and telephone number of the Department's medical consultant will be made available to the recipient hospital. The Department's medical consultant will, if appropriate, contact medical personnel of the recipient hospital in connection with the preliminary inquiry, investigation or medical consultant's evaluation. To the extent practicable, the medical consultant will be a specialist with respect to the condition of the infant who is the subject of the preliminary inquiry or investigation. The medical consultant may be an employee of the Department or another person who has agreed to serve, with or without compensation, in that capacity.

(7) The Department will advise the recipient hospital of its conclusions as soon as possible following the completion of a preliminary inquiry or investigation. Whenever final administrative findings following an investigation of a compliant of suspected life-threatening noncompliance cannot be made promptly, the Department will seek to notify the recipient and the complainant of the Department's decision on whether the matter will be immediately referred to the Department of Justice pursuant to 45 CFR 80.8.

(8) Except as necessary to determine or effect compliance, the Department will (i) in conducting preliminary inquiries and investigations, permit information provided by the recipient hospital to the Department to be furnished without names or other identifying information relating to the infant and the infant's family; and (ii) to the extent permitted by law, safeguard the confidentiality of information obtained.

HHS ENFORCEMENT PROCEDURES

§80.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

§80.7 Conduct of investigations.

(a) *Periodic compliance reviews.* The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in §80.8.

(2) If an investigation does not warrant action pursuant to subparagraph (1) of this paragraph the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

§80.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with §80.4.* If an applicant fails or refuses to furnish an assurance required under §80.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the

mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

§80.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by §80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and §80.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, D.C., at a time fixed by the responsible Department official unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5-8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee considered to be on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided for by this part, may be reimbursed for his travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or Joint Hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with §80.10.

§80.10 Decisions and notices.

(a) *Decisions by hearing examiners.* After a hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the hearing examiner, the applicant or recipient or the counsel for the Department may, within the period provided for in the rules of procedure issued by the responsible Department official, file with the reviewing authority exceptions to the initial decision, with his reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision thereof including the reasons therefor. In the absence of exceptions the initial decision shall constitute the final decision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of a hearing examiner pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to §80.9(a) the reviewing authority shall make its final decision on the record or refer the matter to a hearing examiner for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing examiner or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraphs (a), (b), or (c) of this section, a recipient or applicant or the counsel for the Department may request the Secretary to review a decision of the Reviewing Authority in accordance with rules of procedure issued by the responsible Department official. Such review is not a matter of right and shall be granted only where the Secretary determines there are special and important reasons therefor. The Secretary may grant or deny such request, in whole or in part. He may also review such a decision upon his own motion in accordance with rules of procedure issued by the responsible Department official. In the absence of a review under this paragraph, a final decision referred to in paragraphs (a), (b), (c) of this section shall become the final decision of the Department when the Secretary transmits it as such to Congressional committees with the report required under section 602 of the Act. Failure of an applicant or recipient to file an exception with the Reviewing Authority or to request review under this paragraph shall

not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation.

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. An elementary or secondary school or school system which is unable to file an assurance of compliance with §80.3 shall be restored to full eligibility to receive Federal financial assistance, if it files a court order or a plan for desegregation which meets the requirements of §80.4(c), and provides reasonable assurance that it will comply with the court order or plan.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible Department official. The applicant or recipient will be restored to such eligibility if it proves at such hearing that it satisfied the requirements of paragraph (g)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

PART 81 — PRACTICE AND PROCEDURE FOR HEARINGS UNDER PART 80 OF THIS TITLE

Subpart A— General Information

§81.1 Scope of rules.

The rules of procedure in this part supplement §§80.9 and 80.10 of this subtitle and govern the practice for hearings, decisions, and administrative review conducted by the Department of Health and Human Services, pursuant to Title VI of the Civil Rights Act of 1964 (sec. 602, 78 Stat. 252) and Part 80 of this subtitle.

§81.2 Records to be public.

All pleadings, correspondence, exhibits, transcripts, of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied in the office of the Civil Rights hearing clerk. Inquiries may be made at the Central Information Center, Department of Health and Human Services, 330, Independence Avenue SW., Washington, D.C. 20201.

§81.3 Use of gender and number.

As used in this part, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing the masculine gender may be applied to females or organizations.

§81.4 Suspension of rules.

Upon notice to all parties, the reviewing authority or the presiding officer, with respect to matters pending before them, may modify or waive any rule in this part upon determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

Subpart B—Appearance and Practice

§81.11 Appearance.

A party may appear in person or by counsel and participate fully in any proceeding. A State agency or a corporation may appear by any of its officers or by any employee it authorizes to appear on its behalf. Counsel must be members in good standing of the bar of a State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico.

§81.12 Authority for representation.

Any individual acting in a representative capacity in any proceeding may be required to show his authority to act in such capacity.

§81.13 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at any hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

Subpart C—Parties

§81.21 Parties; General Counsel deemed a party.

(a) The term party shall include an applicant or recipient or other person to whom a notice of hearing or opportunity for hearing has been mailed naming him a respondent.

(b) The General Counsel of the Department of Health and Human Services shall be deemed a party to all proceedings.

§81.22 Amici curiae.

(a) Any interested person or organization may file a petition to participate in a proceeding as an amicus curiae. Such petition shall be filed prior to the prehearing conference, or if none is held, before the commencement of the hearing, unless the petitioner shows good cause for filing the petition later. The presiding officer may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and may contribute materially to the proper disposition thereof. An amicus curiae is not a party and may not introduce evidence at a hearing.

(b) An amicus curiae may submit a statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. The amicus curiae may submit a brief on each occasion a decision is to be made or a prior decision is subject to review. His brief shall be filed and served on each party within the time limits applicable to the party whose position he deems himself to support; or if he does not deem himself to support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings.

(c) When all parties have completed their initial examination of a witness, any amicus curiae may request the presiding officer to propound specific questions to the witness. The presiding officer, in his discretion, may grant any such request if he believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties and will not expand the issues.

§81.23 Complainants not parties.

A person submitting a complaint pursuant to §80.7(b) of this title is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become an amicus curiae.

Subpart D—Form, Execution, Service and Filing of Documents

§81.31 Form of documents to be filed.

Documents to be filed under the rules in this part shall be dated, the original signed in ink, shall show the docket description and title of the proceeding, and shall show the title, if any, and address of the signatory. Copies need not be signed but the name of the person signing the original shall be reproduced. Documents shall be legible and shall not be more than 8 1/2 inches wide and 12 inches long.

§81.32 Signature of documents.

The signature of a party, authorized officer, employee or attorney constitutes a certificate that he has read the document, that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may proceed as though the document had not been filed. Similar action may be taken if scandalous or indecent matter is inserted.

§81.33 Filing and service.

All notices by a Department official, and all written motions, requests, petitions, memoranda, pleadings, exceptions, briefs, decisions, and correspondence to a Department official from a party, or vice versa, relating to a proceeding after its commencement shall be filed and served on all parties. Parties shall supply the original and two copies of documents submitted for filing. Filings shall be made with the Civil Rights hearing clerk at the address stated in the notice of hearing or notice of opportunity for hearing, during regular business hours. Regular business hours are every Monday through Friday (legal holidays in the District of Columbia excepted) from 9 a.m. to 5:30 p.m., eastern standard or daylight saving time, whichever is effective in the District of Columbia at the time. Originals only on exhibits and transcripts of testimony need be filed. For requirements of service in amici curiae, see §81.107.

§81.34 Service — how made.

Service shall be made by personal delivery of one copy to each person to be served or by mailing by first-class mail, properly addressed with postage prepaid. When a party or amicus has appeared by attorney or other representative, service upon such attorney or representative will be deemed service upon the party or amicus. Documents served by mail preferably should be mailed in sufficient time to reach the addressee by the date on which the original is due to be filed, and should be air mailed if the addressee is more than 300 miles distant.

§81.35 Date of service.

The date of service shall be the day when the matter is deposited in the U.S. mail or is delivered in person, except that the date of service of the initial notice of hearing or opportunity for hearing shall be the date of its delivery, or of its attempted delivery if refused.

§81.36 Certificate of service.

The original of every document filed and required to be served upon parties to a proceeding shall be endorsed with a certificate of service signed by the party making service or by his attorney or representative, stating that such service has been made, the date of service, and the manner of service, whether by mail or personal delivery.

Subpart E—Time

§81.41 Computation.

In computing any period of time under the rules in this part or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed in the District of Columbia, in which event it includes the next following business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

§81.42 Extension of time or postponement.

Requests for extension of time should be served on all parties and should set forth the reasons for the application.Applications may be granted upon a showing of good cause by the applicant. From the designation of a presiding officer until the issuance of his decision such requests should be addressed to him. Answers to such requests are permitted, if made promptly.

§81.43 Reduction of time to file documents.

For good cause, the reviewing authority or the presiding officer, with respect to matters pending before them, may reduce any time limit prescribed by the rules in this part, except as provided by law or in Part 80 of this title.

Subpart F—Proceedings Prior to Hearing

§81.51 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing to an affected applicant or recipient, pursuant to §80.9 of this title.

§81.52 Answer to notice.

The respondent, applicant or recipient may file an answer to the notice within 20 days after service thereof. Answers shall admit or deny specifically and in detail each allegation of the notice, unless the respondent party is without knowledge, in which case his answer should so state, and the statement will be deemed a denial. Allegations of fact in the notice not denied or controverted by answer shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered. Failure of the respondent to file an answer within the 20-day period following service of the notice may be deemed an admission of all matters of fact recited in the notice.

§81.53 Amendment of notice or answer.

The General Counsel may amend the notice of hearing or opportunity for hearing once as a matter of course before an answer thereto is served, and each respondent may amend his answer once as a matter of course not later than 10 days before the date fixed for hearing but in no event later than 20 days form the date of service of his original answer. Otherwise a notice or answer may be amended only by leave of the presiding officer. A respondent shall file his answer to an amended notice within the time remaining for filing the answer to the original notice or within 10 days after service of the amended notice, whichever period may be the longer, unless the presiding officer otherwise orders.

§81.54 Request for hearing.

Within 20 days after service of a notice of opportunity for hearing which does not fix a date for hearing the respondent, either in his answer or in a separate document, may request a hearing. Failure of the respondent to request a hearing shall be deemed a waiver of the right to a hearing and to constitute his consent to the making of a decision on the basis of such information as is available.

§81.55 Consolidation.

The responsible Department official may provide for proceedings in the Department to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies. All parties to any proceeding consolidated subsequently to service of the notice of hearing or opportunity for hearing shall be promptly served with notice of such consolidation.

§81.56 Motions.

Motions and petitions shall state the relief sought, the authority relied upon, and the facts alleged. If made before or after the hearing, these matters shall be in writing. If made at the hearing, they may be stated orally; but the presiding officer may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Motions, answers, and replies shall be addressed to the presiding

officer, if the case is pending before him. A repetitious motion will not be entertained.

§81.57 Responses to motions and petitions.

Within 8 days after a written motion or petition is served, or such other period as the reviewing authority or the presiding officer may fix, any party may file a response thereto. An immediate oral response may be made to an oral motion.

§81.58 Disposition of motions and petitions.

The reviewing authority or the presiding officer may not sustain or grant a written motion or petition prior to expiration of the time for filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however*, That prehearing conferences, hearings and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately. Motions and petitions submitted to the reviewing authority or the presiding officer, respectively, and not disposed of in separate rulings or in their respective decisions will be deemed denied. Oral arguments shall not be held or written motions or petitions unless the presiding officer in his discretion expressly so orders.

Subpart G—Responsibilities and Duties of Presiding Officer

§81.61 Who presides.

A hearing examiner assigned under 5 U.S.C. 3105 or 3344 (formerly sec. 11 of the Administrative Procedure Act) shall preside over the taking of evidence in any hearing to which these rules of procedure apply.

§81.62 Designation of hearing examiner.

The designation of the hearing examiner as presiding officer shall be in writing, and shall specify whether the examiner is to make an initial decision or to certify the entire record including his recommended findings and proposed decision to the reviewing authority, and may also fix the time and place of hearing. A copy of such order shall be served on all parties. After service of an order designating a hearing examiner to preside, and until such examiner makes his decision, motions and petitions shall be submitted to him. In the case of the death, illness, disqualification or unavailability of the designated hearing examiner, another hearing examiner may be designated to take his place.

§81.63 Authority of presiding officer.

The presiding officer shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He shall have all powers necessary to these ends, including (but not limited to) the power to:

(a) Arrange and issue notice of the date, time, and place of hearings, or, upon due notice to the parties, to change the date, time, and place of hearings previously set.

(b) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(c) Require parties and amici curiae to state their position with respect to the various issues in the proceeding.

(d) Administer oaths and affirmations.

(e) Rule on motions, and other procedural items on matters pending before him.

(f) Regulate the course of the hearing and conduct of counsel therein.

(g) Examine witnesses and direct witnesses to testify.

(h) Receive, rule on, exclude or limit evidence.

(i) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him.

(j) Issue initial or recommended decisions.

(k) Take any action authorized by the rules in this part or in conformance with the provisions of 5 U.S.C. 551-559 (the Administrative Procedure Act).

Subpart H—Hearing Procedures

§81.71 Statement of position and trial briefs.

The presiding officer may require parties and amici curiae to file written statements of position prior to the beginning of a hearing. The presiding officer may also require the parties to submit trial briefs.

§81.72 Evidentiary purpose.

(a) The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather it should be presented in statements, memoranda, or briefs, as determined by the presiding officer. Brief opening statements, which shall be limited to statement of the party's position and what he intends to prove, may be made at hearings.

(b) Hearings for the reception of evidence will be held only in cases where issues of fact must be resolved in order to determine whether the respondent has failed to comply with one or more applicable requirements of Part 80 of this title. In any case where it appears from the respondent's answer to the notice of hearing or opportunity for hearing, from his failure timely to answer, or from his admissions or stipulations in the record, that there are no matters of material fact in dispute, the reviewing authority or presiding officer may enter an order so finding, vacating the hearing date if one has been set, and fixing the time for filing briefs under §81.101. Thereafter the proceedings shall go to conclusion in accordance with Subpart J of this part. The presiding officer may allow an appeal from such order in accordance with §81.86.

§81.73 Testimony.

Testimony shall be given orally under oath or affirmation by witnesses at the hearing; but the presiding officer, in his discretion, may require or permit that the direct testimony of any witness be prepared in writing and served on all parties in advance of the hearing. Such testimony may be adopted by the witness at the hearing, and filed as part of the record thereof. Unless authorized by the presiding officer, witnesses will not be permitted to read prepared testimony into the record. Except as provided in §§81.75 and 81.76, witnesses shall be available at the hearing for cross-examination.

§81.74 Exhibits.

Proposed exhibits shall be exchanged at the prehearing conference, or otherwise prior to the hearing if the presiding officer so requires. Proposed exhibits not so exchanged may be denied admission as evidence. The authenticity of all proposed exhibits exchanged prior to hearing will be deemed admitted unless written objection thereto is filed prior to the hearing or unless good cause is shown at the hearing for failure to file such written objection.

§81.75 Affidavits.

An affidavit is not inadmissible as such. Unless the presiding officer fixes other time periods affidavits shall be filed and served on the parties not later than 15 days prior to the hearing; and not less than 7 days prior to hearing a party may file and serve written objection to any affidavit on the ground that he believes it necessary to test the truth of assertions therein at hearing. In such event the assertions objected to will not be received in evidence unless the affiant is made available for cross-examination, or the presiding officer determines that cross-examination is not necessary for the full and true disclosure of facts referred to in such assertions. Notwithstanding any objection, however, affidavits may be considered in the case of any respondent who waives a hearing.

§81.76 Depositions.

Upon such terms as may be just, for the convenience of the parties or of the Department, the presiding officer may authorize or direct the testimony of any witness to be taken by deposition.

§81.77 Admissions as to facts and documents.

Not later than 15 days prior to the scheduled date of the hearing except for good cause shown, or prior to such earlier date as the presiding officer may order, any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the

request. Each of the matters of which an admission is requested shall be deemed admitted, unless within a period designated in the request (not less than 10 days after service thereof, or within such further time as the presiding officer or the reviewing authority if no presiding officer has yet been designated may allow upon motion and notice) the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny such matters. Copies of requests for admission and answers thereto shall be served on all parties. Any admission made by a party to such request is only for the purposes of the pending proceeding, or any proceeding or action instituted for the enforcement of any order entered therein, and shall not constitute an admission by him for any other purpose or be used against him in any other proceeding or action.

§81.78 Evidence.

Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded.

§81.79 Cross-examination.

A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his direct examination.

§81.80 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the proceeding. These data are not deemed part of the evidence or record in the hearing.

§81.81 Objections.

Objections to evidence shall be timely and briefly state the ground relied upon.

§81.82 Exceptions to rulings of presiding officer unnecessary.

Exceptions to rulings of the presiding officer are unnecessary. It is sufficient that a party, at the time the ruling of the presiding officer is sought, makes known the action which he desires the presiding officer to take, or his objection to an action taken, and his grounds therefor.

§81.83 Official notice.

Where official notice is taken or is to be taken of a material fact not appearing in the evidence of record, any party, on timely request, shall be afforded an opportunity to show the contrary.

§81.84 Public document items.

Whenever there is offered (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a State or its agencies, and such document (or part thereof) has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice, as a public document item by specifying the document or relevant part thereof.

§81.85 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

§81.86 Appeals from ruling of presiding officer.

Rulings of the presiding officer may not be appealed to the reviewing authority prior to his consideration of the entire proceeding except with the consent of the presiding officer and where he certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense, or prejudice to any party, or substantial detriment to the public interest. If an appeal is allowed, any party may file a brief with the reviewing authority within such period as the presiding officer directs. No oral argument will be heard unless the reviewing authority directs otherwise. At any time prior to submission of the proceeding to it for decisions, the reviewing authority may direct the presiding officer to certify any question or the entire record to it for decision. Where the entire record is so certified, the presiding officer shall recommend a decision.

Subpart I —The Record

§81.91 Official transcript.

The Department will designate the official reporter for all hearings. The official transcripts of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith shall be filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance.

§81.92 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision shall constitute the exclusive record for decision.

Subpart J—Posthearing Procedures, Decisions

§81.101 Posthearing briefs: proposed findings and conclusions.

(a) The presiding officer shall fix the time for filing posthearing briefs, which may contain proposed findings of fact and conclusions of law, and, if permitted, reply briefs.

(b) Briefs should include a summary of the evidence relied upon together with references to exhibit numbers and pages of the transcript, with citations of the authorities relied upon.

§81.102 Decisions following hearing.

When the time for submission of posthearing briefs has expired, the presiding officer shall certify the entire record, including his recommended findings and proposed decision, to the responsible Department official; or if so authorized he shall make an initial decision. A copy of the recommended findings and proposed decision, or of the initial decision, shall be served upon all parties, and amici, if any.

§81.103 Exceptions to initial or recommended decisions.

Within 20 days after the mailing of an initial or recommended decision, any party may file exceptions to the decision, stating reasons therefor, with the reviewing authority. Any other party may file a response thereto within 30 days after the mailing of the decision. Upon the filing of such exceptions, the reviewing authority shall review the decision and issue its own decision thereon.

§81.104 Final decisions.

(a) Where the hearing is conducted by a hearing examiner who makes an initial decision, if no exceptions thereto are filed within the 20-day period specified in §81.103, such decision shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of §81.106.

(b) Where the hearing is conducted by a hearing examiner who makes a recommended decision, or upon the filing of exceptions to a hearing examiner's initial decision, the reviewing authority shall review the recommended or initial decision and shall issue its own decision thereon, which shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5

U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of §81.106.

(c) All final decisions shall be promptly served on all parties, and amici, if any.

§81.105 Oral argument to the reviewing authority.

(a) If any party desires to argue a case orally on exceptions or replies to exceptions to an initial or recommended decision, he shall make such request in writing. The reviewing authority may grant or deny such requests in its discretion. If granted, it will serve notice of oral argument on all parties. The notice will set forth the order of presentation, the amount of time allotted, and the time and place for argument. The names of persons who will argue should be filed with the Department hearing clerk not later than 7 days before the date set for oral regument.

(b) The purpose of oral argument is to emphasize and clarify the written argument in the briefs. Reading at length from the brief or other texts is not favored. Participants should confine their arguments to points of controlling importance and to points upon which exceptions have been filed. Consolidations of appearances at oral argument by parties taking the same side will permit the parties' interests to be presented more effectively in the time allotted.

(c) Pamphlets, charts, and other written material may be presented at oral argument only if such material is limited to facts already in the record and is served on all parties and filed with the Department hearing clerk at least 7 days before the argument.

§81.106 Review by the Secretary.

Within 20 days after an initial decision becomes a final decision pursuant to §81.104(a) or within 20 days of the mailing of a final decision referred to in §81.104(b), as the case may be, a party may request the Secretary to review the final decision. The Secretary may grant or deny such request, in whole or in part, or serve notice of his intent to review the decision in whole or in part upon his own motion.If the Secretary grants the requested review, or if he serves notice of intent to review upon his own motion, each party to the decision shall have 20 days following notice of the Secretary's proposed action within which to file exceptions to the decision and supporting briefs and memoranda, or briefs and memoranda in support of the decision. Failure of a party to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

§81.107 Service on amici curiae.

All briefs, exceptions, memoranda, requests, and decisions referred to in this subpart J shall be served upon amici curiae at the same times and in the same manner required for service on parties. Any written statements of position and trial briefs required of parties under §81.71 shall be served on amici.

Subpart K—Judicial Standards of Practice

§81.111 Conduct.

Parties and their representatives are expected to conduct themselves with honor and dignity and observe judicial standards of practice and ethics in all proceedings. They should not indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations. A representative of any party whether or not a lawyer shall observe the traditional responsibilities of lawyers as officers of the court and use his best efforts to restrain his client from improprieties in connection with a proceeding.

§81.112 Improper conduct.

With respect to any proceeding it is improper for any interested person to attempt to sway the judgement of the reviewing authority by undertaking to bring pressure or influence to bear upon any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper that such interested persons or any members of the Department's staff or the presiding officer give statements to communications media, by paid advertisement or otherwise, designed to influence the judgement of any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper for any person to solicit communications to any such officer, or his decisional staff, other than proper communications by parties or amici curiae.

§81.113 Ex Parte communications.

Only persons employed by or assigned to work with the reviewing authority who perform no investigative or prosecuting function in connection with a proceeding shall communicate ex parte with the reviewing authority, or the presiding officer, or any employee or person involved in the decisional process in such proceedings with respect to the merits of that or a factually related proceeding. The reviewing authority, the presiding officer, or any employee or person involved in the decisional process of a proceeding shall communicate ex parte with respect to the merits of that or a factually related proceeding only with persons employed by or assigned to work with them and who perform no investigative or prosecuting function in connection with the proceeding.

§81.114 Expeditious treatment.

Requests for expeditious treatment of matters pending before the responsible Department official or the presiding officer are deemed communications on the merits, and are improper except when forwarded from parties to a proceeding and served upon all other parties thereto. Such communications should be in the form of a motion.

§81.115 Matters not prohibited.

A request for information which merely inquires about the status of a proceeding without discussing issues or expressing points of view is not deemed an ex parte communication.Such requests should be directed to the Civil Rights hearing clerk. Communications with respect to minor procedural matters or inquiries or emergency requests for extensions of time are not deemed ex parte communications prohibited by §81.113. Where feasible, however, such communications should be by letter with copies to all parties. Ex parte communications between a respondent and the responsible Department official or the Secretary with respect to securing such respondent's voluntary compliance with any requirement of Part 80 of this title are not prohibited.

§81.116 Filing of ex parte communications.

A prohibited communication in writing received by the Secretary, the reviewing authority, or by the presiding officer, shall be made public by placing it in the correspondence file of the docket in the case and will not be considered as part of the record for decision. If the prohibited communication is received orally a memorandum setting forth its substance shall be made and filed in the correspondence section of the docket in the case. A person referred to in such memorandum may file a comment for inclusion in the docket if he considers the memorandum to be incorrect.

Subpart L—Posttermination Proceedings

§81.121 Post termination proceedings.

(a) An applicant or recipient adversely affected by the order terminating, discontinuing, or refusing Federal financial assistance in consequence of proceedings pursuant to this title may request the responsible Department official for an order authorizing payment, or permitting resumption, of Federal financial assistance. Such request shall be in writing and shall affirmatively show that since entry of the order, it has brought its program or activity into compliance with the requirements of the Act, and with the Regulation thereunder, and shall set forth specifically, and in detail, the steps which it has taken to achieve such compliance. If the responsible Department official denies such request the applicant or recipient shall be given an expeditious hearing if it so requests in writing and specifies why it believes the responsible Department official to have been in error. The request for such a hearing shall be addressed to the responsible Department official and shall be made within 30 days after the applicant or recipient is informed

that the responsible Department official has refused to authorize payment or permit resumption of Federal financial assistance.

(b) In the event that a hearing shall be requested pursuant to subparagraph (a) of this section, the hearing procedures established by this part shall be applicable to the proceedings, except as otherwise provided in this section.

Subpart M—Definitions

§81.131 Definitions.

The definitions contained in §80.13 of this subtitle apply to this part, unless the context otherwise requires, and the term "reviewing authority" as used herein includes the Secretary of Health and Human Services, with respect to action by that official under §81.106.

Transition provisions: (a) The amendments herein shall become effective upon publication in the FEDERAL REGISTER.

(b) These rules shall apply to any proceeding or part thereof to which Part 80 of this title as amended effective October 19, 1967 (published in the FEDERAL REGISTER for Oct. 19, 1967), and as the same may be hereafter amended, applies. In the case of any proceeding or part thereof governed by the provisions of Part 80 as that part existed prior to such amendment, and rules in this Part 81 shall apply as if these amendments were not in effect.

wise qualified." On the other hand, if Dancy's position was a "light duty" assignment, which he fulfilled for three years, then his discharge violated the Act. The court examined the Equal Employment Opportunity Commission's (EEOC) interpretation of this issue in *Ignacio v. United States Postal Service*. The EEOC took the position that the "position in question" is not limited to the position held by the complainant, but includes any position the complainant could have held with reasonable accommodation. The court disagreed with this view, instructing that the inquiry should focus on the specific position the plaintiff was denied as a result of the adverse determination, and whether he could perform the position with reasonable accommodation. Finding there to be a genuine issue of material fact remaining, the court denied both motions for summary judgment. Thus the issue at trial will be whether Dancy's position at the time of his discharge was that of FPO or the "light duty" clerical job to which he was assigned.

358 *Dexler v. Carlin*, 660 F. Supp 1418 (D. Conn. 1986)

Rehabilitation Act does not require Postal Service to consider rejected applicants for positions for which he did not apply since this would not constitute accommodation to his handicap

The plaintiff in this case suffers from achrondroplastic dwarfism, a growth disorder, that results in various physical limitations. He applied for employment as a clerk with the U.S. Postal Service in 1981 but was rejected because the postmaster determined he could not make reasonable accommodation for the plaintiff's physical limitations. This suit was brought under sections 501 and 505 of the Rehabilitation Act of 1973 (the Act), alleging that the Postal Service engaged in "surmountable barrier" and "disparate impact" discrimination.

]The Postal Service moved for partial summary judgment on three issues: (1) the Act does not require the Postal Service to accommodate the plaintiff by considering him for positions for which he did not and could not apply; (2) the Act does not require accommodation that would ignore collective bargaining agreements; and (3) the plaintiff cannot ask the court to abrogate terms of a collective bargaining agreement without joining the union as a party to the suit. The defendant did not submit any factual basis for this motion, however, and the court refused to grant the motion in a "factual vacuum." "On a basic level," wrote the court, "there is a dispute as to the existence or non-existence of the facts that would link these legal issues to the case."

As the court pointed out, the defendant asked the court to rule that the Act does not require the Postal Service to accommodate Dexler by ignoring obligations imposed by a collective bargaining agreement. Yet there was no evidence presented that the Postal Service has any collective bargaining obligations, or, if it does, whether accommodating Dexler would conflict with these obligations, or what union should be joined as a party if there is an affected agreement.

In considering the plaintiff's claim that the Postal Service was required to consider him for other positions as a means of reasonable accommodation, the court provided a lengthy analysis of a federal employer's obligation to make reasonable accommodations. Focusing on the need to consider the demands of the specific "position in question" and the applicant's ability to meet those specific demands at virtually every step, however, the court found it is necessary first to know what physical standards are at issue for each job. Since these will vary from job to job, the court concluded:

> The requirement that an employer make reasonable accommodation to the known handicaps of job applicants does not mandate that an employer consider handicapped applicants for jobs for which they have not applied, assuming that the employer does not do so for applicants who are not handicapped and that the applicant's failure or inability to apply for other positions was not a function of his handicap.

At trial Dexler will be limited in his claim to showing that the Postal Service failed to make reasonable accommodations in the position for which he applied.

359 *DeVargas v. Mason & Hangar*, 40 F.E.P. Cases 1803 (D. N.M. 1986); No. 89-2061 (10th Cir. 1990) *Cert. denied* 1990

Procurement contract with federal government is not "federal financial assistance" under section 504

Plaintiff cannot sue under 42 U.S.C. §1983 to extent suit is based upon section 504

Appeals court rules Civil Rights Restoration Act is retroactive

This civil rights action arose from the alleged refusal of Mason & Hangar-Silas Mason Co., Inc. (the defendant) to hire the plaintiff as a security officer at the Los Alamos National Laboratory (LANL) in New Mexico. The defendant employs individuals as security guards under a contract with LANL, which is engaged in weapons and atomic energy research under the auspices of the U.S. Department of Energy (DOE) and the University of California.

The plaintiff, who has only one eye, applied for employment with defendant in 1981 and again in 1983. He complained that the defendant's refusal to consider his application violated section 504 of the Rehabilitation Act of 1973. He also claimed he was discriminated against on the basis of ancestry, handicap and/or exercise of his First Amendment right of free association, in violation of 42 U.S.C. §1983, and that these actions violated the First and Fifth Amendments. Finally, he alleged that a DOE regulation, Interim Management Directive No. 6102, is unconstitutional and violated section 504.

The court first examined the plaintiff's claim under section 504 and concluded that the defendant is not a "recipient of federal financial assistance" for purposes of that statute. DOE's purpose in procuring privately hired security personnel to guard the LANL facility was to realize cost savings, not to provide assistance to a private company. Further, DOE's antidiscrimination regulations explicitly do not apply to procurement contracts. Consequently the court granted defendant's motion for summary judgment on this claim. The court also ruled that the plaintiff could not sue under 42 U.S.C. §1983 to the extent that the claim is based on section 504 for the reasons outlined above, stating, "plaintiff cannot circumvent the requirements of the Rehabilitation Act by pleading the same cause of action under 1983."

The court also ruled that the plaintiff may sue under both 42 U.S.C. §1983 (so long as it is based on a statute other than section 504) and directly under the due process clause of the Fifth Amendment, even though the only difference between the two claims is that the constitutional challenge characterizes the parties as being agents of the United States govern-

ment. According to the court, there is no evidence that Congress intended §1983 to be an exclusive remedy.

Section 504 is also inapplicable to DOE regulations governing medical standards for personnel in procurements contracts, according to the court. Since the defendant is paid by a procurement contract with LANL, not through federal financial assistance, DOE's I.M.R. No. 6102 that sets medical standards for security personnel is not affected by section 504. Consequently that part of the plaintiff's claim was also dismissed.

Finally, the court disposed of several other motions concerning sovereign and qualified immunity of the various defendants.

On appeal —

The 10th U.S. Circuit Court of Appeals upheld the District Court's decision that procurement contracts do not constitute federal assistance for purposes of section 504.

The District Court had also ruled that section 504 did not apply to LANL because the law was program specific and the lab's particular programs were not discriminatory. This was consistent with the Supreme Court's 1984 ruling in *Grove City College v. Bell* that certain federal civil rights laws applied only to the programs or activities receiving federal funds.

Subsequently, however, Congress passed the Civil Rights Restoration Act, which requires institution-wide coverage of four federal statutes, including section 504. DeVargas petitioned the appeals court to overturn the District Court's ruling on the grounds that the act retroactively broadened section 504's scope.

On this issue, the appeals court again rejected DeVargas' argument. The court said it found, "a congressional purpose to overturn *Grove City College*, but no clear expression of intent regarding retroactive application of the act's amendments." It acknowledged that a Senate report discussed restoring section 504 to its pre-*Grove City* application, but said the reference was ambiguous and did not "amount to the clear intent required to invoke retroactivity."

At least three courts have held that the act does apply retroactively (*Leake v. Long Island Jewish Medical Center*, Appendix IV:465, *Bonner v. Lewis*, Appendix IV: 458 and *Lussier v. Dugger*, Appendix IV:485.) The 10th Circuit noted the *Leake* decision and the decision in (*Ayers v. Allain* 898 F.2d 1014 (5th Cir. 1990), but found their analyses to be "unpersuasive."

In *Leake*, the 2nd Circuit acknowledged that the Restoration Act itself does not indicate retroactivity. However, that court cited a statement by the law's sponsor, Rep. Don Edwards, D-Calif., that the "bill applies to all pending cases." It also noted that statute contains the words "restore" and "clarify," which, in the Handicapped Children's Protection Act, were meant by Congress to apply retroactively.

The 10th Circuit disagreed with the *Leake* decision for two reasons. First, it objected to the use of terms from one act and applying them to another. "We reject the notion that congressional intent for the Restoration Act can be discerned by analogy to a different statute enacted by a different Congress," the court said.

Second, it said floor statements of lawmakers were insufficient to resolve the issue. "We refuse to rely on such a slender thread to fashion out of whole cloth a cloak of retroactivity for the Restoration Act," the court said.

In *Ayers* (which involved race discrimination under Title VI of the Civil Rights Act), the 5th Circuit held that "retroactive application is appropriate when Congress enacts a statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture."

But the 10th Circuit disagreed, saying the *Ayers* court resolved the issue based on "congressional intent implied from the circumstances motivating Congress to act rather than from the directly relevant statements of Congress in the statute's language or authoritative legislative history." Congressional intent, the court said, requires "articulated and clear" statements, not inferences drawn from the general purpose of the legislation.

The court held that the *Ayers* court incorrectly drew the lines of power separating judicial and legislative branches. According to the 10th Circuit, Congress makes the law, but the Supreme Court interprets it. It acknowledged that Congress may change a law to clarify its legislative intent, but said any amendment enacted "cannot undo the Supreme Court's authoritative construction of the original statute."

In cases (such as the Civil Rights Restoration Act) where one Congress reacts to a Supreme Court interpretation of a law passed by previous lawmakers, the "restoration" effort is a newly created law, the court said. And as with any new law, "Congress must state clearly its intentions with regard to retroactivity," it concluded.

Seeking guidance in the absence of clear congressional intent, the appellate court cited the Supreme Court's decision in *Bowen v. Georgetown University Hospital* (109 S. Ct. 468 (1988)). In this case, the Court struck down cost-limit rules issued by the U.S. Department of Health and Human Services that had required hospitals to return Medicare payments retroactively.

The High Court held: "[R]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Based on this, the 10th Circuit held that the Restoration Act should not be applied retroactively and dismissed DeVargas' claim on this issue.

360 *Neihaus v. Kansas Bar Association*, 41 F.E.P. Cases 13 (10th Cir. 1986)

Kansas Bar Association not a federal grant recipient for purposes of section 504, nor can it be considered a branch of state government to trigger coverage of 42 U.S.C. §1983, First and Fourteenth Amendments

The appellants in this case were employed as a secretary-receptionist and a bookkeeper by the Kansas Bar Association until they were terminated in November and December 1982. Appellant Neumann suffers a slight handicap in her right hand, while appellant Niehaus is apparently not handicapped.[1] As a result of their terminations, appellants commenced separate employment discrimination actions in January 1984 and they were later consolidated for trial. They alleged violations of section 504 of the Rehabilitation Act, 42 U.S.C. §1983 and §1988, as well as the First and Fourteenth Amendments.

In 1985 the district court granted summary judgment against the appellants section 504 claim because the Kansas Bar Association is not a federal grant recipient. The court granted summary judgment on the remaining claims also, finding that the terminations were not the result of state action. The appellants argued on appeal that the district court erred in these rulings and also that an earlier magistrate's decision denying their motion to compel discovery was clearly erroneous. The Tenth Circuit affirmed the district court's decision in all respects.

In upholding the summary judgment on the section 504 claim, the appeals court relied on numerous precedents holding that "section 504, by its terms, prohibits discrimination only by a 'program or activity receiving Federal financial assistance,' " quoting from *Consolidated Rail Corporation v. Darrone* (Appendix IV:95). In this case the court found that the Kansas Bar Association did not receive any direct federal assistance after 1977, and received none at the time appellants were terminated. The court also ruled that federal funds received by two semi-related not-for-profit organizations were too remote from the Bar Association to be considered as fed-

[1] The court noted that Neihaus may lack standing to sue under section 504, but it was not necessary to reach this question since it found the district court correctly resolved the issue of federal funding.

492 *Chiari v. City of League City*, 920 F.2d 311 (5th Cir. 1991)

Construction inspector who has Parkinson's disease not otherwise qualified to perform essential functions of the job

A city did not violate Section 504 of the Rehabilitation Act when it fired a construction inspector who would lose his balance and thus was unable to perform the essential functions of the job, the 5th U.S. Circuit Court of Appeals ruled.

Antonio Chiari, an engineer who has Parkinson's disease, was a construction inspector for League City, Texas. Inspectors are responsible for approving construction plans and verifying that the work was properly completed. Nearly half of the job is spent at construction sites visually inspecting contractors' work, which requires considerable walking and climbing.

In early 1987, Chiari began to have trouble walking; he was seen stumbling in the city hall and falling while at a construction site. At the request of his supervisor, Chiari was examined separately by two neurosurgeons, who found he had an unsteady "shuffling gait and body rigidity." They both said his loss of balance rendered him unable to continue his job as a construction inspector and that he would be a danger to himself and others if he continued to work.

Chiari's personal physician also examined him, and saw "no particular limitation of [Chiari's] work, as long as he [did] not climb."

City officials tried unsuccessfully to restructure the job to accommodate Chiari's condition. First, they assigned another inspector to do on-site work while Chiari remained at his desk to review the plans. That arrangement did not work because to do the job properly, an inspector must review plans before visiting the site. They tried to create a new position, but could not due to budgetary constraints, and the city had no open positions for a transfer.

After these attempts failed, the city fired Chiari in April 1987. He sued, charging that the dismissal violated section 504 and the Texas Human Rights Act. He said he had never fallen on or injured a co-worker, and that the risk of personal injury was not a factor under section 504. Chiari also argued that the city could have provided him with part-time work as an accommodation.

The city said Chiari was not protected by section 504 because he could not perform the essential functions of the job, namely walking and climbing around construction sites safely.

The U.S. District Court for the Southern District of Texas ruled in favor of the city. That ruling was upheld by the 5th Circuit, which agreed that Chiari was no longer qualified to be a construction inspector. Citing *Arline* (see Appendix IV:329) and other section 504 cases, the appeals court said a "handicapped person cannot perform the essential functions of a job if his handicap poses a significant safety risk to those around him."

To support its judgment, the court cited the neurosurgeons' diagnoses that Chiari's balance problem would prevent him from working safely. Chiari's doctor concluded similarly when he was read the job description during the case.

The appeals court disagreed with Chiari that the risk of personal injury was immaterial. It cited section 501 regulations that include "health and safety of the individual" in the definition of qualified handicapped person. The existence of a personal safety rule in section 501 creates a similar rule under section 504, the court said.

Finally, the court ruled that city officials "went beyond their statutory duty in an effort to accommodate Chiari's disease" and that they were not required to create a new part-time position as an accommodation.

"All the city must do is demonstrate that a part-time schedule would not accommodate Chiari's performance on that job that he is currently doing," it said. "Even if Chiari worked fewer hours, he still would not be able to climb buildings or climb into ditches, [which are] 'essential functions' of a construction inspector's job."

For the same reasons cited under section 504, the court found no violations of the Texas discrimination law.

ADA COMPLIANCE GUIDE

Filing Instructions: April 1991

In this month's update you'll find the latest issue of your ADA Monthly Bulletin newsletter. After reading it, the newsletter should be placed behind the "Monthly Bulletins" tab in your manual.

To add the other pages in this month's mailing, follow the directions below, discarding the old pages and adding the new ones as appropriate.

Pages to Remove (Dated)	Pages to Add (Dated April 1991)	Description of Changes
p. xiii (March 1991)	p. xiii	Update to Current Contents page
Tab 100 p. 5 (December 1990)	Tab 100 p. 5	Correction of typographical error
Tab 100 p. 65 (August 1990)	Tab 100 p. 65	Update to ¶150, "State and Local Governments"
Tab 200 pp. 61-62 (August 1990)	Tab 200 pp. 61-62	Correction of typographical error
Tab 300 pp. 5-7	Tab 300 pp. 5-7	Update to discussion of public-sector employment issues
Tab 300 pp. 105-106	Tab 300 pp. 105-106	Update to discussion of public-sector employment issue
Tab 500 pp. 39-40 (September 1990)	Tab 500 pp. 39-40	Revision of discussion on "readily achievable"

DISCARD THIS SHEET AFTER CHANGES HAVE BEEN MADE

CURRENT CONTENTS

ADA Compliance Guide

Current Contents as of April 1991

The following is a list of all pages that make up the *ADA Compliance Guide*.

Figure 100-A
Effective Dates of ADA Titles I–IV

TITLE	EFFECTIVE DATE	RESPONSIBLE AGENCY	REGULATIONS DUE
I Employment	25 or more employees July 26, 1992 15 or more employees July 26, 1994	Equal Employment Opportunity Commission	July 26, 1991 *Proposed issued Feb. 28, 1991*
II Public Services	Jan. 26, 1992	Justice Department	July 26, 1991 *Proposed issued Feb. 28, 1991*
Public Transportation	Newly acquired vehicles Aug. 26, 1990	Transportation Department	Issued Oct. 4, 1990
	Paratransit Jan. 26, 1992	Transportation Department	July 26, 1991
III Public Accommodations	Jan. 26, 1992	Justice Department	July 26, 1991 *Proposed issued Feb. 22, 1991*
Private Transportation	Newly acquired vehicles Aug. 26, 1990	Transportation Department	Issued Oct. 4, 1990
Over-the-Road Buses*	July 26, 1996	Transportation Department	July 26, 1991** (Interim)
IV Telecom-munications	Telecommunication providers must comply with title IV by July 26, 1993	Federal Communications Commission	July 26, 1991 *Proposed issued Dec. 4, 1990*

* Private, over-the-road buses must be accessible by July 26, 1996 (six years after the effective date) for large providers; the effective date for small providers is July 26, 1997 (seven years after the effective date).
** The DOT will issue interim regulations concerning accessibility to private bus transportation by July 26, 1991. Final regulations, based on a 3-year study to be conducted by the U.S. Office of Technology Assessment, are due July 26, 1994.

[The next page is Tab 100, Page 15.]

¶150 State and Local Governments

*In most cases, the Americans with Disabilities Act (ADA) affects all state and local governments, regardless of size. Exemptions and grace periods given to small business owners are not extended to state and local governments in their capacity as operators of a public facility. However, exemptions provided to small employers do apply to state and local governments as employers (see ¶¶303 and 370).

The ADA makes some significant changes regarding federal non-discrimination requirements on state and local governments. The law imposes its non-discrimination mandate on all programs and activities of all governments, whether or not they receive federal funds.

State and local governments that receive federal grants are required by Section 504 of the Rehabilitation Act to make their programs and facilities accessible to the disabled. During the revenue-sharing era of the 1970s and early 1980s, most local governments were subject to section 504 because they received federal funds under the Revenue Sharing Act. After the act was repealed, many small towns, which did not receive any other federal aid, lost their federal nexus and thus were no longer subject to section 504's requirements.

No immunity against suit

States may not claim an 11th Amendment immunity against lawsuits filed under the ADA. The law provides the same remedies for actions brought against private entities in suits filed against states (see ¶620).

Finally, the ADA does not limit or invalidate any state or local disability rights law that provides greater protection for disabled people. The ADA applies to situations in which the state or local law has less stringent requirements. (See ¶700 for a discussion of state disability discrimination laws.)

[The next page is Tab 100, Page 75.]

* Indicates new or revised material.

¶240 Substance Abuse and Communicable Diseases

The subjects of communicable diseases and substance abuse (both alcohol abuse and illegal drug use) have always been controversial in relation to laws protecting disabled individuals, although for different reasons.

Although people with communicable diseases, especially debilitating, life-threatening ones such as AIDS or hepatitis, seem clearly disabled, the civil rights of such people must be balanced against a need to protect the public safety. Unfortunately, unfounded public fears exacerbate the problem, leaving the person with a communicable disease in particular need of civil rights protection. The ADA treats people with contagious or communicable diseases that threaten one or more major life functions as disabled, but does not require actions that would pose a threat to the health or safety of others (see ¶232).

Substance abuse, on the other hand, raises continual controversies. Although medical experts tend to agree that substance abuse is an illness, the specter of having to hire or keep drug addicts on the payroll has caused many people to shy away from considering substance abuse a "disability." The ADA sets out very specific situations in which substance abusers are to be considered disabled for purposes of the act (see ¶231).

¶241 Drug and Alcohol Abuse

Under the ADA, employers are permitted to hold drug and alcohol abusers to the same performance and behavior standards as other employees, even if it is their addiction to the drugs or alcohol that causes their unsatisfactory performance. In fact, Section 104(a) of the ADA specifically excludes current illegal drug users from its definition of qualified individuals with a disability.

An individual who is otherwise disabled is not to be excluded from the protections of the ADA just because he or she *also* uses or is addicted to drugs, as long as such use does not affect his or her work (H. Rpt. 101-485, Part 2, p. 77). For example, a woman with a satisfactory work record who uses a wheelchair requests a reasonable modification of her work environment to make it more accessible. The employer cannot refuse to provide the accommodation because he knows or believes that the employee uses drugs. Just because an employee has a condition that is specifically not protected by the ADA, such as current drug use, doesn't mean the employer can refuse to accommodate a different, protected disability, such as using a wheelchair.

Alcoholism is not considered a protected disability under the ADA if it interferes with a person's ability to work or poses a threat to the property or safety of others (§104(c)(4)). For example, action taken against an employee who is failing to perform required job responsibilities

would not be a violation of the ADA, even if the failure of the employee is a result of alcohol addiction.

In dealing with drug or alcohol abusers, employers are specifically permitted by Section 104(c) of the ADA to:

- prohibit the use of alcohol or illegal drugs at the work place by all employees;
- prohibit employees from being under the influence of alcohol or illegal drugs at the work place;
- require employees to follow the requirements of the Drug-Free Work Place Act of 1988;
- require employees to meet the job-related requirements established by the U.S. Departments of Transportation and Defense and the Nuclear Regulatory Commission with respect to drugs and alcohol; and
- hold a drug user or alcoholic to the same qualification standards for employment or job performance and behavior to which it holds other individuals, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such individual.

Former drug abusers

Section 104(b) of the act makes it clear that illegal drug users who have successfully completed rehabilitation treatment are not excluded by section 104(a). Section 104(b) specifically includes the following in the definition of "individual with a disability":

- someone who has successfully completed a supervised drug rehabilitation program and who is no longer engaging in the illegal use of drugs or has otherwise been rehabilitated successfully and is no longer using drugs;
- someone who is participating in a supervised rehabilitation program and is no longer using drugs; and
- someone who is not using drugs but is erroneously regarded as engaging in illegal drug use.

Drug tests

Drug testing is specifically addressed in a number of ways by the ADA. First of all, the ADA *neither requires nor prohibits* drug testing by employers. Section 104(d)(2) of the act states: "Nothing in this title 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."

Second, a drug test is not to be considered a "medical examination" for purposes of Title I of the ADA (§104(d)(1)). The ADA sets out very narrow circumstances under which employers are permitted to offer or require medical examinations (see ¶324).

• adopting separate lines of progression for employees with disabilities, based on a presumption that no individual with a disability would be interested in moving into a particular job;

• denying employment to an applicant based on generalized fears about the safety of the applicant or higher rates of absenteeism;

• denying health insurance coverage completely to an individual based on the person's diagnosis or disability;

• participating in a contractual or other relationship that has the effect of subjecting a qualified applicant or employee with a disability to a type of discrimination that is prohibited by the act;

• using standards, criteria or methods of administration that have the effect of discrimination on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control;

• excluding or otherwise denying equal jobs or benefits to a qualified applicant because of the known disability of an individual with whom the qualified individual has a relationship or association;

• failing to make reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business.

¶302 Who Is Covered?

The act applies to all employers, employment agencies, labor organizations and joint labor-management committees (§101(2)).

The term "employer" is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year and any agent of such person" (§101(5)(A)). (Between July 26, 1992, and July 26, 1994, there is an exemption for employers with 15-24 employers — see ¶301.)

The act (§101(5)(B)) specifically excepts from the definition of employer the following entities: the U.S. government; corporations wholly owned by the U.S. government, Indian tribes, and private membership clubs (other than labor organizations) that are tax-exempt under §501(c) of the Internal Revenue Code.

*¶303 Effective Dates

ADA's mandate for equal employment opportunity is to be phased in over four years. (See Figure 303-A.) With certain exceptions (see ¶211), the provisions of ADA Title I apply to all

*Indicates new or revised material.

employers, employment agencies, governmental agencies and departments, labor organizations and joint labor-management committees with 25 or more employees as of July 26, 1992, two years after the law was enacted. Two years later, on July 26, 1994, all employers with 15 or more employees will be covered. Employers with fewer than 15 employees are exempt. The ADA applies even if a covered entity has a collective bargaining agreement with provisions that conflict with ADA.

Figure 303-A
Effective Dates of Title I Employment Provisions

Types of Employer	Minimum # of Employees	Effective Date
Private and public	25	July 26, 1992
Private and public	15	July 26, 1994

On Feb. 28, 1991, the Justice Department proposed regulations to implement Title II of the ADA (28 C.F.R. Part 35; 56 *Fed. Reg.* 8538-8557). In the rule (§35.140), the department indicated that public employers, such as state and local governments, would be covered by the small-employer exemption that applies to private employers under title I of the act. Therefore, the employment provisions of the ADA would become effective for public employers with 25 or more employees on July 26, 1992, and for those with 15 or more employees on July 26, 1994.

*¶304 Implementation and Enforcement of the Employment Provisions of the ADA

The U.S. Equal Employment Opportunity Commission (EEOC) is the lead federal agency for regulation and enforcement of the employment provisions of the ADA. Congress has required the EEOC to issue final rules to implement the employment provisions of ADA no later than July 26, 1991, one year after the ADA was signed into law. Proposed rules were issued on Feb. 28, 1991, to permit public comment. EEOC is currently responsible for enforcing similar civil rights mandates as they apply to employment discrimination on the basis of race, color, national origin, religion, sex, pregnancy and age, and the agency proposed rules that reflect its experience in those areas as well as sections 501 and 504 of the Rehabilitation Act, which cover non-discrimination in employment by the federal government and recipients of federal aid.

The ADA draws on the experience of Section 504 of the Rehabilitation Act, an earlier federal law that applies only to federal grantees and contractors (see ¶122). Many of the standards, concepts and definitions related to employment discrimination in the section 504 regulations are included in the ADA. The ADA also incorporates by reference the enforcement provisions in the Civil Rights Act of 1964 (see ¶142), which allow for injunctive relief, reinstatement, restraining from further discriminatory conduct, and back pay. See Tab 600 for more information on the enforcement provisions of the ADA.

*Indicates new or revised material.

In addition, the statute does not prohibit a religious corporation, association, educational institution or society from giving preference in employment to individuals of a particular religion to perform work connected with its activities. In fact, such organizations may require conformance to its religious tenets as a qualification standard for employment.

See ¶210 for a detailed discussion of which employers are covered by the act.

[The next page is Tab 300, Page 25.]

*¶370 State and Local Government Employment

The employment provision (Title I) of the Americans with Disabilities Act (ADA) subjects state and local governmental entities to equal employment opportunity mandates. Title I includes governments in its definition of "employer" (§101(5)(B)).

After the ADA was enacted, there was some discussion over whether title II of the act, which prohibits discrimination in services, programs or activities of state and local governments (§202), applied to employment. Title II applies to all state and local governments, regardless of size. Some officials initially suggested that employment would be considered a public service within the meaning of title II.

However, on Feb. 28, 1991, the Justice Department proposed regulations covering title II of the act (28 C.F.R. Part 25; *Fed. Reg.* 8538-8557). The department indicated that state and local governments, in their capacity as employers, would be covered by the definitions, requirements and procedures established by the Equal Employment Opportunity Commission in its regulations to implement title I.

¶371 Exemptions for Small Employers

Title I of the ADA contains an exemption for small employers. Beginning in 1992, when the provisions become effective, employers with fewer than 25 employees are exempt; when the employment provisions become fully effective two years later in 1994, only employer with fewer than 15 employees will be exempt.

The Justice Department, when it issued its proposed regulations, said exemptions extended to small private employers would apply to small public employers, as well.

¶372 Effective Dates

Title I of the ADA provides two effective dates for employers, based on their size. The act becomes effective July 26, 1992, for employers with 25 or more employees. For employers with between 15 and 24 workers, the act takes effect July 26, 1994. Employers with fewer than 15 employees are exempt entirely.

According to the Justice Department, the title I effective dates will apply to state and local governments in their capacity as employers. Therefore, the employment provisions of the ADA would become effective for public employers with 25 or more employees on July 26, 1992, and for those with between 15 and 24 employees on July 26, 1994. These smaller entities do not have the same resources as larger governments and are more likely to encounter situations that would be an undue hardship (see ¶250).

It is important to note, however, that *all* governments are subject to the provisions of title II (regarding programs, activities and services) as soon as they are effective.

*Indicates new or revised material.

¶373 Other Disability Discrimination Laws

As noted in ¶710, many state and local governments presently prohibit discrimination against qualified individuals with disabilities in government employment (even in several states where there is no such mandate for private employers).

Many state and local governments, as recipients of federal assistance, are also subject to Section 504 of the Rehabilitation Act, which prohibits discrimination against qualified individuals with disabilities. As a result of the Civil Rights Restoration Act of 1988, an entire governmental entity (not merely the particular federally funded program) is subject to the non-discrimination mandate. Also, state and local government buildings financed with federal funds must be designed, constructed and altered so as to be accessible to, and usable in compliance with, the Architectural Barriers Act of 1968, as amended. (See ¶121 for a discussion of these and other federal disability statutes that may affect state and local governments.)

[The next page is Tab 300, Page 135.]

¶530 Removal of Architectural Barriers

The Americans with Disabilities Act (ADA) requires places of public accommodation to remove "architectural and communications barriers that are structural in nature in existing facilities" if such removal is "readily achievable" (§302(b)(2)(A)(iv)). The term "readily achievable" is defined as (§301(9)) "easily accomplishable and able to be carried out without much difficulty or expense." Factors to consider in determining whether the alteration is readily achievable include (§301(9)):

(A) the nature and cost of the action needed;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action on the operation of the facility;

(c) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure and functions of the work force of such entity, the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

These are the same factors to consider in determining whether a reasonable accommodation required in title I imposes an undue hardship on the employer (see ¶251), although the "readily achievable" standard is a significantly lesser or lower standard than the "undue hardship" standard. Simply stated, if the covered entity can demonstrate that barrier removal cannot be readily achieved, then it is not required, even though it would not result in an undue burden.

*What the "readily achievable" standard will mean for any particular public accommodation depends on all the circumstances. For example, a small facility might have to place a ramp over one or two steps, add a grab bar, or install a paper cup dispenser to make a water fountain more accessible, but might *not* be required to make major modifications such as long ramps or completely remodeled rest rooms, if those changes could not be easily accomplishable without much expense.

This requirement is deliberately designed to be flexible, depending on the size of the business. What is easily accomplishable for a large business might be impossible or tremendously costly for a small one. The ADA explicitly mandates that the size and the nature of the business be taken into account in determining what is readily achievable. Figure 530-A lists examples of barrier removals that are often considered to be readily achievable.

*Indicates new or revised material.

Figure 530-A
Examples of Readily Achievable Ways To Remove Architectural and Communications Barriers

CONDITION	APPROACHES
VISUAL IMPAIRMENTS	• Use large-letter signs • Remove displays or other objects in path of travel • Use "talking" calculators (or computers) • Add raised or braille lettering to elevator control buttons and door signs • Raise low-hanging signs or lights • Increase frequency of existing oral announcements • Make optical magnifiers available • Install entrance indicators such as strips of textured material near doorways, elevators, etc. • Tape texts/menus • Have servers or sales clerks read menus or price tags
MOBILITY IMPAIRMENTS	• Add a ramp to cover one or two steps • Install grab bars in bathrooms • Rearrange tables in restaurants • Adjust layout of display racks or shelves to widen aisles • Designate parking spaces for disabled people • Lower towel dispensers in restrooms • Raise desks with blocks or use simple crank-style drafting tables as alternatives to standard desks • Add paper cup dispenser at a water fountain • Lower telephones • Use floor coverings that allow easy mobility, e.g., non-skid surfaces or low carpet • Make curb cuts in sidewalks and entrances

ADA COMPLIANCE GUIDE

Filing Instructions: May 1991

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To add the other pages in this month's mailing, follow the directions below, discarding the old pages and adding the new ones as appropriate.

Pages to Remove (Dated)	Pages to Add (Dated May 1991)	Description of Changes
p. ix-xiii (various)	pp. ix-xiii	Update to Table of Contents, Current Contents page
Tab 300 pp. 67-68 (August 1990)	Tab 300 pp. 67-68	Clarification of paragraph to indicate that employees are not necessarily required to make entire facilities barrier-free
Appendix III p. 1 (March 1991)	Appendix III p. 1	Update to Table of Contents
None	Appendix III pp. 221-235	Addition of proposed DOT rules on accessible transportation

DISCARD THIS SHEET AFTER CHANGES HAVE BEEN MADE

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ADA Compliance Guide

Current Contents as of May 1991

The following is a list of all pages that make up the *ADA Compliance Guide*.

Any accommodation that would pose a significant health or safety risk, to the employee or to anyone else, is an unreasonable accommodation. For example, assigning an employee to a job that has as an essential function operating a machine (for which the individual is not qualified) would be dangerous and unreasonable. Likewise, an employer is not required to eliminate an essential job function just because an employee is unable to operate that equipment safely.

It would be unreasonable for a recovering alcoholic to insist on attending counseling during the critical part of the work day if similar sessions were available in non-duty hours.

The ADA also does not require an employer to make an accommodation simply because the technology exists. Purchasing a mechanical desk to assist an employee who had problems opening desk drawers would be unreasonable if other devices such as levers or even string were equally effective.

*Similarly, an employer is not required to make its entire existing facility barrier-free to accommodate employees who can be provided an accessible work environment in the part of the facility where they perform their duties.

¶335 Structural Accessibility in the Work Place

The ADA requires employment activities to take place in an integrated setting (§102(b)(1)). Employees with disabilities may not be segregated into particular areas. This means that architectural barriers might have to be removed or altered to provide structural accessibility to the work place. However, employers are not required to make structural modifications that are unreasonable and would impose an undue hardship (see ¶330).

In existing structures, structural modifications are necessary only to the extent that they constitute reasonable accommodations that will allow the disabled employee to perform the essential functions of the job. This applies to work stations, as well as normal support facilities such as bathrooms, water fountains and lunch rooms.

Non-structural accommodations are allowed if they accomplish the same result. This could mean moving a meeting to an accessible part of an office, installing a cup dispenser by a water fountain within reach of someone in a wheelchair, or holding a conference at an accessible hotel or restaurant. If a lunch room is located on the second floor of an existing building, an employer should provide comparable amenities on the ground floor for employees who use wheelchairs (such as coffee pots, microwave ovens, lunch tables, vending machines, etc.).

Title III of the ADA, which covers places of public accommodations (including places of employment), requires that new construction and major alterations be free of architectural and communications barriers. (See ¶500 for a discussion of accessibility under title III.)

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* Indicates new or revised material.

Regulations under Section 504 of the Rehabilitation Act cite the Uniform Federal Accessibility Standards (UFAS; see Appendix IV) as an acceptable architectural standard for achieving structural accessibility. It is anticipated that rules to implement the employment section of the ADA will also cite UFAS as an acceptable standard.

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Authority: 49 U.S.C. 322.

Subpart A—General

§ 37.1 Purpose.

The purpose of this part is to implement the transportation and related provisions of the Americans with Disabilities Act of 1990 (Pub. L. 101–336).

§ 37.3 Applicability.

(a) This Part applies to the following entities, whether or not they receive Federal financial assistance from the Department of Transportation:

(1) Any public entity that provides designated public transportation or intercity or community rail transportation;

(2) Any private entity that provides specified public transportation; and

(3) Any private entity that is not in the principal business of transporting people but operates a demand responsive or fixed route system or otherwise transport individuals.

(b) For entities receiving Federal financial assistance from the Department of Transportation, compliance with applicable requirements of this part is a condition of receiving the financial assistance. This obligation is enforced under the provisions of 49 CFR part 27, not under this part.

§ 37.5 Definitions.

As used in this part: *ADA* or *"the Act"* means the Americans with Disabilities Act of 1990 (Pub. L. 101–336), as it may be amended from time to time. *Auxiliary aids and services* includes:

(1) Qualified interpreters or other methods of making aurally delivered materials available to individuals with hearing impairments;

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

(3) Acquisition or modification of equipment or devices; or

(4) Other similar services or actions.

Commerce means travel, trade, transportation, or communication among the several states, between any foreign country or any territory or possession and any state, or between points in the same state but through another state or foreign country.

Commuter authority means any state, local, regional authority, corporation, or other entity established for purposes of providing commuter rail transportation (including, but not necessarily limited to, the New York Metropolitan Transportation Authority, the Connecticut Department of Transportation, the Maryland Department of Transportation, the Southeastern Pennsylvania Transportation Authority, the New Jersey Transit Corporation, the Massachusetts Bay Transportation

Authority, the Port Authority Trans-Hudson Corporation, and any successor agencies) and any entity created by one or more such agencies for the purposes of operating, or contracting for the operation of, commuter rail transportation.

Commuter bus service means fixed route bus service characterized by service predominantly in one direction during peak periods, limited stops, use of multi-ride tickets, and routes of extended length, usually between the central business district and outlying suburbs.

Demand responsive system means any system of transporting individuals, including but not limited to providing designated public transportation service or specified public transportation service by vehicle at the request of the user, which is not a fixed route system.

Designated public transportation means transportation provided by a public entity (other than public school transportation) by bus, rail, or other conveyance (other than transportation by aircraft or intercity or commuter rail transportation) that provides the general public with general or special service, including charter service, on a regular and continuing basis.

Disability means, with respect to an individual—

(1) A permanent or temporary physical or mental impairment that substantially limits one or more of the major life activities of such individual. For purposes of this part, a physical or mental impairment means:

(i) 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, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such contagious or 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, tuberculosis, drug addiction (but not including the current use of illegal drugs) and alcoholism. "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; or

(2) A record of such an impairment. For purposes of this Part, a record of an impairment means a history of, or classification or misclassification, as having a mental or physical impairment that substantially limits one or more major life activities; or

(3) Being regarded as having such an impairment. For purposes of this Part, this term means:

(i) Having a physical or mental impairment that does not substantially limit major life activities, but which is treated as constituting such a limitation;

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

(iii) Having none of the impairments set forth in this definition but being treated as having such an impairment.

Fixed route system means a system of transporting individuals (other than by aircraft), including but not limited to providing designated or specified public transportation services, on which a vehicle (including a bus, van, rail vehicle, or other vehicle) is operated along a prescribed route according to a fixed schedule and which does not involve an advance request by a passenger to ensure that service is provided.

Intercity rail passenger car means a rail passenger car obtained by Amtrak for use in intercity rail transportation.

Intercity rail transportation means transportation provided by the National Rail Passenger Corporation (Amtrak).

New vehicle means a vehicle which is offered for sale or lease after manufacture without any prior use.

Operates includes, with respect to a fixed route or demand-responsive system, the provision of transportation service by the public entity itself or by a person under a contractual or other arrangement or relationship with a public entity.

Over-the-road bus means a vehicle characterized by an elevated passenger deck located over a baggage compartment.

Private entity means any entity other than a public entity.

Public entity means:

(1) Any state or local government;

(2) Any department, agency, special purpose district, or other instrumentality of one or more state or local governments; and

(3) The National Railroad Passenger Corporation (Amtrak) and any commuter authority.

Public school transportation means transportation by schoolbus vehicles of schoolchildren, personnel, and equipment to and from a public elementary or secondary school and school-related activities.

Purchase or lease, with respect to vehicles, means the time at which an entity is legally obligated to obtain the vehicles, such as the time of contract execution.

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 or services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Remanufactured vehicle means a vehicle which has been structurally restored and has had new or rebuilt major components installed to extend its service life.

Secretary means the Secretary of Transportation or his/her designee.

Solicitation means the closing date for the submission of bids or offers in a procurement.

Specified public transportation means transportation by bus, rail, or any other conveyance (other than aircraft) provided by a private entity to the general public, with general or special service (including charter service) on a regular and continuing basis.

Station means, with respect to intercity and commuter rail transportation, the portion of a property located appurtenant to a right of way on which intercity or commuter rail transportation is operated, where such portion is used by the general public and is related to the provision of such transportation, including passenger platforms, designated waiting areas, ticketing areas, restrooms, and, where a public entity providing rail transportation owns the property, concession areas, to the extent that such public entity exercises control over the selection, design, construction, or alteration of the property, but this term does not include flag stops.

UMT Act means the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. App. 1601 *et seq.*):

Used vehicle means a vehicle with prior use that was originally purchased before June 26, 1990.

Vehicle, as the term is applied to private entities, does not include a rail passenger car, railroad locomotive, railroad freight car, or railroad caboose, or other rail rolling stock described in section 242 or Title III of the Act.

Wheelchair means any mobility device with wheels used by an individual with a disability, including three-wheeled scooters and other non-traditional mobility devices.

§ 37.7 Nondiscrimination.

(a) No public or private entity shall discriminate against an individual with a disability in connection with the provision of its transportation service for the general public.

(b) Notwithstanding the provision of any special service to individuals with disabilities, a public or private entity shall not, on the basis of disability, deny to any individual with a disability the opportunity to use the entity's transportation system for the general public, if the individual is capable of using that system.

(c) No public or private entity shall impose special charges on individuals with disabilities, including individuals who use wheelchairs, for providing services required by this part or otherwise necessary to accommodate them.

(d) Private entities that are primarily engaged in the business of transporting people and whose operations affect commerce shall not discriminate against any individual on the basis of disability in the full and equal enjoyment of specified transportation services. This obligation includes, with respect to the provision of transportation services, compliance with the requirements of the Department of Justice concerning eligibility criteria, making reasonable modifications, providing auxiliary aids and services, and removing barriers (28 CFR 6.301—36.306).

§ 37.9 Training requirement.

Each public or private entity which operates a fixed route or demand-responsive system shall ensure that personnel are trained to proficiency, as appropriate to their duties, so that they operate vehicles and equipment safely and properly and treat individuals with disabilities who use the service in a respectful and courteous way, with appropriate attention to the differences among individuals with disabilities.

§ 37.11 Private entities providing service under contract with public entities.

(a) When a public entity enters into a contractual or other arrangement or relationship with a private entity to provide fixed route or demand-responsive service, the public entity shall ensure that the private entity meets the requirements of this part that would apply to the public entity if the public entity itself provided the service.

(b) A private entity which purchases or leases new or used vehicles, or remanufactures vehicles, for use, or in contemplation of use, in fixed route or demand-responsive service under contract or other arrangement or relationship with a public entity, shall acquire accessible vehicles in all situations in which the public entity itself would be required to do so by §§ 37.51–37.57 of this part.

(c) A public entity which enters into a contractual or other arrangement or relationship with a private entity to provide fixed route or demand-responsive service shall ensure that the service provided by the private entity does not diminish the percentage of accessible service provided by the public entity in its overall fixed route or demand-responsive service.

§ 37.13 Standards for accessible vehicles and transportation facilities.

(a) For purposes of this part, a vehicle shall be considered to be readily accessible to and usable by individuals with disabilities if it meets the standards set forth in appendix A to this part.

(b) For purposes of this part, a transportation facility shall be considered to be readily accessible to and usable by individuals with disabilities if it meets the standards set forth in appendix B to this part.

§ 37.15 Administrative enforcement.

(a) For recipients of Federal financial assistance from the Department of Transportation or any of its operating administrations, compliance with this part is a condition of compliance with section 504 of the Rehabilitation Act of 1973 and 49 CFR part 27. The Department will process complaints of noncompliance with this part under the provisions of 49 CFR part 27, subpart B.

(b) For public entities which do not receive Federal financial assistance from the Department of Transportation or any of its operating administrations, administrative enforcement action shall be taken as provided in the regulations of the Department of Justice implementing title II of the ADA (28 CFR part 35).

(c) For private entities, administrative action shall be taken as provided in the regulations of the Department of Justice implementing title III of the ADA (28 CFR part 36).

§§ 37.17–37.19 [Reserved]

Subpart B—Transportation Facilities

§ 37.21 Construction and alteration of transportation facilities by public entities

(a) A public entity shall construct any new facility to be used in providing designated public transportation services so that the facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. This requirement also applies to the construction of a new station for use in intercity or commuter rail transportation. For purposes of this section, a facility or station is "new" if its construction begins (i.e., issuance of notice to proceed) after January 26, 1992, or, in the case of intercity or commuter rail stations, after the effective date of this section.

(b)(1) When a public entity alters an existing facility or a part of an existing facility used in providing designated public transportation services in a way that affects or could affect the usability of the facility or part of the facility, the entity shall make the alterations (or ensure that the alterations are made) in such a manner, to the maximum extent feasible, that the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations. This paragraph applies to any alteration which begins after January 26, 1992.

(2) When a public entity undertakes an alteration that affects or could affect the usability of or access to an area of a facility containing a primary function, the entity shall make the alteration in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of the alterations; *Provided, That* alterations to the path of travel, drinking

fountains, telephones, and bathrooms are not required to be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, if the cost and scope of doing so would be disproportionate.

(3) The requirements of this paragraph also apply to the alteration of existing intercity or commuter rail stations by the responsible person for, owner of, or person in control of the station.

(4) The requirements of this paragraph apply to any alteration made after January 26, 1992, or, in the case of intercity and commuter rail stations, after the effective date of this section.

(c) As used in this section, the phrase "to the maximum extent feasible" applies to the occasional case where the nature of an existing facility makes it impossible to comply fully with applicable accessibility standards through a planned alteration. Any altered feature of the facility or portion of the facility that can be made accessible shall be made accessible. If providing accessibility to certain individuals with disabilities (e.g., those who use wheelchairs) would not be feasible, the facility shall be made accessible to individuals with other types of disabilities (e.g., those who use crutches or walkers, persons with vision or hearing impairments).

(d) As used in this section, a "primary function" is a major activity for which the facility is intended. Areas of transit facilities that involve primary functions include, but are not necessarily limited to, ticket purchase and collection areas, train or bus platforms, baggage checking and return areas, and employment areas.

(e) As used in this section, a "path of travel" includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, parking areas, and streets), an entrance to the facility, and other parts of the facility. The term also includes the restrooms, telephones, and drinking fountains serving the altered area. An accessible path of travel may include walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps, clear floor paths through corridors, waiting areas, concourses, and other improved areas, parking access aisles, elevators and lifts, bridges, tunnels, or other passageways between platforms, or a combination of these and other elements.

(f) The costs of providing an accessible path to an altered area are "disproportionate" to the costs of the overall alteration if the cost exceeds (10 or 20 or 30) percent of the cost of the alteration to the primary function area. Costs that may be counted as expenditures required to provide an accessible path of travel include, but are not necessarily limited to, the following:

(1) Costs associated with providing an accessible entrance and an accessible route to the altered area (e.g., widening doorways and installing ramps);

(2) Costs associated with making restrooms accessible (e.g, grab bars, enlarged toilet stalls, accessible faucet controls);

(3) Costs associated with providing accessible telephones (e.g., relocation of phones to an accessible height, installation of amplification devices or TDDs);

(4) Costs associated with relocating an inaccessible drinking fountain.

(g) (1) When the cost of alterations necessary to make a path of travel to the altered area fully accessible is disproportionate to the cost of the overall extension, then such areas shall be made accessible to the maximum extent that does not result in disproportionate costs;

(2) In this situation, the public entity shall give priority to accessible elements in the following order:

(i) An accessible entrance;

(ii) An accessible route to the altered area;

(iii) At least one accessible restroom for each sex or a single unisex restroom;

(iv) Accessible telephones;

(v) Accessible drinking fountains;

(vi) When possible, other accessible elements (e.g., parking, storage, alarms).

(h) If a public entity performs a series of small alterations to the area served by a single path of travel rather than as making the alterations as part of a single undertaking, it shall nonetheless be responsible for providing an accessible path of travel.

(i) (1) If an area containing a primary function has been altered without providing an accessible path of travel to that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alteration to the primary function areas on that path of travel during the preceding three year period shall be considered in determining whether the cost of making that path of travel is disproportionate;

(2) For the first three years after January 26, 1992, only alterations undertaken between that date and the date of the alteration at issue shall be considered in determining if the cost of providing accessible features is disproportionate to the overall cost of the alteration.

(j) Elevators and other accessibility features of facilities shall be maintained in proper working order and shall be repaired promptly if they are damaged or out of order. When an accessibility feature is out of order, the entity shall take reasonable steps to accommodate individuals with disabilities who would otherwise use the feature.

§ 37.23 Construction and alteration of transportation facilities by private entities.

In constructing and altering transit facilities, private entities shall comply with the regulations of the Department of Justice implementing title III of the ADA (28 CFR part 36).

§ 37.25 Key stations in light and rapid rail systems

(a) Each public entity that provides designated public transportation by means of a light or rapid rail systems shall make key stations on its system readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. This requirement is separate from and in addition to requirements set forth in § 37.21 of this part.

(b) Each public entity shall determine which stations on its system are key stations, taking into consideration the following criteria:

(1) Stations where passenger boarding exceed average station passenger boardings by at least fifteen percent;

(2) Transfer stations on a rail line or between rail lines;

(3) Major interchange points with other transportation modes, including stations connecting with major parking facilities, bus terminals, intercity or commuter rail stations, or airports;

(4) End stations, unless an end station is close to another accessible station; and

(5) Stations serving major activity centers, such as employment or government centers, institutions of higher education, hospitals or other major health care facilities, or other facilities that are major trip generators for individuals with disabilities.

(c)(1) Except as provided in this paragraph, the public entity shall achieve accessibility of key stations as soon as practicable, but in no case later than July 26, 1993.

(2) The Secretary may grant an extension of this completion date for key station accessibility for a period up to July 26, 2020, provided that two-thirds of key stations are made accessible by July 26, 2010. Extensions may be granted as provided in paragraph (e) of this section.

(d) The public entity shall develop a plan for compliance for this section. The plan shall be submitted to the Secretary by January 26, 1992.

(1) The public entity shall consult with individuals with disabilities affected by the plan. The public entity shall also hold at least one public hearing on the plan and solicit comments on it. The plan submitted to the Secretary shall document this public participation, including summaries of the consultation with individuals with disabilities and the comments received at the hearing and during the comment period. The plan shall also summarize the public entity's responses to the comments and consultation.

(2) The plan shall establish milestones for the achievement of required accessibility of key stations consistent with the requirements of this section.

(e) A public entity wishing to apply for an extension of the July 26, 1993, deadline for key station accessibility shall include a request for an extension with its plan submitted to the Secretary under paragraph (d) of this section. Extensions may be requested only for extraordinarily expensive alterations to key stations (e.g., installations of elevators, raising the entire passenger platform, or alterations of similar magnitude and cost). Requests for extensions shall provide for completion of key station accessibility within the time limits set forth in paragraph (c) of this section. The Secretary may approve, approve with conditions, modify, or disapprove any request for an extension.

§ 37.27 Key stations for commuter rail systems

(a) The responsible person(s) shall make key stations on its system readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. This requirement is separate from and in addition to requirements set forth in § 37.21 of this part.

(b) Each commuter rail authority shall determine, in consultation with responsible persons involved and with individuals with disabilities and organizations representing them, which stations on its system are key stations, taking into consideration the following criteria.

(1) Stations where passenger boardings exceed average station passenger boardings by at least fifteen percent;

(2) Transfer stations on a rail line or between rail lines;

(3) Major interchange points with other transportation modes, including stations connecting with major parking facilities, bus terminals, intercity or commuter rail stations, or airports;

(4) End stations, unless an end station is close to another accessible station; and

(5) Stations serving major activity centers, such as employment or government centers, institutions of higher education, hospitals or other major health care facilities, or other facilities that are major trip generators for individuals with disabilities.

(c)(1) Except as provided in this paragraph, the responsible person(s) shall achieve accessibility of key stations as soon as practicable, but in no case later than July 26, 1993.

(2) The Secretary may grant an extension of this deadline for key station accessibility for a period up to July 26, 2010. Extensions may be granted as provided in paragraph (e) of this section.

(d) The commuter authority and responsible person(s) for stations involved shall develop a plan for compliance for this section. The plan shall be submitted to the Secretary by January 26, 1992.

(1) The commuter authority and responsible person(s) shall consult with individuals with disabilities affected by the plan. The commuter authority and responsible person(s) shall also hold at least one public hearing on the plan and solicit comments on it. The plan submitted to the Secretary shall document this public participation, including summaries of the consultation with individuals with disabilities and the comments received at the hearing and during the comment period. The plan shall also summarize the responsible person(s) responses to the comments and consultation.

(2) The plan shall establish milestones for the achievement of required accessibility of key stations, consistent with the requirements of this section.

(3) The commuter authority and responsible person(s) of each key station identified in the plan shall, by mutual agreement, designate one of the parties involved as project manager for the purpose of undertaking the work of making the key station accessible.

(e) Any commuter authority and/or responsible person(s) wishing to apply for an extension of the July 26, 1993, deadline for key station accessibility shall include a request for an extension with its plan submitted to the Secretary under paragraph (d) of this section. Extensions may be requested only for extraordinarily expensive modifications to stations (e.g., raising the entire passenger platform, installation of an elevator, or a modification of similar magnitude and cost). Requests for extensions shall provide for completion of key station accessibility within the time limits set forth in paragraph (c) of this section. The Secretary may approve, approve with conditions, modify, or disapprove any request for an extension.

§ 37.29 Intercity rail station accessibility.

All intercity rail stations shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable, but in no event later than July 26, 2010. This requirement is separate from and in addition to requirements set forth in § 37.21 of this part.

§ 37.31 Designation of responsible person(s) for intercity and commuter rail stations.

(a) When more than one person owns or provides service to an intercity or commuter rail station, the parties may designate one or more responsible persons, for purposes of this part, and allocate the proportion of responsibility of each party, by contract or other written agreement among themselves.

(b) In the absence of such a contract or other written agreement, the following rules determine who the responsible person(s) are for the station:

(1) In the case of a station more than fifty percent of which is owned by a public entity, the public entity is the responsible party.

(2) In the case of a station more than fifty percent of which is owned by a private party, the persons providing commuter or intercity rail service to the station are the responsible parties, in a

proportion equal to the percentage of all passenger boardings at the station attributable to the service of each during the immediately past calendar year.

(3) In the case of a station where no party owns more than fifty percent, the owners of the station (other than private party owners) and persons providing intercity or commuter rail service to the station are the responsible persons. Each non-private party owner of the station which does not provide intercity or commuter rail service to the station is a responsible person in the ratio of its ownership interest in the station to the portion of station ownership which is not in the hands of private parties. If there is only one person providing commuter or intercity rail service to the station, that person is the responsible person for the remaining percentage of the station. If more than one person provides commuter or intercity or intercity rail service to the station, these persons divide the remaining percentage of the station in a proportion equal to the percentage of all passenger boardings at the station attributable to the service of each during the immediately past calendar year.

(c) The responsible person(s) designated in accordance with this section shall bear the legal and financial responsibility for making a key station accessible in the same proportions as determined in paragraph (a) or (b) of this section.

§ 37.33 Required cooperation.

An owner or person in control of an intercity or commuter rail station shall provide reasonable cooperation to the responsible person(s) for that station with respect to the efforts of the responsible person to comply with the requirements of this subpart.

§ 37.35 Public transportation programs and activities in existing facilities.

(a) A public entity shall operate a designated public transportation program or activity conducted in an existing facility so that, when viewed in its entirety, the program or activity is readily accessible to and usable by individuals with disabilities.

(b) This section does not require a public entity to make structural changes to existing facilities in order to make the facilities accessible by individuals who use wheelchairs, unless and to the extent required by § 37.21 (with respect to alterations) or § 37.25 (with respect to key stations).

(c) Public entities, with respect to facilities that, as provided in paragraph (b) of this section, are not required to be made accessible to individuals who use wheelchairs, are not required to provide to such individuals services made available to the general public at these facilities when the individuals could not utilize or benefit from the services.

§§ 37.37–37.49 [Reserved]

Subpart C—Acquisition of Accessible Vehicles by Public Entities

§ 37.51 Purchase or lease of new non-rail vehicles by public entities operating fixed route systems.

(a) Except as provided elsewhere in this section, each public entity operating a fixed route system making a solicitation after August 25, 1990, to purchase or lease a new bus or other new vehicle for use on the system, shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) A public entity may purchase or lease a new bus that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, if it applies for, and the UMTA Administrator grants, a waiver as provided for in this section.

(c) Before submitting a request for such a waiver, the public entity shall hold at least one public hearing concerning the proposed request.

(d) The UMTA Administrator may grant a request for such a waiver if the public entity demonstrates to the UMTA Administrator's satisfaction that—

(1) The initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) Hydraulic, electromechanical, or other lifts for such new buses could not be provided by any qualified lift manufacturer to the manufacturer of such new buses in sufficient time to comply with the solicitation; and

(3) Any further delay in purchasing new buses equipped with such necessary lifts would significantly impair transportation services in the community served by the public entity.

(e) The public entity shall include with its waiver request a copy of the initial solicitation and written documentation from the bus manufacturer of its good faith efforts to obtain lifts in time to comply with the solicitation, and a full justification for the assertion that the delay in bus procurement needed to obtain a lift-equipped bus would significantly impair transportation services in the community. This documentation shall include a specific date at which the lifts could be supplied and copies of advertisements in trade publications and inquiries to trade associations seeking lifts.

(f) Any waiver granted by the UMTA Administrator under this section shall be subject to the following conditions:

(1) The waiver shall apply only to the particular bus delivery to which the waiver request pertains;

(2) The waiver shall include a termination date, which will be based on information concerning when lifts will become available for installation on the new buses the public entity is purchasing. Buses delivered after this date, even though procured under a solicitation to which a waiver applied, shall be equipped with lifts;

(3) Any bus obtained subject to the waiver shall be capable of accepting a lift, and the public entity shall install a lift as soon as one becomes available;

(4) Such other terms and conditions as the UMTA Administrator may impose.

(g) (1) When the UMTA Administrator grants a waiver under this section, he/she shall promptly notify the appropriate committees of Congress.

(2) If the UMTA Administrator has reasonable cause to believe that a public entity fraudulently applied for a waiver under this section, the UMTA Administrator shall:

(i) Cancel the waiver if it is still in effect; and

(ii) Take other appropriate action.

§ 37.53 Purchase or lease of used non-rail vehicles by public entities operating a fixed route system.

(a) Except as provided elsewhere in this section, each public entity operating a fixed route system purchasing or leasing, after August 25, 1990, a used bus or other used vehicle for use on this system, shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) A public entity may purchase or lease a used vehicle for use on its fixed route system that is not readily accessible to and usable by individuals with disabilities if, after making demonstrated good faith efforts to

obtain an accessible vehicle, it is unable to do so.

(c) Good faith efforts shall include at least the following steps:

(1) An initial solicitation for used vehicles specifying that all used vehicles are to be lift-equipped and otherwise accessible to and usable by individuals with disabilities, or, if an initial solicitation is not used, a documented communication so specifying;

(2) A nationwide search for accessible vehicles, involving specific inquiries to used vehicle dealers and other transit providers; and

(3) Advertising in trade publications and contacting trade associations.

(d) Each public entity purchasing or leasing used vehicles that are not readily accessible to and usable by individuals with disabilities shall retain documentation of the specific good faith efforts it made for two years from the date the vehicles were purchased. These records shall be made available, on request, to the UMTA Administrator and the public.

§ 37.55 Remanufacture of non-rail vehicles and purchase or lease of remanufactured non-rail vehicles by public entities operating fixed route systems.

(a) This section applies to any public entity operating a fixed route system which takes one of the following actions:

(1) After August 25, 1990, remanufactures a bus or other vehicle so as to extend its useful life for five years or more or makes a solicitation for such remanufacturing; or

(2) Purchases or leases a bus or other vehicle which has been remanufactured so as to extend its useful life for five years or more, where the purchase or lease occurs after August 25, 1990, and during the period in which the useful life of the vehicle is extended.

(b) Vehicles acquired through the actions listed in paragraph (a) of this section shall, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) For purposes of this section, it shall be considered feasible to remanufacture a bus or other motor vehicle so as to be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless an engineering analysis demonstrates that including accessibility features required by this part would have a significant adverse effect on the structural integrity of the vehicle.

(d) If a public entity operates a fixed route system, any segment of which is included on the National Register of Historic Places, and if making a vehicle of historic character used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity has only to make (or purchase or lease a remanufactured vehicle with) those modifications to make the vehicle accessible which do not alter the historic character of such vehicle, in consultation with the National Register of Historic Places.

(e) A public entity operating a fixed route system as described in paragraph (d) of this section may apply in writing to the UMTA Administrator for a determination of the historic character of the vehicle. The UMTA Administrator shall refer such requests to the National Register of Historic Places, and shall rely on its advice in making determinations of the historic character of the vehicle.

§ 37.57 Purchase or lease of new non-rail vehicles by public entities operating a demand responsive system for the general public.

(a) Except as provided in this section, a public entity operating a demand responsive system for the general public making a solicitation after August 25, 1990, to purchase or lease a new bus or other new vehicle for use on the system, shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) If the system, when viewed in its entirety, provides a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service it provides to individuals without disabilities, it may purchase new vehicles that are not readily accessible to and usable by individuals with disabilities.

(c) For purposes of this section, a demand responsive system, when viewed in its entirety, shall be deemed to provide equivalent service if the service available to individuals with disabilities, including individuals who use wheelchairs, is provided in the most integrated setting appropriate to the needs of the individual and is equivalent to the service provided other individuals with respect to the following service characteristics:

(1) Response time;

(2) Fares;

(3) Geographic area of service;

(4) Hours and days of service;

(5) Restrictions based on trip purpose;

(6) Availability of information and reservations capability; and

(7) Any constraints on capacity or service availability.

(d) A public entity receiving UMTA funds under section 18 or a public entity in a small urbanized area which receives UMTA funds under Section 9 from a state administering agency rather than directly from UMTA, which determines that its service to individuals with disabilities is equivalent to that provided other persons shall, before any procurement of an inaccessible vehicle, file with the appropriate state program office a certification that it provides equivalent service meeting the standards of paragraph (c) of this section. Public entities operating demand responsive service receiving funds under any other section of the UMT Act shall file the certification with the appropriate UMTA regional office. A public entity which does not receive UMTA funds shall make such a certification and retain in its files, subject to inspection on request of UMTA. All certifications under this paragraph certification may be made and filed in connection with a particular procurement or in advance of a procurement; however, no certification shall be valid for more than one year. A copy of the required certification is found in appendix C to this part.

(e) The waiver mechanism set forth in § 37.21(b)–(h) of this subpart shall be available to public entities operating a demand responsive system for the general public.

§ 37.59 Purchase or lease of new rail vehicles by public entities operating rapid or light rail systems.

Each public entity operating a rapid or light rail system making a solicitation after August 25, 1990, to purchase or lease a new rapid or light rail vehicle for use on the system shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

§ 37.61 Purchase or lease of used rail vehicles by public entities operating rapid or light rail systems.

(a) Except as provided elsewhere in this section, each public entity operating a rapid or light rail system which, after August 25, 1990, purchases or leases a used rapid or light rail vehicle for use on the system shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) A public entity may purchase or lease a used rapid or light rail vehicle for use on this rapid or light rail system that is not readily accessible to and usable by individuals if, after making demonstrated good faith efforts to obtain an accessible vehicle, it is unable to do so.

(c) Good faith efforts shall include at least the following steps:

(1) The initial solicitation for used vehicles made by the public entity specifying that all used vehicles were to be accessible to and usable by individuals with disabilities;

(2) A nationwide search for accessible vehicles, involving specific inquiries to manufacturers and other transit providers; and

(3) Advertising in trade publications and contacting trade associations.

(d) Each public entity purchasing or leasing used rapid or light rail vehicles that are not readily accessible to and usable by individuals with disabilities shall retain documentation of the specific good faith efforts it made for two years from the date the vehicles were purchased. These records shall be made available, on request, to the UMTA Administrator and the public.

§ 37.63 Remanufacture of rail vehicles and purchase or lease of remanufactured rail vehicles by public entities operating rapid or light rail systems.

(a) This section applies to any public entity operating a rapid or light rail system which takes one of the following actions:

(1) After August 25, 1990, remanufactures a light or rapid rail vehicle so as to extend its useful life for five years or more or makes a solicitation for such remanufacturing;

(2) Purchases or leases a light or rapid rail vehicle which has been remanufactured so as to extend its useful life for five years or more, where the purchase or lease occurs after August 25, 1990, and during the period in which the useful life of the vehicle is extended.

(b) Vehicles acquired through the actions listed in paragraph (a) of this section shall; to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) For purposes of this section, it shall be considered feasible to remanufacture a rapid or light rail vehicle so as to be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless an engineering analysis demonstrates that doing so would have a significant adverse effect on the structural integrity of the vehicle.

(d) If a public entity operates a rapid or light rail system any segment of which is included on the National Register of Historic Places and if making a rapid or light rail vehicle of historic character used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity need only make (or purchase or lease a remanufactured vehicle with) those modifications that do not alter the historic character of such vehicle.

(e) A public entity operating a fixed route system as described in paragraph (d) of this section may apply in writing to the UMTA Administrator for a determination of the historic character of the vehicle. The UMTA Administrator shall make such determinations on a case by case basis, in consultation with the National Register of Historic Places.

§ 37.65 Purchase or lease of new intercity and commuter rail cars.

Amtrak or a commuter authority making a solicitation after August 25, 1990, to purchase or lease a new intercity or commuter rail car for use on the system shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

§ 37.67 Purchase or lease of used intercity and commuter rail cars.

(a) Except as provided elsewhere in this section, Amtrak or a commuter authority purchasing or leasing a used intercity or commuter rail car after August 25, 1990, shall ensure that the car is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) Amtrak or a commuter authority may purchase or lease a used intercity or commuter rail car that is not readily accessible to and usable by individuals if, after making demonstrated good faith efforts to obtain an accessible vehicle, it is unable to do so.

(c) Good faith efforts shall include at least the following steps:

(1) An initial solicitation for used vehicles specifying that all used vehicles accessible to and usable by individuals with disabilities;

(2) A nationwide search for accessible vehicles, involving specific inquiries to used vehicle dealers and other transit providers; and

(3) Advertising in trade publications and contacting trade associations.

(d) Amtrak and commuter authorities purchasing or leasing used intercity or commuter rail cars that are not readily accessible to and usable by individuals with disabilities shall retain documentation of the specific good faith efforts that were made for two years from the date the cars were purchased. These records shall be made available, on request, to the UMTA or FRA Administrator, as applicable.

§ 37.69 Remanufacture of intercity and commuter rail cars and purchase or lease of remanufactured intercity and commuter rail cars.

(a) This section applies to Amtrak or a commuter authority which takes one of the following actions:

(1) Remanufactures an intercity or commuter rail car so as to extend its useful life for ten years or more;

(2) Purchases or leases an intercity or commuter rail car which has been remanufactured so as to extend its useful life for ten years or more.

(b) Intercity and commuter rail cars listed in paragraph (a) of this section shall, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) For purposes of this section, it shall be considered feasible to remanufacture an intercity or commuter rail car so as to be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless an engineering analysis demonstrates that remanufacturing the car to be accessible would have a significant adverse effect on the structural integrity of the car.

§ 37.71 Ferries and other vessels operated by public entities. [Reserved]

§§ 37.73–37.89 [Reserved]

Subpart D—Acquisition of Accessible Vehicles by Private Entities

§ 37.91 Purchase or lease of non-rail vehicles by private entities not primarily engaged in the business of transporting people.

(a) A private entity which is not primarily engaged in the business of transporting people, which operates a fixed route system, and which makes a solicitation after August 25, 1990, to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on the system shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) A private entity which is not primarily engaged in the business of transporting people and which operates a fixed route system shall not purchase or lease a vehicle, after August 25, 1990, with a seating capacity of 16 passengers or less (including the driver) for use on the system that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the system, when viewed in its entirety, ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals with disabilities. For purposes of this paragraph, a fixed route system, when viewed in its entirety, shall be deemed to provide equivalent service if the service available to individuals with disabilities, including individuals who use wheelchairs, is provided in the most integrated setting appropriate to the needs for the individual and is equivalent to the service provided other individuals with respect to the following service characteristics:

(1) Schedules/headways;
(2) Fares;
(3) Geographic area of service;
(4) Hours and days of service;
(5) Availability of information; and
(6) Any constraints on capacity or service availability.

(c) A private entity which is not primarily engaged in the business of transporting people and which operates a demand responsive system shall not make a solicitation, after August 25, 1990, to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on its system that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless its system, when viewed in its entirety, provides a level of service to individuals with disabilities, including individuals who use wheelchairs, that is equivalent to the level of service provided to individuals without disabilities. For purposes of this paragraph, this equivalent service requirement shall be deemed to have been met if service to individuals with disabilities is provided in the most integrated setting appropriate to the needs of the individual and is the same as or fully equivalent to the service provided other individuals with respect to the following service characteristics:

(1) Response time;
(2) Fares;
(3) Geographic area of service;
(4) Hours and days of service;
(5) Restrictions based on trip purpose;
(6) Availability of information and reservations capability; and
(7) Any constraints on capacity or service availability.

§ 37.93 Purchase or lease of non-rail vehicles private entities primarily engaged in the business of transporting people.

(a) Except as provided in this paragraph, a private entity which is primarily engaged in transporting people and whose operations affect commerce, which make a solicitation after August 25, 1990, to purchase or lease a new vehicle (other than an automobile, a van with a seating capacity of less than eight persons, including the driver, or an over-the-road bus) for use in providing specified public transportation on the system shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) The entity may purchase such a new vehicle that is not readily accessible to and usable by individuals with disabilities if the vehicle is to be used solely on a demand responsive system and the entity can demonstrate that the system, when viewed in its entirety, provides a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service it provides to individuals without disabilities. For purposes of this paragraph, a demand responsive system, when viewed in its entirety, shall be deemed to provide equivalent service if the service available to individuals with disabilities, including individuals who use wheelchairs, is provided in the most integrated setting appropriate to the needs of the individual and is equivalent to the service provided other individuals with respect to the following service characteristics:

(1) Response time;
(2) Fares;
(3) Geographic area of service;
(4) Hours and days of service;
(5) Restrictions based on trip purpose;
(6) Availability of information and reservations capability; and
(7) Any constraints on capacity or service availability.

(c) Except as provided in this paragraph, a private entity which is primarily engaged in transporting people and whose operations affect commerce, which makes a solicitation after February 25, 1992, to purchase or lease a new van with a seating capacity of less than eight persons, including the driver, for use in providing specified public transportation on the entity's system shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. The entity may purchase such a new van that is not readily accessible to and usable by individuals with disabilities, if the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service it provides to individuals without disabilities. For purposes of this paragraph, the system, when viewed in its entirety, shall be deemed to provide equivalent service if the service available to individuals with disabilities, including wheelchair users, is provided in the most integrated setting feasible and is the same as or fully equivalent to the service provided other individuals with respect to the following service characteristics:

(1) Response time (if the system is demand responsive) or schedules/headways (if the system is a fixed route system):
(2) Fares;
(3) Geographic area of service;
(4) Hours and days of service;
(5) Restrictions based on trip purpose;
(6) Availability of information and reservations capability; and

(7) Any constraints on capacity or service availability.

§ 37.95 Acquisition of passenger rail cars by private entities primarily engaged in the business of transporting people.

(a) A private entity which is primarily engaged in the business of transporting people and whose operations affect commerce, which makes a solicitation after February 25, 1992, to purchase or lease a new rail passenger car to be used in providing specified public transportation, shall ensure that the car is readily accessible to, and usable by, individuals with disabilities, including individuals who use wheelchairs. The accessibility standards in appendix A which apply depend upon the type of service in which the car will be used.

(b) Except as provided paragraph (c) of this section, a private entity which is primarily engaged in transporting people and whose operations affect commerce, which remanufactures a rail passenger car to be used in providing specified public transportation to extend its useful life for ten years or more, or purchases or leases such a remanufactured rail car, shall ensure that the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. For purposes of this paragraph, it shall be considered feasible to remanufacture a rail passenger car to be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless an engineering analysis demonstrates that doing so would have a significant adverse effect on the structural integrity of the car.

(c) Compliance with paragraph (b) of this section is not required to the extent that it would significantly alter the historic or antiquated character of a historic or antiquated rail passenger car, or a rail station served exclusively by such cars, or would result in the violation of any rule, regulation, standard or order issued by the Secretary under the Federal Railroad Safety Act of 1970. For purposes of this section, a historic or antiquated rail passenger car means a rail passenger car—

(1) Which is not less than 30 years old at the time of its use for transporting individuals;

(2) The manufacturer of which is no longer in the business of manufacturing rail passenger cars; and

(3) Which—

(i) Has a consequential association with events or persons significant to the past; or

(ii) Embodies, or is being restored to embody, the distinctive characteristics of a type of rail passenger car used in the past, or to represent a time period which has passed.

§ 37.97 Ferries and other vessels operated by private entities. [Reserved]

§§ 37.99–37.109 [Reserved]

Subpart E—Transportation Services

§ 37.111 Paratransit as a complement to fixed route service.

(a) Except as provided in §§ 37.123–37.127 of this part, each public entity operating a fixed route system, other than a system which provides solely commuter bus service, shall provide paratransit or other special service to individuals with disabilities that is comparable to the level of service provided to individuals without disabilities who use the fixed route system.

(b) Each public entity subject to the requriement of paragraph (a) of this section shall establish a process for determining the "ADA Paratransit Eligibility" of persons seeking to use the service. The entity, through this process, shall strictly limit "ADA Paratransit Eligibility" to persons required to be eligible under this paragraph.

(1) Individuals with permanent or temporary disabilities in the following categories shall be eligible for the service at all times, or with respect to a particular type of trip or a trip under particular conditions, even when the fixed route system is completely accessible:

(i) Any individual with a disability who is unable, as the result of a physical or mental impairment (including a vision impairment), and without the assistance of another individual (except the operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities;

(ii) Any individual with a disability who has a specific impairment-related condition which prevents such individual from traveling to a boarding location or from a disembarking location on such system;

(2) Individuals with permanent or temporary disabilities in the following category shall be eligible for the service, at all times or with respect to a particular type of trip or a trip under particular conditions, until complete accessibility of the fixed route system is achieved: any individual with a disability who needs the assistance of a wheelchair lift or other boarding assistance device and is able, with such assistance, to board, ride and disembark from any vehicle which is readily accessible to and usable by individuals with disabilities if the individual wants to travel on a route on the system during the hours of operation of the system at a time, or within a reasonable period of such time, when such a vehicle is not being used to provide designated public transportation on the route; and

(3) Individuals accompanying an eligible individual with a disability shall be provided service as follows:

(i) One other individual accompanying the eligible individual with a disability shall be provided service;

(ii) Additional individuals accompanying the eligible individual with a disability shall be provided service provided that space is available for them in the paratransit vehicle carryng the eligible individual with a disability and that transportation of the additional individuals will not result in a denial of service to individuals with disabilities.

(4) The entity's process for determining "ADA Paratransit Eligibility" shall include the following features:

(i) Information about the process and materials necessary to apply for eligibility shall be made available in accessible formats.

(ii) Individuals with disabilities shall be presumptively "ADA Paratransit Eligible" if the entity has not made an eligibility determination within (2 or 4) weeks of the submission of a completed application. Such presumptive eligibility shall remain in effect until and unless the entity determines that the individual is ineligible.

(iii) The entity's determination concerning eligibility shall be in writing. If the determination is that the individual is ineligible the determination shall state the basis for the finding.

(iv) The entity shall establish an administrative appeal process through

which individuals who are denied "ADA Paratransit Eligibility' can obtain review of the denial.

(v) The entity shall provide documentation to each eligible individual stating that he or she is "ADA Paratransit Eligible." The documentation shall include any expiration date for eligibility and any conditions or limitations on the individual's eligibility.

(5) Each entity shall treat as eligible for its complementary paratransit service all individuals, regardless of place of residence, who present documentation that they are "ADA Paratransit Eligible" for complementary paratransit, under the criteria of this section, in the jurisdiction in which they reside. With respect to individuals with disabilities who do not present such documentation and who do not reside in the entity's service area, the entity shall make presumptive "ADA Parastransit Eligibility" available to them immediately, without the (2 or 4) week waiting period provided for in paragraph (b)(4)(ii) of this section.

(c) In order to meet the requirement of this section for comparable service, the complementary paratransit shall meet the following service criteria:

(1) Service shall be provided to all origins and destinations within (one mile *or* ¼ mile *or* a range from ¼ mile to 1½ miles, depending on the population density of the area through which a route or portion of a route passes) on each side of any fixed route, except a route on which the entity provides only commuter bus service; *Provided,* That a public entity is not required to provide paratransit service outside the boundaries of the jurisdiction in which it is authorized to operate.

(2) The entity shall schedule and provide paratransit service to any eligible person at any time on a particular day in response to a request for service made any time the previous day. The entity shall make reservation service directly available during at least all normal business hours of the entity's offices, as well as during times, comparable to normal business hours, on a day before a service day when the entity's offices are not open.

(3) The fare for a trip charged to a user of the complementary paratransit system shall be comparable to the base fare that would be charged to the individual for a trip of similar length, at a similar time of day, on the entity's fixed route system.

(i) The base fare, for this purpose, shall include discounts to which the individual would be entitled on the fixed route system.

(ii) Except as provided in this paragraph (c)(3)(iii) of this section, the fare shall not in any case exceed twice this base fare that would be charged to the individual for a trip of similar length, at a similar time of day, on the entity's fixed route system.

(iii) The entity may charge, in addition to the base fare, the equivalent of transfer, premium, or other charges that a person making a similar trip, at a similar time of day on the fixed route system, would have to pay, even if the total of the base fare and these extra charges is more than twice the base fare.

(iv) Nothing in this paragraph shall preclude the entity from charging higher fares or fees to social service or other organizations which arrange with the entity to provide transportation for their clients or other individuals with disabilities.

(4) The entity shall not impose restrictions or priorities based on trip purpose.

(5) The complementary paratransit service shall be available throughout the same hours and days as the entity's fixed route service.

(6) The entity shall not limit the availability of complementary paratransit service to eligible persons by capacity constraints including, but not limited to, restrictions on the number of trips an individual will be provided, waiting lists or consistent denials of trip requests on the basis of insufficient capacity, or consistent untimeliness with respect to scheduled pickup times or trip lengths.

§ 37.113 Requirement to develop and submit paratransit plant.

(a) Each public entity operating a fixed route system shall submit to the appropriate office (indicated in paragraph (b) of this section) a plan for providing paratransit service as a complement to its fixed route service. For purposes of developing and submitting a plan, a group of two or more public entities with overlapping or contiguous service areas may develop and submit a single plan covering their service area. Joint plans must clearly identify the cooperating entities and indicate their endorsement of the plan.

(b) Initially, each plan must be submitted by January 26, 1992. Plan updates must be submitted annually thereafter, with each year's submission due January 26, of that year.

(c) An entity shall submit its plan to one of the following offices, as appropriate:

(1) UMTA Regional Office, as listed in Appendix C to this Part, if it is—

(i) An UMTA recipient under section 9 of the UMT Act;

(ii) Submitting a joint plan and any of the entities is a recipient under section 9 of the UMT Act; or

(iii) Submitting a joint plan that covers portions of more than one State.

(2) UMTA, through the individual state administering agency, if it is—

(i) A section 18 recipient;

(ii) A small urbanized recipient of section 9 funds administered by the state; or

(iii) A public entity that is not an UMT Act recipient.

(d)(1) With respect to plans submitted to UMTA under paragraph (c)(1) of this section, UMTA will approve or disapprove each plan submitted to it, consistent with the provisions of § 37.119 of this part.

(2)(i) With respect to plans submitted through a state under paragraph (c)(2) of this section, the state shall review the plan consistent with the provisions of § 37.119 of this part and further guidance provided by UMTA, as applicable. Upon completion of its review, the state shall forward the plan to the relevant UMTA regional office, attaching specific findings and a recommendation for approval or disapproval. As a further part of its review of plans from non-urbanized areas, the state shall determine whether the plan is in compliance with statewide planning activities.

(ii) If a paratransit plan includes a request for a waiver based on undue financial burden, the state shall also forward the request, with its recommendation for action to the appropriate UMTA Regional office.

(iii) If the state recommends disapproval, the state's transmittal shall include the basis of the recommendation and suggested modifications that the entity must make to come into compliance. Taking the state's recommendation into consideration, UMTA will approve or disapprove the plan.

(3) If the plan is disapproved, UMTA will specify which provisions are disapproved. Each entity shall amend its plan consistent with this information

and resubmit the plan to the appropriate entity within 90 days of receipt of the disapproval letter.

§ 37.115 Specific requirements for developing a paratransit plan.

(a) Each submitting entity shall ensure public participation in the development of its paratransit plan. At a minimum, this must include:

(1) *A public hearing.* The entity shall provide adequate notice of the meeting, including use of appropriate media, such as newspapers of general and special interest and radio announcements.

(2) *Opportunity for public comments.* In making the plan available for public review, the entity shall ensure that the plan is available upon request in appropriate accessible formats, such as large print, tape, etc.; and

(3) *Consultation with individuals with disabilities.* Each entity shall make special efforts to contact individuals with disabilities and groups representing them in the community.

(b) Each submitting entity shall survey the area to be covered by the plan to identify any person or entity (public or private) which provides a paratransit or other special transportation service for ADA-eligible individuals in the service area to which the plan applies. The submitting entity can consider transportation service provided by others in its plan to meet the paratransit needs of its service area, without duplicating this service.

(c) The requirements of this section apply to the initial plan as well as each annual submission thereafter.

§ 37.117 Contents of plan.

Each plan must contain the following:

(a) A description of the fixed route system, including:

(1) Data on overall service area, routes, population served, hours and days of service, fare structure, and unmet demand;

(2) Data on number of accessible vehicles in fleet, total fleet size, current distribution of accessible vehicles in daily service.

(b) An inventory of existing paratransit service. When the public entity intends to include service provided by the other entities in its overall paratransit plan, the public entity shall ensure and document that:

(1) the listed service is being provided in the manner represented;

(2) *ADA Paratransit Eligible* individuals have access to these services; and

(3) if this other service does not meet all of the service criteria specified in § 37.111 of this part, the public entity shall supplement the service it provides to ensure that the service criteria are met.

(c) Analysis of discrepancies between the current paratransit service and what is required under this part;

(d) Discussion of the public participation process including a description of public hearings held, public comment periods, outreach efforts, etc. The discussion should include resolution of issues raised during the public comment period.

(e) Description of the plan to provide complementary paratransit. This must include:

(1) A description of the service as it relates to each of the service criteria described in § 37.111 of this part;

(2) A budget for complementary paratransit service, including capital and operating expenditures over the next six years;

(3) A description of changes to existing service that will take place during the implementation of the complementary paratransit service;

(4) A timetable for implementation of the paratransit plan. This should include specific milestones for implementing phases of the plan, if phase-in is required, with a specific date indicating when the plan will be completely operational.

(f) Efforts to coordinate the provision of paratransit service by other providers;

(g) Description of process used to certify individuals with disabilities as eligible for service. This must include a policy on accepting travelers consistent with § 37.111(b)(5) of this part.

(h) A contact person.

(i) The following certifications:

(1) Certification by the submitting entity(ies) that the entity(ies) concur with the plan.

(2) In urbanized area, the Metropolitan Planning Organization (MPO) must endorse the plan and certify that the plan is in conformance with the transportation plan developed under 49 CFR part 613 and 23 CFR part 450 (the UMTA/FHWA joint planning regulation).

(j) A request for a waiver based on undue financial burden, if applicable (See §§ 37.123–37.127 of this part). If a request for an undue financial burden waiver is made, the plan shall include a description of the complementary paratransit service the entity intends to provide if the waiver is granted.

§ 37.119 Review and approval of plans.

In reviewing each plan UMTA/state (as appropriate) will consider the following:

(a) Whether plan includes all of the elements required under § 37.117 of this part.

(b) Whether the plan is consistent with the substantive provisions of this part, and

(c) Whether public participation in the development of the paratransit plan consistent with this part has taken place.

§ 37.121 Plan implementation.

(a) Each entity shall begin implementation of its complementary paratransit plan, pending notice of approval or disapproval from UMTA. The implementation of the plan shall be consistent with the terms of the plan, including its specified phase-in period.

(b) If the plan includes a request for a waiver for undue financial burden, the entity shall begin implementation of its plan, pending a determination on its waiver request.

§ 37.123 Exception for undue financial burden.

(a) An entity may request a waiver from providing comparable paratransit service which meets the service criteria of § 37.111 of this part, if the entity satisfies the condition specified in § 37.125 of this part.

(b) The Administrator will make a determination to grant a waiver for undue financial burden on a case-by-case basis, after considering the factors identified in § 37.127 of this part and the information accompanying the request. Any waiver granted will be for a limited and specified time period. If the Administrator grants the applicant a waiver, the Administrator will do one of the following:

(1) Require the public entity to provide complementary paratransit to the extent it can do so without incurring an undue financial burden. The entity shall make changes in its plan that the Administrator determines are appropriate to maximize the complementary paratransit service that is provided to ADA Paratransit Eligible individuals.

(2) Require the public entity to provide basic complementary paratransit services to all "ADA Paratransit

Eligible" individuals, even if doing so would cause the public entity to incur an undue financial burden. Basic complementary paratransit service shall include at least complementary paratransit service along the public entity's key routes during core service hours.

(i) For purposes of this section, key routes are defined as routes along which there is service at least hourly throughout the service day.

(ii) For purposes of this section, core service hours encompass at least morning, noon and evening peak periods, as these periods are defined locally for fixed routes service, consistent with industry practice.

(3) If the Administrator determines that the public entity will incur an undue financial burden as the result of providing basic complementary paratransit service, such that it is infeasible for the entity to provide basic complementary paratransit service, the Administrator shall require the public entity to coordinate with other available providers of demand responsive service in the area served by the public entity to maximize the service to "ADA Paratransit Eligible" individuals, to the maximum extent feasible.

§ 37.125 Request for undue financial burden waiver.

An entity submitting a plan for complementary paratransit is eligible to apply for a waiver based on undue financial burden, if

Option I: The entity asserts that it is unable, without significant adverse effects on its overall service to all individuals, to meet the requirements in § 37.111 of this part.

Option II: The entity asserts that it is unable, without significant adverse effects on its overall service to all individuals, to provide to ADA-eligible persons a comparable number of trips meeting the requirements of § 37.111 of this part, as it provides to all other individuals. The entity shall calculate trips per capita on its fixed route system based on the entire population of the service area divided into the total number of fixed route trips provided. A comparable number of complementary paratransit trips is provided if this number of trips is made available to all ADA Paratransit Eligible persons registered for complementary paratransit service with the public entity.

Option III: The entity exceeds the average cost of providing complementary paratransit service for an area of its size classification.

§ 37.127 Determination of undue financial burden.

(a) In making a determination of undue financial burden, the UMTA Administrator will consider the following factors: (1) Effects on current fixed route service, including reallocation of accessible fixed route vehicles and potential reduction in service, measured by service miles;

(2) Reductions in other services (including other special services as well as fixed route service);

(3) Increases in fares;

(4) Resources available to implement complentary paratransit service, over the period covered by the plan.

(5) Percentage of budget needed to implement the plan, both as a percentage of operating and a percentage of entire budget.

(6) The current level of accessible service, both fixed route and paratransit;

(7) Cooperation/coordination among area transportation providers;

(8) Evidence of increase efficiencies that have been or could be effectuated that would benefit the level and quality of complementary paratransit service available; and

(9) Unique circumstances in the submitting entity's area that affect the ability of the entity to provide paratransit, that militate against the need to provide paratransit, or in some other respect create a circumstance considered exceptional by the submitting entity.

(b) Costs attributable to complementary paratransit shall be limited to costs of providing service specifically required by this part to ADA-eligible individuals, by entities responsible under this part for providing such service.

§ 37.129 Interim requirements for over-the-road bus service operated by private entities.

(a) Private entities operating over-the-road buses, in addition to compliance with other applicable provisions of this part, shall provide accessible service as provided in this section.

(b) The private entity shall provide assistance, as needed, to individuals with disabilities in boarding and disembarking, including moving to and from the bus seat for the purpose of boarding and disembarking.

(c) The private operator shall not deny transportation to any individual on the basis of disability, except on the basis that such denial is essential for the safety of the individual or other persons using the bus. In the event of a denial of transportation on this basis, the private entity shall provide to the individual, within 20 days, a written explanation of the reasons for its action.

(d) To the extent that they can be accommodated in the areas of the passenger compartment provided for passengers' personal effects, wheelchairs or other mobility aids and assistive devices used by individuals with disabilities, or components of such devices, shall be permitted in the passenger compartment. When the bus is at rest at a stop, the driver or other personnel shall assist individuals with disabilities with the stowage and retrieval of mobility aids, assistive devices, or other items that can be accommodated in the passenger compartment of the bus.

(e) Wheelchairs and other mobility aids or assistive devices that cannot be accommodated in the passenger compartment (including electric wheelchairs and mobility devices) shall be accommodated in the baggage compartment of the bus, unless the size of the baggage compartment prevents such accommodation.

(f) At any given stop, individuals with disabilities shall have the opportunity to have their wheelchairs or other mobility aids or assistive devices stowed in the baggage compartment before other baggage or cargo is loaded, but baggage or cargo already on the bus does not have to be off-loaded in order to make room for such devices. This requirement is subject to the provisions of paragraph (j) of this section with respect to electric wheelchairs.

(g) The private entity shall permit a service animal to accompany an individual with a disability in the passenger compartment.

(h) The private entity shall not mandate separate treatment for individuals for disabilities who use its service, except as permitted or required by this part.

(i) The private entity shall not impose charges for providing facilities, equipment or services required by this part to individuals with disabilities.

(j) The private entity may require 48 hours advance notice for provision of boarding assistance under paragraph (b)

of this section or stowage of an electrically-powered mobility device in the baggage compartment under paragraph (e) of this section.

§ 37.131 Equivalency requirement for demand responsive service operated by private entities not primarily engaged in the business of transporting people.

A private entity not primarily engaged in the business of transporting people which operates a demand responsive system shall ensure that its system, when viewed in its entirety, provides equivalent service to individuals with disabilities, including individuals who use wheelchairs, as it does to individuals without disabilities. For purposes of this paragraph, a demand responsive system, when viewed in its entirety, shall be deemed to provide equivalent service if the service available to individuals with disabilities, including wheelchair users, is provided in the most intergrated setting appropriate to the needs of the individual and is equivalent to the service provided other individuals with respect to the following service characteristics:

(a) Response time;

(b) Fares;

(c) Geographic area of service;

(d) Hours and days of service;

(e) Restrictions based on trip purpose;

(f) Availability of information and reservations capability; and

(g) Any constraints on capacity or service availability.

§ 37.133 Provision of service.

(a) This sections sets forth requirements for the provision of service by public and private entities operating fixed route or demand responsive systems.

(b) Vehicles or other conveyances used for transportation of individuals with disabilities, and lifts, securement devices, and other equipment used to accommodate such individuals, shall be maintained in proper operating condition. The lift on each vehicle shall be tested before the vehicle goes into service each day. If the lift does not work properly, the vehicle shall not go into service until repairs or maintenance is performed that cause the lift to work properly; *Provided,* That a public entity listed in § 37.113(c)(2) (i) or (ii) may continue to use the vehicle on an inaccessible route if keeping the vehicle out of service for repairs would reduce service to the general public. Such use of a vehicle with a nonworking lift may not continue for more than five working days.

(c) All wheelchairs and other mobility devices, including three-wheeled mobility devices, which, with their users, can be accommodated within the size and weight limits set forth in the standards of appendix A to this part, shall be transported on the entity's vehicles or other conveyances. The entity is not required to permit wheelchairs or mobility devices to ride in places other than designated securement locations in the vehicle.

(d) The entity may require that a mobility device be secured, to the extent practicable, given the characteristics of the device and the vehicle's securement system. The entity may not deny transportation to the device or its user on the ground that the device cannot be secured by the securement system. If the entity is unable to secure the device in accordance with the provisions of appendix A, it shall provide a means of ensuring that the mobility device remains within the securement area.

(e) Except as provided in this paragraph, the entity may not require that an individual transfer from his or her mobility device to a vehicle seat. The entity may require such a transfer only in a vehicle with a capacity of 16 seats or less, including the driver, and only under the following conditions:

(1) All persons riding in the vehicle are required to be secured;

(2) The individual can be secured adequately in the vehicle seat; and

(3) The entity determines, after consulting with the individual, that the risk of injury to the individual is greater from remaining in his or her own mobility device than the risk of injury to the individual from transferring.

(g) Operators of vehicles or other conveyances, or other personnel of the entity, shall assist passengers, where necessary or requested by the passenger, in the use of the lift and securement devices, leaving their seats to provide such assistance as needed.

(f) Where vehicles or other conveyances for more than one route serve the same stop, the entity shall provide a means by which a person with a visual impairment or mental disability can identify the proper vehicle to enter or be identified to the operator as a person seeking to ride on a particular route.

(g) Adequate assistance and information concerning transportation services shall be made available to individuals with disabilities, including those with vision and hearing impairments. This obligation includes making adequate communications capacity available, in accessible formats, to enable users to obtain information about and schedule service.

(h) Operators of vehicles shall announce stops or cause them to be announced.

(i) Operators of vehicles and other personnel of the entity shall make use of accessibility-related equipment or features required by appendices A and B to this part.

§ 37.135 One car per train rule.

(a) Each person providing intercity rail service and each commuter rail authority shall ensure that, as soon as practicable, but in no event later than July 26, 1995, that each train has one car that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) Each public entity providing light or rapid rail service shall ensure that each train, consisting of two or more vehicles, includes at least one car that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no case later than July 25, 1995.

§ 37.137 Wheelchair securement locations and food service on intercity rail trains.

(a) As soon as practicable, but in no event later than July 26, 1995, each person providing intercity rail service shall provide on each train a number of spaces—

(1) To park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than one half of the number of single level rail passenger coaches in the train; and

(2) To fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than one half the number of single level rail passenger coaches in the train.

(b) As soon as practicable, but in no event later than July 26, 2000, each person providing intercity rail service shall provide on each train a number of spaces—

(1) To park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than the total number of single level rail passenger coaches in the train; and

(2) To fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than the total number of single level rail passenger coaches in the train.

(c) In complying with paragraphs (a) and (b) of this section, a person providing intercity rail service is not required to provide more than two spaces to park and secure wheelchairs nor more than two spaces to fold and store wheelchairs in any one coach or food service car.

(d) Unless not practicable, a person providing intercity rail transportation shall place an accessible car adjacent to the end of a single level dining car through which an individual who uses a wheelchair may enter.

(e) On any train in which either a single level or bi-level dining car is used to provide food service, a person providing intercity rail service shall provide appropriate auxiliary aids and services to ensure that equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals. Appropriate auxiliary aids and services include providing a hard surface on which to eat.

HANDICAPPED
Requirements Handbook

Supplement No. 151 June 1991

Highlights

Current Developments

Congress extends Rehabilitation Act programs for one year

Congress has sent to President Bush legislation (H.R. 2127) that would renew federal programs under the Rehabilitation Act for one year.

The bill doesn't include an overall fiscal year 1992 authorization amount, although it would provide $1.87 billion for state vocational rehabilitation programs. The bill would also support a host of other programs, including independent living centers, research and training, and rehabilitation facility construction.

The bill includes a waiver for states that cannot afford to create early intervention programs for disabled toddlers; a 1986 law required states to develop such programs and provide services within five years.

Congress appropriated $1.9 billion overall in fiscal year 1991 for Rehabilitation Act programs.

Rehabilitation Act programs usually are reauthorized for five years; the current authorization expires in fiscal year 1991. The one-year extension will give legislators, the administration and disability groups more time to craft a more extensive reauthorization of the 1973 statute to incorporate provisions of the Americans with Disabilities Act.

Work on a revised act is expected to begin next year. In the meantime, advocates and federal agencies (notably the National Council on Disability) have held hearings across the country to glean public input into how the law should be changed.

More disabled children served by special education programs, Education Dept. finds

Over the past 15 years, the number of students with disabilities receiving special education services has increased steadily, according to the U.S. Department of Education (ED). Approximately 4.7 million students were served in the 1989–1990 school year, a 2.2 percent increase over the 1988–1989 term.

These and other findings were announced in the department's 13th annual report to Congress on the Individuals with Disabilities Education Act (IDEA, formerly the Education of the Handicapped Act). The report describes the progress in providing a "free and appropriate

public education" to disabled youth that Congress mandated when it first passed the act in 1975.

"We're finding more and more children with disabilities involved in preschool programs," said Robert Davila, assistant secretary for special education and rehabilitative services. "And that's very encouraging. It means the states are addressing the challenge of the first national education goal: all children will start school ready to learn."

The vast majority (86 percent) of students served by special education are between the ages of 6 and 17. However, ED found that the number of children ages 3–5 enrolled in special education increased by an average of 8.2 percent annually since 1986–1987.

Learning disabilities are the most common disabling condition found in special education students (49 percent), followed by speech or language impairments (23 percent), mental retardation (13 percent) and serious emotional disturbances (9 percent). The proportion of school children with learning disabilities served has increased in the past 15 years, going from 25 percent in 1976–1977 to 50 percent in 1989–1990, ED found.

With the increase in special education enrollments has come a shortage of special education teachers. Although the number of teachers increased by 1.2 percent between 1987–1988 and 1988–1989, ED said, states reported that they need nearly 28,000 more teachers to fill vacancies and replace uncertified staff.

Mainstreamed, graduating

Most students served by IDEA programs take classes with their non-disabled peers. According to ED, 93 percent of students ages 3–21 were served in regular school settings; the remaining 7 percent were served in separate schools or facilities.

A majority of the students with disabilities exiting school graduated with a diploma (44 percent) or certificate (10 percent). Twenty-seven percent of those leaving school dropped out, and 2 percent reached the legal age limit set in their states for special education services.

ADA services office created at EEOC

A new office devoted to disability issues has been created within the Equal Employment Opportunity Commission.

The EEOC announced last month that it will add Americans with Disabilities Act Services to its Office of Legal Counsel. Full-time staff will develop policy and provide technical assistance for the commission and the public on the Americans with Disabilities Act. The EEOC will enforce the employment provisions (title I) of the act.

According to the commission, ADA Services will have two divisions: ADA Policy and ADA Technical Assistance. The policy branch will develop regulations under both the ADA and sections 501 and 504 of the Rehabilitation Act. The EEOC proposed ADA regulations in February (see Supplement No. 148, March 1991).

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ADA guidance will be handled by the technical assistance division. This will include developing a technical assistance manual and other publications on the rights and responsibilities under the ADA. The manual is due Jan. 26, 1992, six months before the effective date of title I.

The technical assistance division also will manage a nationwide training and education program that EEOC plans to develop for employers and disabled individuals.

Kansas amends state civil rights law to parallel ADA, Fair Housing Act

Kansas Gov. Joan Finney signed legislation last month that makes the Kansas Act Against Discrimination parallel to the Americans with Disabilities Act and the Fair Housing Amendments Act.

In some areas, the Kansas law goes beyond federal law. For example, Kansas employers with four or more employees are covered by the state's non-discrimination requirements; the ADA will eventually apply to businesses with 15 or more workers.

The law was also amended to prohibit certain private membership clubs (such as country clubs) from discriminating in their membership practices. Organizations that have 100 or more members, serve food on a regular basis to non-members and collect dues are subject to the act. Fraternities, sororities and religious organizations are not covered.

States and cities are not required to amend existing anti-discrimination statutes to conform with the ADA. The ADA doesn't invalidate or limit any state or local law that provides equal or greater protection to disabled people. But where a state or local law has less stringent requirements, the ADA applies.

In the State Courts

Suspending HIV-infected doctor's surgery privileges did not violate state discrimination law, New Jersey court rules

A hospital did not violate New Jersey's anti-discrimination law when it suspended the surgery privileges of a doctor who had AIDS, the New Jersey Superior Court for Mercer County ruled (*Behringer v. Medical Center at Princeton*, NJ SuperCT L88-2550, 4/25/91).

The doctor, an ear, nose and throat surgeon, was a patient at the hospital where he worked. During his stay, he tested positive for HIV and was diagnosed with AIDS. Several hospital officials knew the doctor's test result, which also was noted on his medical chart. Soon after his discharge, the doctor received calls from well-wishers who spoke of his having AIDS.

A few weeks after his diagnosis, the hospital suspended the doctor's surgical privileges. Hospital policy restricts health care providers from participating in any activity, including surgery, that would pose a risk of transmitting HIV to patients. The hospital also required the doctor's patients to sign informed consent forms noting his HIV status.

After his death, the doctor's estate sued the hospital for violating the New Jersey Law Against Discrimination, charging the suspension discriminated against the doctor based on disability. The estate also sued the hospital for breaching its duty of confidentiality to the doctor as its patient.

The state court agreed that New Jersey's law protects the doctor as a disabled person. The law prohibits "any unlawful discrimination against any person because such person is or has been at any time handicapped or any unlawful employment practice against such person."

However, the court ruled that the hospital does not violate the state law in requiring HIV-positive doctors to inform their patients and limiting their medical activities. Patients must be included in the decision-making process, it said, and disclosing potential, even remote, risks is material to that process.

"The risk of transmission is not the sole risk involved," the court said. "The risk of a surgical accident, no matter how small, performed by an HIV-positive surgeon may subject a previously uninfected patient to months or even years of continual HIV testing."

A doctor's right to perform invasive procedures fails when weighed against New Jersey's "strong policy" supporting patient rights, the court added. "Where the ultimate harm is death, even the low risk of transmission justifies the adoption of a policy that precludes invasive procedures where there is 'any' risk of transmission," it concluded.

The court did award damages to the doctor's estate for breach of confidentiality regarding his stay there as a patient, ruling that the hospital's procedures do not provide adequate protection to the patient.

'Vicarious disability' argument fails in Iowa court

The Supreme Court of Iowa has rejected a lawsuit brought by a man who claimed that he was a victim of "vicarious disability discrimination" (*Monson v. Commission*, 467 N.W. 2d 230).

Ron Monson was fired from his job after missing extended periods of work to care for his terminally ill daughter. The girl, who was completely disabled by a brain tumor, required around-the-clock attention. Monson's wife had died, and he could not afford to hire a full-time attendant. His employer gave him unpaid leave, but after time fired him for excessive absenteeism.

Monson claimed that the amount he needed to tend to his daughter rendered him disabled, and that his firing was "vicarious disability discrimination."

An Iowa district court ruled that Monson failed to state a viable claim under state civil rights law. The state Supreme Court upheld that decision, ruling that Monson was not part of a protected class under Iowa law. Expressing sympathy for his argument, the court nevertheless said it discerned "no legislative intent, express or implied, that would extend the benefits of [Iowa's anti-discrimination statute] to employees with disabled family members. The extension of the law which Monson suggests must come from the legislature, not this court."

Further, the court rejected Monson's claim that he was a victim of discrimination by association. "Monson was not terminated because of his association with a disabled person," it held. "He was terminated because of extended absence from work."

Profiles

John Wodatch: the ADA "point man" at the Justice Department

John Wodatch has been a busy man lately.

Across from his desk sit 16 loose-leaf notebooks filled with 2,500 comments — more than 15,000 pages — that were submitted in response to the Justice Department's proposed rules on titles II and III of the Americans with Disabilities Act (ADA). And as the department's point man on the ADA, it's his job to read them.

"We are going through them, we are reading every single one, analyzing them all, " Wodatch said "They're very good — they're very helpful. Surprisingly, we didn't get a lot of 'we're shocked and appalled that you're doing this.' Certainly there were disagreements with choices we have made. There were a lot of suggestions."

Wodatch heads the Office on the Americans with Disabilities Act, the division at Justice responsible for getting out the rules and technical advice to the estimated 3.8 million businesses that will be affected by the public accommodations provision of the act. His office will also issue regulations for state and local governments.

For Wodatch and his colleagues at Justice, the comment process (what he calls "our reality check") is the second stage in the long and involved process of codifying the ADA. The department issued draft rules for both public accommodations and public services in February (see Supplement No. 148, March 1991). Final versions are due July 26, 1991.

"Our goal in the regulation is to keep the same balance as there is in the statute, which is between providing access for persons with disabilities while still recognizing that there's a price tag that comes along with this for business," he said.

"There's a certain tension between giving flexibility to the entities covered by the ADA and at the same time giving them enough guidance so they know what's expected of them. We're trying to find the right mix of that in the regulations, and it's a daunting task."

The section 504 experience

Wodatch is no stranger to disability issues. A veteran government lawyer, he's been involved with federal disability law for more than 15 years. He was director of the Office for Civil Rights at the Department of Health, Education and Welfare in 1977 when HEW issued the first regulations under Section 504 of the Rehabilitation Act.

Wodatch believes the section 504 experience should ease the transition to ADA compliance for both the federal government and entities covered by the new law. Many of the terms and concepts in the ADA, such as reasonable accommodation, undue hardship and otherwise qualified, come directly from the section 504 rules.

"It was very important to have section 504 be the basis for the ADA because we did have the track record, we knew what it meant, and it would not only ease compliance, it would let people know what was expected of them," he noted.

State and local governments

The section 504 experience should be particularly helpful to state and local governments in their efforts to comply with the ADA. Because they receive federal funds, many jurisdictions have been subject to section 504 and have had to make their services accessible to disabled people. Title II of the ADA, which applies to public services, extends the Rehabilitation Act requirements to all programs of all public agencies, whether or not they are grantees.

As a result of this connection, title II hasn't gotten the attention paid to the private sector parts of the act. "[Title II] is not as groundbreaking as titles I or III, so it doesn't have the potential for major impact," Wodatch said. "But in those areas where there will be changes, the impact will be great."

Examples of key issues? He said there have been many complaints about the lack of accessibility in municipal halls, most of which aren't covered by section 504. Also, towns will have to make their "911" emergency services accessible to hearing-impaired people.

Other issues he mentioned include police departments arrest procedures for disabled people whose conditions may appear to be disorderly conduct (i.e., epilepsy, cerebral palsy), accessibility of state courts, and accommodations in state and local licensing procedures (i.e., hunting, professional licenses).

Myths and misconceptions

Wodatch said that while there is a "great deal of knowledge" that the ADA has been enacted, "there's a great deal of misinformation about what it is."

A common misconception among business is that altering one part of a building means that the entire building must be made accessible, Wodatch said. Under the ADA and the proposed title III rules, if part of a building is renovated, the altered part must be accessible, but not the whole building.

From the disabled community, Wodatch senses an "unawareness" with some of the limitations in the ADA. Some advocates portray the ADA as a "new day" for disabled people, he noted. And while that's true to a large extent, he said, "the ADA is a very limited piece of legislation in terms of what's required."

As an example, Wodatch pointed out that while businesses must provide auxiliary aids, they can choose which auxiliary aid to provide and they don't have to do it if it's an undue burden. "I don't think people have an appreciation of the checks and balances in the ADA," he said.

Issues to address

Wodatch has identified a number of trends in the title III comments. One concerns people with hearing impairments, who feel that the proposed rule pays too much attention to mobility impairments and not enough to communications barriers.

Title III of the ADA requires businesses to remove communication barriers that are structural in nature, if it's readily achievable to do so. "We don't have a lot about that in the rule and we will correct that," Wodatch said.

Wodatch said the main complaint from the business community stemmed from the Architectural and Transportation Barriers Compliance Board's proposed ADA guidelines (see Supplement No. 147, February 1991). Many disagreements with the specifics of the guidelines were based on misunderstanding of what the guidelines meant, he said, but some were valid and will be addressed in the final standards. Justice expects to reference the access board's guidelines in its final title III rules.

NIDRR proposes projects for ADA implementation

The National Institute on Disability Research and Rehabilitation (NIDRR) at the U.S. Department of Education (ED) has proposed funding priorities to help implement the Americans with Disabilities Act (ADA). Under NIDRR's plan, grants would be awarded for establishing national peer training, developing training materials and resources (on accessibility/public accommodations, employment and communications/telecommunications), and setting up regional disability and business accommodation centers.

Both the Senate and House reports that accompanied the fiscal year 1991 appropriation bill for the departments of Labor, Health and Human Services and Education called on NIDRR to provide technical assistance for the new disability civil law. The House specifically recommended that 10 new regional centers on disability be established.

For more information on NIDRR's proposal, contact David Esquith (202) 732-5081. (May 21 *Federal Register*, Pages 23336-23342.)

ED proposes special education, technology assistance rules

The Education Department (ED) has proposed regulatory changes to two of its disability-related programs. The department intends to amend its rules for the Services for Children with Deaf-Blindness program (34 C.F.R. Part 307) to incorporate changes mandated by Congress when it reauthorized the Individuals with Disabilities Education Act.

Among other issues, the proposed rule defines deaf-blindness, expands the age of youth who can benefit from the program and adds the authority to create a national clearinghouse for children with deaf-blindness. For more information on the proposed rule, contact Charles Freeman at ED, (202) 732-1165.

In addition, the department has proposed regulations to implement the Training and Public Awareness Projects authorized under the Technology-Related Assistance for Individuals with Disabilities Act. The rule would describe the purpose of the program, the types of activities that could be supported and selection criteria for funding priorities and awarding grants. For more information, contact Carol Cohen, (202) 732-5607.

Both proposed rules were published in the May 21 *Federal Register*, Pages 23344-23358.

Applicants sought for Education Dept. research, training grants

Approximately $450,000 is available from the Education Department to fund three awards for advanced disability rehabilitation training and research. The application deadline is Sept. 30. For more information, contact Sean Sweeney (202) 732-1202 (May 14 *Federal Register*, Page 22282).

Funding is also available from the Office of Special Education Programs at ED. Grants will be awarded for projects to encourage people to enter special education teaching, retain special education teachers and examine high school curricula for students with disabilities. For more information, contact Linda Glidewell (202) 732-1099. (May 7 *Federal Register*, Pages 21226-21235.)

ADD to fund university affiliated programs in certain states

The Administration on Developmental Disabilities (ADD) at the U.S. Department of Health and Human Services is accepting applications to establish university affiliated programs (UAPs). Universities in the following states and territories are eligible to apply: Alaska, Delaware, Maine, Nevada, Oklahoma, Rhode Island, Wyoming, American Samoa, Guam, Northern Mariana Islands, Palau, Puerto Rico and the Virgin Islands.

Applications are due July 15. For more information, contact Judy Moore, UAP coordinator, (202) 245-2911. (May 14 *Federal Register*, Pages 22173-22176.)

HUD announces availability of fair housing program grants

The U.S. Department of Housing and Urban Development is seeking applications from state and local fair housing enforcement agencies for specified funding under its Fair Housing Assistance Program (FHAP). Under the program, HUD funds state and local agencies to investigate housing discrimination complaints.

Through this notice, capacity building funds will be awarded to state and local agencies that have not previously participated in the program. Incentive funding is available to agencies that have participated in the program for training, complaint processing and other purposes. For more information, contact Lauretta Dixon, branch chief for FHAP, (202) 708-0455. (May 3 *Federal Register*, Pages 20500-20503.)

Briefly —

• NIDRR has scheduled a series of hearings to solicit public input into long-range planning for research on disability and rehabilitation. Hearings will be June 15 in Houston, June 20 in Seattle and June 25 in Oakland, Calif. Hearings were also held in Boston, Chicago and Columbia, S.C. For more information, contact Jacquie Price, Walcoff & Associates, (703) 684-5588.

• The Administration on Developmental Disabilities published reallotments of fiscal year 1991 formula grants to states and territories (April 30 *Federal Register*, Pages 19868-19870).

• Training interpreters for hearing-impaired students has been proposed as a fiscal year 1991 funding priority under ED's Training Personnel for the Education of Individuals with Disabilities program (April 30 *Federal Register*, Page 19896).

• ED is seeking comments on several issues concerning the Rehabilitation Training program (May 1 *Federal Register*, Pages 20074-20075).

• ED has proposed as a fiscal year 1991 funding priority awarding grants to develop pilot projects to protect and advocate for the rights of people with severe disabilities who aren't being served by other protection and advocacy programs (May 28 *Federal Register*, Pages 24122-21423).

Handbook Page Changes in Supplement No. 151

June 1991

Pages to be DISCARDED	Pages to be ADDED (Dated June 1991)	Description of Revisions
v & vi (May 1991)	v & vi	Update to Current Contents page

DISCARD THIS SHEET AFTER CHANGES HAVE BEEN MADE

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Contents of Basic 504 Compliance Guide

The following is a listing of all pages that make up the Basic 504 Compliance Guide of the *Handicapped Requirements Handbook* with the inclusion of the June 1991, Supplement No. 151 update pages.

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HANDICAPPED
Requirements Handbook

Supplement No. 141 August 1990

Highlights

Bush signs Americans with Disabilities Act into law

Proclaiming an "independence day" from physical and social barriers that have prevented some people from participating fully in society, President Bush signed into law on July 26 legislation that guarantees federal civil rights protection to 43 million disabled Americans.

An estimated 2,000 people, many in wheelchairs, with guide dogs or using sign language, gathered on the South Lawn of the White House to witness the signing of the Americans with Disabilities Act (ADA), the most sweeping anti-discrimination law enacted since the 1964 Civil Rights Act.

The ADA (P.L. 101-336) bars discrimination against qualified disabled people in employment, public services, transportation, public accommodations and telecommunications. When fully effective, it will apply to employers with 15 or more workers and almost every commercial establishment open to the public.

A strong supporter of the law, Bush compared passage of the ADA to the collapse of the Berlin Wall. He said the act "takes a sledgehammer to another wall, one which has, for too many generations, separated Americans with disabilities from the freedom they could glimpse, but not grasp.

A Note to subscribers —

In September, subscribers to the *Handicapped Requirements Handbook* will be sent a new chapter on the recently enacted Americans with Disabilities Act (ADA). The chapter will cover all aspects of the ADA, including coverage, requirements and enforcement. In addition, certain sections of the *Handbook* will be revised to reflect changes in Section 504 of the Rehabilitation Act made by the ADA. *Handbook* subscribers should remember that the ADA supplements — but does not replace — section 504. Federal grantees must still comply with the non-discrimination requirements of section 504.

"Every man, woman and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom," Bush declared.

Federal civil rights protection for the disabled

Bush's signature culminates a two-year effort by disability advocates and lawmakers to bring people with disabilities under the umbrella of federal civil rights protection. First introduced in Congress in April 1988, ADA was approved by the House 377-28 on July 12, 1990, and by the Senate 91-6 the next day.

Under the ADA, employers will have to provide disabled employees with "reasonable accommodations" to help them perform their jobs. Public buses and trains will be equipped with lifts for passengers in wheelchairs. Store owners and other businesses will be required to remove architectural barriers and modify policies to make their establishments accessible to disabled customers. (See articles throughout this newsletter for detailed discussions of the various provisions of the law.)

The law uses broad criteria to define "disabled." Rather than using a list of conditions, the act considers a person disabled if he or she has an impairment which limits a "major life activity," such as walking, seeing, hearing or working. Within that definition are conditions such as paraplegia, sight and hearings impairments, learning disabilities and AIDS.

The ADA also protects people who have been disabled in the past, but are now recovered. Rehabilitated drug users and people with cured cancer are examples. Finally, the statute prohibits discrimination against people who are regarded as being disabled, but do not necessarily have a disabling condition — such as burn victims or people with a limp.

The legislative forerunners to the ADA include the Civil Rights Act of 1964 and Section 504 of the 1973 Rehabilitation Act. The definition of disability and many key terms come from section 504, which requires federal grantees to make their programs accessible to disabled people. ADA supplements, but does not supplant, section 504.

Praise and criticism

Disability advocates hailed the ADA as a milestone. Sandra Parrino, chairman of the National Council on Disability, told the *Washington Post* that the ADA "heralds a new day" for disabled Americans.

But not everyone shared the day's optimism. John Sloan, president of the National Federation of Independent Business (NFIB), a small-business lobby group, claimed the ADA leaves many legal questions unanswered and exposes small businesses to lawsuits.

"Small-business owners will have no way of knowing whether they are complying with this law or not," said Sloan, whose organization has been a vocal critic of the ADA. "There was never even an attempt to list the disabilities involved. Congress has clearly abdicated its responsibility to the courts."

Bush dismissed charges that the law is onerous or costly. "We've all been determined to ensure that it gives flexibility, particularly in terms of the timetable or implementation and we've been committed to containing the costs that may be incurred," he said.

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Business, the president said, has in its hands "the key to the success of this act." Noting that many employers are looking for new sources of workers, Bush said the ADA " does something important for American business . . . . Many of our fellow citizens with disabilities are unemployed, they want to work and they can work.

"When given the opportunity to be independent, they will move proudly into the economic mainstream of American life, and that's what this legislation is all about."

"11th-hour" compromises settle controversies

Although the ADA was on a legislative fast track, final approval wasn't certain until sponsors could overcome two last-minute hurdles that threatened to delay or even derail any White House ceremony.

The first issue involved coverage of food-industry workers with contagious diseases. The House-Senate conference committee on the bill had dropped a controversial amendment passed by the House that would have allowed employers to transfer workers with any contagious diseases out of food-handling positions. (The ADA protects people with infectious diseases, provided they don't pose a health or safety risk to others.)

Sponsors of the amendment said it was needed to protect restaurants from public fears about the spread of diseases; they were outraged at the conferees' move and threatened to filibuster or even send the bill back through the legislative process. Opponents criticized the amendment as pandering to unfounded fears about AIDS.

In a compromise, negotiators inserted language that requires the Department of Health and Human Services to publish annually a list of diseases that can be transmitted through food-handling. Employers are permitted to transfer employees with diseases on the list out of food-handling positions.

The other contentious issue surrounding final passage dealt with with the ADA's coverage of the Senate. A cadre of senators pushed for an amendment offered by Sen. Charles Grassley, R-Iowa, that would have given their employees the right to sue under the ADA in federal court. This prompted an outcry from other senators, who charged that allowing the judicial branch to judge members of Congress would violate the separation of powers.

Ultimately, lawmakers agreed that the Senate Select Committee on Ethics will handle ADA-related complaints by employees. House and other congressional employees (including the Library of Congress, Office of Technology Assessment and General Accounting Office) will file complaints with the House Office of Fair Employment Practices.

An Analysis of the ADA

Employment

The doors to equal employment opportunities opened considerably wider last month, when President Bush signed legislation that requires businesses to eliminate any employment practices that discriminate against disabled people.

Enacted July 26, the Americans with Disabilities Act (ADA) prohibits employers from discriminating against qualified job applicants and employees who are or become disabled. All aspects of employment are covered, including the application process and hiring, on-the-job training, advancement and wages, benefits and employer-sponsored social activities.

ADA becomes effective for businesses with 25 or more employees on July 26, 1992. Employers with 15 or more workers must comply beginning July 26, 1994. Exempted are businesses with fewer than 15 employees, the federal government (but not Congress) and private membership clubs. Additionally, the law allows secular organizations to give hiring preference to people of a certain religion or require employees to practice that religion.

For many private employers, the ADA means learning — and implementing — a vocabulary that federal grantees and contractors have spoken for more than 15 years. The act incorporates terms such as "reasonable accommodation," "undue hardship" and

"otherwise qualified" from Section 504 of the Rehabilitation Act. ADA supplements, but does not replace, section 504.

Accommodating disabled workers

In a nutshell, the ADA protects otherwise qualified disabled people from job discrimination. To be considered otherwise qualified, a job applicant or employee must be able to perform the essential functions of the position with or without reasonable accommodations. Employers must accommodate an employee's known mental or physical disabilities, unless that would impose an "undue hardship."

The first step an employer should take is determine the essential functions of a job — tasks that are integral and constant, not marginal and occasional. The ADA recognizes an employer's judgment regarding essential job functions. Written job descriptions prepared before a position is advertised are considered evidence of essential job functions.

Employers cannot ask questions about disabilities on applications or during interviews, or use selection criteria that screen out disabled people, unless those questions or tests are job-related.

Employers must provide disabled employees with reasonable accommodations that are needed to perform the essential (and non-essential) duties of the job. Accommodations can be any of myriad adjustments to the workplace or job responsibilities, such as modifying work schedules, reassigning job duties, removing architectural barriers and offering auxiliary aids (e.g., interpreters or taped texts).

However, the employer is not obligated to accommodate a disability if that would impose an "undue hardship." To determine undue hardship, the ADA allows employers to consider the cost and nature of an accommodation, budget, staff size, and type and location of the facility.

For example, a wheelchair user applies to be a secretary at downtown consulting firm. The essential functions of the job are typing, shorthand and delivering mail. The applicant scores the highest on the skills tests, but steps in the suite would prevent him from distributing mail to some offices. In this case, the firm could accommodate his disability by either installing a ramp or asking another employee to bring mail to the inaccessible offices (in exchange for the secretary picking up one of his colleague's duties).

The ADA does not require employers to change or eliminate essential job prerequisites or functions to accommodate a disabled person. A law firm that only hires law school graduates as attorneys need not hire someone whose disability prevented her from earning a law degree. The consulting firm in the situation described above would not have to hire the applicant if he didn't know shorthand.

The responsibility not to discriminate under the ADA goes beyond an employer's own office. Employers may not enter into contracts or relationships with labor unions, employment agencies or other outside organizations that would indirectly cause discrimination against disabled employees. Training seminars, conferences and meetings must also be accessible.

Also, an employer can't discriminate against a non-disabled applicant or employee just because he or she is related to or associated with someone who is disabled. For example, an employer would violate the ADA if it did not hire a woman for fear that she would be absent often to care for her disabled husband. Likewise, an employer could not fire an employee because his partner is infected with the HIV virus (which causes AIDS).

Restrictions on medical exams

Generally, the ADA prohibits employers from requiring pre-employment medical exams or inquiring about a disability, but there are limited exceptions.

Employers may ask about disabling conditions if they are job-related (e.g., asking potential bus drivers if they have any visual impairments). Employers may offer a job and condition the offer on the results of a medical exam, but only if all entering employees in that position are given pre-employment exams and employee medical records are confidential.

Optional, employer-sponsored health activities, such as "wellness programs," exercise classes or cholesterol testing, are allowed under the ADA, as long as they are voluntary and any information obtained is kept confidential.

Amendment supporters argued that it would protect restaurants from falling victim to public fears about contagious diseases, namely AIDS. Critics charged that it pandered to unfounded fears about the disease. There is no medical evidence that AIDS can be transmitted through handling food.

The House-Senate conference committee that reconciled the two bills decided to drop the amendment. The conferees inserted alternative language requiring the U.S. secretary of health and human services to publish and distribute a list of communicable diseases that can be transmitted by handling food and the methods by which such diseases are transmitted. Employers may transfer employees with diseases on that list to non-foodhandling positions, if any are available.

Substance abuse

The definition of disability in the ADA specifically excludes current illegal drug users. The law does, however, protect alcoholics and past drug users who have successfully completed rehabilitation treatment.

Employee drug testing is legal under the ADA. Employers may bar workers from using drugs or alcohol on the job, and they are allowed to hold drug abusers and alcoholics to the same job standards as other employees, even if their addiction causes unsatisfactory performance.

Alcoholics are not afforded ADA's protection if their condition interferes with their work or poses a threat to the property or safety or others.

Remedies for discrimination

The U.S. Equal Employment Opportunity Commission will enforce the employment section of the ADA, with regulations due in one year. The commission already oversees compliance with federal laws that protect employees from discrimination based on race, color, sex, religion, age and national origin.

As with other forms of discrimination, victims of disability-related job bias may seek "equitable relief" — back pay, reinstatement and injunctions. These are the same remedies currently available under Title VII of the Civil Rights Act, which the ADA references as its enforcement scheme.

This could soon change, however. Legislation passed by the Senate last month (S. 2104) and the House Aug. 3 (the Civil Rights Act of 1990 — H.R. 4000) would make compensatory and punitive damages available to victims of sex, religious and ethnic discrimination under title VII. (Black employees can seek money damages under another federal civil statute.) Because the ADA incorporates title VII by reference, the bill would make compensatory and punitive damages available to employees who are victims of disability discrimination.

The president has threatened to veto the bill. Administration critics claim the damages provision would expose employers to big-money lawsuits, as well as force them to adopt hiring quotas.

EEOC seeks comments on ADA regulations

The U.S. Equal Employment Opportunity Commission (EEOC) is seeking public comments on regulations to implement the employment section (title I) of the Americans with Disabilities Act. The commission published an "advanced notice of proposed rulemaking" in the Aug. 1 *Federal Register* (Page 31192), requesting "any ideas, comments or concerns which should be considered in the course of framing these regulations."

The EEOC, which will enforce compliance with the ADA's employment requirements, must issue regulations within a year of enactment (by July 26, 1991).

Comments on the proposed regulations should be sent no later than Aug. 31 to Frances M. Hart, Executive Officer, Executive Secretariat, EEOC, 1801 L St. N.W., Washington, D.C. 20507.

Public Accommodations

The newly enacted Americans with Disabilities Act (ADA), signed by President Bush July 26, gives disabled people an unprecedented opportunity to enter the mainstream of society.

The law requires that disabled people have equal access to places of public accommodation, including shops, offices and recreational spots. Its intent is to prevent incidents of exclusion and discrimination — recounted several times during congressional hearings by disabled people — from recurring.

Some business groups fear that vague provisions and costly requirements will force many "mom and pop" operations into bankruptcy. Soon after the ADA passed Congress, the National Federation of Independent Business denounced it as going "far beyond the reasonable bounds of common sense."

Supporters counter that the act strikes a balance between civil rights and economic livelihood. While businesses are required to modify their policies and structures to accommodate disabled customers, they need not do anything that would impose excessive costs or burdens. It's a point the president emphasized when he signed the legislation.

"We've all been determined to ensure that [the act] gives flexibility, particularly in terms of the timetable of implementation," Bush said. "We've been particularly committed to containing the costs that may be incurred."

Policies and practices

Title III of the act prohibits facilities open to the public from discriminating against disabled people. In the statute is a long (but not exhaustive) list of covered establishments, ranging from restaurants, hotels and theaters to professional offices, libraries and health clubs. The law applies to those who own, lease or operate covered facilities. Only churches and private clubs are exempt.

The law requires a business to offer its goods and services in the most integrated setting appropriate, make "reasonable modifications" to its policies and, if needed, provide auxiliary aids to allow disabled customers an equal opportunity to use its services.

However, businesses are not required to make such changes if they would impose undue financial, staff or operating constraints. An establishment is not required to provide an accommodation or change its policies if either would "fundamentally alter" the nature of the business or impose an "undue burden."

In a restaurant, for example, modifications could include altering a no-pets policy to allow guide dogs, having waiters read menus to blind patrons, or permitting customers in wheelchairs to order drinks at a table without ordering a meal (even though its policy is to only serve food at tables).

A small grocery store would not have to lower all its shelves and widen all its aisles if a sales clerk were willing to help a customer in a wheelchair reach items. A drug rehabilitation clinic could refuse to treat a person with AIDS because that would alter the nature of its business (but it could not refuse to treat that person if he were a drug abuser and had AIDS).

Courses that prepare people to take exams for licenses or other professional credentials (such as the bar) must be accessible, as must be the exam itself.

The ADA's mandate extends to able-bodied people who are related to or associated with a disabled person. A business may not discriminate against someone whose spouse, roommate or friend is disabled.

'Readily Achievable'

Public places must be physically accessible to disabled people. The ADA requires businesses to remove architectural and communication barriers where "readily achievable," defined as "easily accomplishable and able to be carried out without much difficulty or expense." A business can consider its overall size and budget, number of employees, and the type of facility to determine if barrier removal is readily achievable.

Site-specific factors may be considered when an individual business is part of a larger chain. These factors include the amount of financial, staff and other support a business receives from its parent company.

If barrier removal poses an undue burden, a business must offer its goods or services through alternative methods that are readily achievable.

New construction and renovations of facilities are also covered by the ADA. Starting 30 months after enactment (Jan. 26, 1993),

all newly built commercial facilities must be accessible to disabled people. Elevators are not required in facilities with fewer than three stories or less than 3,000 square feet, unless the building is a shopping center, mall or professional medical center.

Renovations must be made accessible, and if a business alters areas that affect "primary functions," the path of travel to the areas and rest rooms, telephones and water fountains in or near those areas must also be accessible. Examples of primary function areas include a dining room at a restaurant, exhibit areas in a museum and reading rooms in libraries.

Small business extension

In response to concerns that the ADA would wreak financial and administrative havoc on small businesses, Congress provided small-business owners a grace period from lawsuits brought under the public accommodations title. Businesses employing fewer than 25 people and grossing less than $1 million a year are exempt from lawsuits filed for six months after the effective date, or until July 26, 1992. Companies with 10 or fewer employees and annual earnings of less than $500,000 are immune from suits until Jan. 26, 1993.

The conference report (H. Rpt. 101-596) that accompanied the ADA makes it clear, however, that these small businesses are expected to make a "good faith effort" toward compliance with the law.

Private bus companies

Public transportation offered by private companies must be accessible to disabled riders. This includes over-the-road bus companies such as Greyhound, charter bus routes and shuttle services. Because it is addressed by the Air Carrier Access Act, air transportation is not covered the ADA.

Large bus companies have six years to comply with the ADA; small companies have seven years. The law directs the U.S. Office of Technology Assessment (OTA) to conduct a 3-year survey on the accessibility needs of inter-city buses. The U.S. Department of Transportation will base its regulations on the results of OTA's study.

Companies that operate "fixed-route" and "demand- responsive" transit must ensure that newly bought vehicles that seat at least 16 must accommodate disabled riders. This applies to companies that offer transportation services, but are not primarily transit operators, for example, shuttle services offered at airports by hotels or car rental companies.

Remedies

The U.S. Justice Department will enforce compliance with the public accommodations provisions of the ADA; regulations are due by July 26, 1991. The attorney general has the authority to seek "pattern and practice" civil penalties — $50,000 for the first offense and $100,000 for subsequent violations. Punitive damages are not available.

In addition, the ADA gives private individuals the right to file suit against public establishments for violations of the law, including suits for "anticipatory discrimination" in new construction or renovations. This would apply if a disabled person discovered that plans for a new building did not feature an accessible design.

Courts may award injunctive relief and order facilities to make accommodations, change policies or provide auxiliary aids.

Public Tansportation

Wheelchair lifts on buses, subway stations with elevators and accessible train cars will soon be common sights for commuters. That's because the Americans with Disabilities Act (ADA) requires public transportation systems to be accessible to disabled riders.

Signed by President Bush on July 26, the ADA covers most forms of public transportation, including buses, trains and paratransit. Private services, such as Greyhound and hotel shuttle vans, are covered by the public accommodations section of the act.

Because air travel is addressed by the Air Carrier Access Act, airlines are not covered the ADA. But the law does apply to public services offered at airports, such as ground transportation between terminals and to parking lots. School bus transportation is also exempted from the ADA.

Lifts for buses

The most immediate impact of the ADA on transportation will be seen on public buses. Starting Aug. 26, (30 days after the enactment date), public transportation authorities can

only purchase new buses that are accessible to people in wheelchairs. Generally, this means that the bus will come equipped with a wheelchair lift. If buying uses vehicles, agencies must make a "good faith" effort to shop for accessible buses. The law does not require retrofitting of older buses, although existing buses that undergo major overhauls must be made accessible.

All new and renovated transit facilities, such as bus terminals, must be accessible. Alterations to "primary function areas" in existing facilities (e.g., waiting rooms, ticket stands and rest rooms) must also be accessible.

Along with accessible fixed-route bus service, transit authorities are obligated to provide paratransit service for disabled people unable to ride the regular bus and to non-disabled passengers accompanying a disabled rider. Paratransit usually involves accessible vans that transport disabled people to and from their homes, most often by reservation.

Paratransit provided must be comparable more often to regular bus service. Local transit authorities will have to submit plans to the U.S. Department of Transportation (DOT) outlining their paratransit proposals.

The ADA allows exceptions to mandatory paratransit. A locality may be exempt if providing the service imposes an undue financial burden. Also, a transit authority need not offer paratransit if it only operates commuter buses (direct, non-stop routes). In addition, the law does not require a transit authority to offer paratransit in areas where other providers operate a similar service.

Ending lawsuits

Several cities, such as Denver and Seattle, have made or are in the process of making their bus fleets lift-equipped. Other cities, however, have been in dispute with disability groups over how to make that same commitment.

At issue was whether existing federal laws, including Section 504 of the Rehabilitation Act (which mandates non-discrimination in federally funded programs) and the Surface Transportation Assistance Act of 1982, as amended (which provides federal transit funding) require localities to provide lift-equipped buses. Disability groups sued DOT in 1987, disputing its regulation that gives localities the option of how they make public transportation accessible.

Last year, the 3rd U.S. Circuit Court of Appeals ruled that section 504 requires accessible transportation, and it ordered the department to examine its policies. The court did not prescribe lifts.

In response to that decision and in anticipation of the ADA, DOT announced in March that it would scrap the so-called "local option" and require federally funded transit authorities to buy accessible vehicles. Final regulations are expected to be released in September. (The ADA effectively overrides DOT's action.)

Access to rail systems

Enactment of the ADA lends a more comprehensive meaning to the conductor's call of "all aboard!". The law requires accessibility to train transportation, which includes city subways, light and commuter rail systems, and Amtrak. As with buses, all newly bought subway and light and commuter rail cars must be accessible. These rail systems must have at least one accessible car per train by 1995. All new stations must be accessible.

In addition, "key" stations in subway and light rail systems must be made accessible within three years of enactment (by July 26, 1993); the law gives transit authorities an additional 30 years if compliance will produce extraordinarily expensive changes. Commuter rail lines also have three years to make key stations accessible, although the extension granted for expensive changes is 20 years.

The statute does not define key station, but the Senate committee report accompanying the ADA notes that such stations that have high riderships, are located in business districts or cultural, educational and recreational centers, or are transfer points to other trains or buses could be considered key stations. Philadelphia and New York City have used the key-station concept to determine which stops in their subway systems should be made accessible.

Amtrak is also subject to the ADA. The law requires the railroad to purchase only accessible new cars starting Aug. 26, 1990 and to have at least one accessible car per train within five years. Features of accessible cars must include a place to store wheelchairs, a

place to secure a wheelchair as a seat, and an accessible rest room. Food services must also be accessible.

New Amtrak stations must be accessible, and all existing stations must be made accessible within 20 years of enactment.

DOT, which will enforce public transportation systems' compliance with the ADA, must issue regulations by July 26, 1991.

Telecommunications

Enactment last month of the Americans with Disabilities Act (ADA) means that people with hearing and speech impairments will soon be able to take advantage of one item that most Americans can't live without — the telephone.

Title IV of the law requires telephone companies to provide continuous telecommunications relay services by 1993. When fully in place, the relay system will enable hearing- and speech-impaired people to communicate nationwide over the phone.

State-of-the-art technology allows hearing-impaired people to communicate over the phone. Telecommunications devices for the deaf (TDDs) send messages from one person to another through a typewriter-style device with a video screen or printer. But this system only works when both parties have TDDs; many deaf and most hearing people don't have the machines.

The relay system envisioned by the ADA will bridge the gap between people and businesses with and without TDDs. It will require intra- and interstate phone systems to have third-party operators available who will relay messages from a TDD user to a non-user, and vice versa. A handful of states already have such a system in place.

The Federal Communications Commission (FCC) will oversee compliance with title IV and issue regulations to set minimum standards, practices and service criteria. Mostly, the commission will be concerned with interstate relay services. States with relay systems that meet federal standards and are certified by the FCC will monitor intrastate compliance.

The law bars phone companies from imposing fixed monthly charges on residential customers to recover the costs of interstate relay services. Further, it prohibits companies from charging relay users higher rates than voice users for standard factors such as length of call, distance, and time when the call is made.

States are given the discretion for determining how providers will recover costs in intrastate relay services.

New from Thompson Publishing Group

To help employers and businesses who are new to disability non-discrimination laws, Thompson Publishing Group has just published the *ADA Compliance Guide*. The new *ADA Compliance Guide* is similar to the *Handicapped Requirements Handbook*, but it covers only the ADA. For more information on the new *Guide*, contact Thompson's Customer Service Department at 1-800-424-2959.

News Briefs

Interior, OPM reference UFAS in section 504 regulations

The U.S. Department of the Interior (DOI) and the Office of Personnel Management (OPM) have made cross-references to the Uniform Federal Accessibility Standards (UFAS) in their regulations implementing section 504 in federally assisted programs and activities.

The agencies' action is part of a government-wide effort to make UFAS the common accessibility standard for federal grantees to follow in all of their assisted programs.

In their regulations, DOI and OPM had required that construction or alterations follow the Minimum Guidelines and Requirements for Accessible Design (MGRAD). UFAS replaces the MGRAD in the regulations, but neither agency will consider UFAS as the only means of compliance. Both agencies will allow scoping or technical departures from UFAS, provided that equal or greater access to the building is achieved.

The DOI final rule (43 CFR Part 17) is published in the July 16 *Federal Register*, Pages 28909-28912; the OPM rule (5 CFR Part 900) is published in the July 24 *Federal Register*, Pages 29992-29999.

Education sets funding priorities for NIDRR; other programs

The U.S. Department of Education (ED) has announced several final and proposed funding priorities in fiscal years 1990-91. Final priorities include:

- funding of a research and training center on improved rehabilitation for low-functioning deaf individuals (July 3 *Federal Register*, Page 27594-27595);
- funding to provide educational and rehabilitation services to low-functioning deaf adults. (July 6 *Federal Register*, Pages 27936-27937); and
- funding to develop compensatory educational technology for disabled students (July 6 *Federal Register*, Page 27940).

The department has also proposed funding priorities for the National Institute on Disability and Rehabilitation Research. These include projects to involve people who have psychiatric disabilities as consumer advocates in vocational rehabilitation; conduct national studies on job coaches and transition of people with severe disabilities leaving school; start a research rehabilitation center for visually impaired people; and develop technology for older people with disabilities. (July 5 *Federal Register*, Pages 27786-27793.)

ED seeks applications for disability-related funding

Funding is available from the Education Department for several disability-related projects. Approximately $8 million in grants will be awarded to develop statewide demonstration projects for supported employment services. Applications are due Sept. 14. For more information, contact RoseAnn Godfrey, Rehabilitation Services Administration, Room 3225, 400 Maryland Ave. S.W., Washington, D.C. 20202. (July 3 *Federal Register*, Page 27489.)

Additionally, the department will award the following grants to train special education teachers: parent training and information centers ($1.5 million, application deadline Oct. 9); preparation of leadership personnel ($2 million, application deadline Oct. 9); special projects ($1.25 million, application deadline Oct. 9); and grants to state education agencies and institutions of higher education ($7.1 million, application deadline March 12, 1991).

For more information on these grants, contact Angele Thomas, Office of Special Education Programs, Room 3517, 400 Maryland Ave. S.W., Washington, D.C. 20202. (July 13 *Federal Register*, Pages 28874-28875.)

Legislative update

- On July 23 the House passed by voice vote the **Disability Prevention Act**, a bill (H.R. 4039) that would make permanent a national Centers for Disease Control program aimed at preventing disabilities. The bill would authorize $10 million for the program in fiscal year 1991, and $15 million annually in fiscal years 1992-93.
- By a 65-34 margin, the Senate approved on July 18 the **Civil Rights Act of 1990** (S. 2104), a bill that would overturn six recent Supreme Court decisions involving employment discrimination. The bill, which President Bush has threatened to veto, would also expand remedies for job discrimination under Title VII of the 1964 Civil Rights Act to include compensatory and punitive damages. Passage of S. 2104 would expand job bias remedies available to disabled people under the Americans with Disabilities Act, which references title VII.

The companion bill (H.R. 4000) was passed by the House on Aug. 3.

Appeals courts uphold decisions involving interpreters for deaf parents, remedies for military personnel

Two federal appeals courts recently upheld decisions by U.S. District Courts involving Section 504 of the Rehabilitation Act.

In *Rothschild v. Grottenthaler* (Appendix IV:474), the 2nd U.S. Circuit Court of Appeals ruled that deaf parents of hearing students are otherwise qualified under section 504 and thus entitled to interpreters at school-sponsored conferences.

The Rothschilds had sued the Ramapo (New York) Central School District because it would not provide interpreters for parent-teacher conferences about their two children. The parents claimed they were denied an equal opportunity to participate in school activities, in violation of section 504.

School officials contended that they were not required to provide an interpreter because section 504 applies not to the parents but to their children. They said the parents did not come within the definition of "otherwise qualified."

The District Court held for the parents, ruling that the parents were covered by section 504 to the extent that they would participate in school-sponsored events. The appellate court agreed, citing a U.S. Department of Education regulation (34 CFR 104.3(k)) that interprets "otherwise qualified" to include a disabled person "who meets the essential eligibility requirements for the receipt" of "other services."

Other services, the appeals court said, includes parent-teachers conferences. "While the school district is subject to section 504 in providing educational services, that is not the only area in which it must refrain from discrimination on the basis of handicap," the court ruled.

Thus, the court said, the school must provide interpreters for academic and disciplinary conferences it initiates. But if the parents want to participate in voluntary extracurricular activities, they must do so at their own expense.

No private right for armed forces

The 11th U.S. Circuit Court of Appeals upheld a District Court's decision that uniformed service members may not sue the federal government for violations of the Rehabilitation Act.

The plaintiff in this case (*Doe v. Garrett*, Appendix IV:477) was a naval reserve officer who tested positive for the HIV virus (which causes AIDS), but did not show any symptoms of AIDS. He was released from active duty.

The reservist sued, arguing that his release discriminated against his disability. AIDS and infection with the HIV virus are considered disabilities under the Rehabilitation Act. Navy regulations in effect at that time stated that asymptomatic HIV-positive reserve personnel should be "retained in service."

(Subsequently, the Navy's Board for Correction of Naval Records ruled that the Navy's action violated those regulations and it recommended that the plaintiff be given back pay and have his record corrected. The Navy's regulation now states that HIV-positive reserve personnel are ineligible for active duty for periods exceeding 30 days.)

The District Court held that federal employees in general must exhaust administrative procedures under Title VII of the Civil Rights Act before filing discrimination claims under the Rehabilitation Act. Moreover, the court ruled, uniformed military personnel do not have any remedies under the Rehabilitation Act.

The appellate court cited the decision in *Prewitt v. Postal Service* (Appendix IV:146) that federal employees must exhaust title VII administrative procedures before bringing suit under the Rehabilitation Act, and noted that it and other courts have adopted a "military exception" for title VII suits. It would be "incongruous" to give military personnel a private right against the government under the Rehabilitation Act, when other discrimination claims under title VII are prohibited, the court said.

ADA COMPLIANCE GUIDE

Filing Instructions: September 1991

In this month's update you'll find the latest issue of your ADA Monthly Bulletin newsletter. After reading it, the newsletter should be placed behind the "Monthly Bulletins" tab in your manual.

To add the other pages in this month's mailing, follow the directions below, discarding the old pages and adding the new ones as appropriate.

Pages to Remove (Dated)	Pages to Add (Dated September 1991)	Description of Changes
pp. v–xiii (various)	pp. v–xiii	Update to Table of Contents; Current Contents page
Tab 500 Entire tab (various dates)	Tab 500 Entire tab	Update of Tab 500 to reflect final title III regulations

DISCARD THIS SHEET AFTER CHANGES HAVE BEEN MADE

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ADA Compliance Guide

Current Contents as of September 1991

The following is a list of all pages that make up the *ADA Compliance Guide*.

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¶500 Public Accommodations

Title III of the Americans with Disabilities Act (ADA) guarantees disabled people the "full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation" (§302(a)). (See ¶510 for a discussion of what constitutes "public accommodations.")

The legislation and U.S. Department of Justice regulations (28 C.F.R. Part 36 — see Appendix III) are very specific about the scope and meaning of these terms and make it clear that this section is to have wide impact (see Figure 500-A). It is not intended to apply to employment practices because these are covered in Title I of the ADA (see Tab 300).

The terms "full and equal enjoyment" mean that disabled people must be given an equal opportunity to obtain the same results as non-disabled people, be it dining at a restaurant, going to the theater, shopping for groceries, or taking a licensing examination. This does not necessarily require disabled people to achieve the identical result or level of achievement of non-disabled persons. Rather, it is the equal opportunity to achieve or receive the benefit that is protected. For example, a health club could not exclude a person in a wheelchair from an exercise class because he or she could not derive the same result from the class as a non-disabled person.

In ensuring that disabled people have the opportunity to make use of the goods or services provided by a public accommodation or in a commercial facility, the covered entity might have to make structural alterations to the building (see ¶530), or it might be required only to make minor alterations in its policies or procedures (see ¶570). Title III does require that all new public buildings be constructed so that they are accessible to disabled people (see ¶540).

By its specific terms (§304), title III of the act applies to public transportation services provided by private entities (except for air transportation, which is covered by the Air Carriers Access Act). The provisions of title III concerning transportation services (such as charter bus companies or hotel-to-airport vans) are discussed in Tab 400.

Exemptions and Exclusions

Only three kinds of entities are specifically excluded from the definition of public accommodation in Title III of the ADA (§307). Religious entities, including places of worship, are exempt, as are public entities (such as state and local government agencies, which are covered under title II). Similarly, private membership clubs that are exempt under Title II of the Civil Rights Act of 1964 are also exempt, except when they lease space to a public accommodation (§36.102(e)).

Figure 500-A
Prohibitions Against Discrimination in Public Accommodations

GUARANTEE	ACTION PROHIBITED
Opportunity to participate	Denying, either directly or through contractual arrangements, the opportunity to participate in or benefit from goods, services, facilities, privileges, advantages and accommodations.
Equality of benefits and opportunity	Failing to afford, either directly or through contractual arrangements, an individual or class of individuals, based on disability, with an equal opportunity to participate in or benefit from goods, privileges, advantages and accommodations as that afforded others.
No unnecessary differences or separateness	Providing an individual or class of individuals with disabilities, either directly or through contractual arrangements, with benefits, goods, privileges, advantages and accommodations that are separate or different from other individuals unless necessary to achieve equally effective services.
Most integrated setting appropriate	Affording goods, services, facilities, benefits, privileges, advantages and accommodations to an individual with a disability in a way that is not the most integrated setting appropriate.
Non-discriminatory administrative methods	Using standards, criteria or methods of administration, either directly or through contractual arrangements, that have the effect of discriminating on the basis of disability or perpetuate the discrimination of others, who are subject to common administrative control.
Non-discrimination based on association with a disabled person	Denying equal goods, services, facilities, benefits, privileges, advantages and accommodations to an individual because he or she has a relationship or association with a disabled individual.

¶501 Implementing Regulations

As directed by the ADA (§306(c)), the U.S. Department of Justice (DOJ) issued on July 26, 1991, regulations that govern the public accommodations title (56 *Fed. Reg.* 35544–35604). These regulations, which add a new part 36 to Title 28 of the *Code of Federal Regulations*, consist of six parts:

- Part A — General
- Part B — General Requirements
- Part C — Specific Requirements
- Part D — New Construction and Alterations
- Part E — Enforcement
- Part F — Certification of State Laws or Local Building Codes

Included as an appendix to the regulations are the Americans with Disabilities Act Accessibility Guidelines (ADAAG) developed by the Architectural and Transportation Barriers Compliance Board (A&TBCB). The title III rules (§36.406) reference the ADAAG as the accessibility standards for covered entities to follow in barrier removal, alterations and new construction (see ¶560). The U.S. Secretary of Transportation is responsible for issuing regulations to implement the transit provisions of title III (see Tab 400).

Standards for architectural accessibility

The ADA requires new construction and substantial alterations to existing buildings to be accessible to disabled people (see ¶540 and ¶550). On July 26, 1991 (56 *Fed. Reg.* 35408–35542), the A&TBCB issued the ADA Accessibility Guidelines (ADAAG), which the Justice Department adopted in its regulations (§36.406) as the standards for new construction and alterations under title III. The ADAAG are reprinted in Appendix IV.

In developing the ADAAG, the access board attempted to be consistent with existing standards, including its own Minimum Guidelines and Requirements for Accessible Design and the American National Standards Institute's ANSI A117.1, the accessibility standards most commonly used in private construction. ADAAG consists of nine main sections and an appendix, and follows the format and numbering system of the ANSI standards.

Justice included a chart in §36.406 of the regulations to assist entities in determining the requirements for particular facilities. A more detailed discussion of the accessibility standards is in ¶560.

¶502 Effective Dates

For the most part, Title III of the ADA becomes effective Jan. 26, 1992, 18 months after the act was signed (§310(a)). The provisions regarding new construction apply to construction of

Revised Figure 502-A
Implementation of Title III Requirements

Activity Required	Applicable Regulations	Effective Date
"Readily achievable" barriers must be removed	§36.304	Jan. 26, 1992
Reasonable modification must be made to policies, practices and procedures	§36.302	Jan. 26, 1992
Auxiliary aids and services must be provided	§36.303	Jan. 26, 1992
New construction must be accessible	§36.401 and ADA Accessibility Guidelines	For buildings taking first occupancy after Jan. 26, 1993
Alterations to existing facilities must be accessible	§36.402 and ADA Accessibility Guidelines	For alterations begun after Jan. 26, 1992

buildings that will be ready for first occupancy on or after Jan. 26, 1993, 30 months after enactment (§303(a)(1)). Provisions affecting alterations apply to work that begins after Jan. 26, 1992. (See Figure 502-A for a list title III implementation dates.)

Section 36.508(c) of DOJ's title III rules clarifies that vehicles newly purchased or leased by public accommodations not primarily engaged in transportation (such as shuttle buses operated by hotels) must be accessible if the solicitation for purchase or lease was made on or after Aug. 25, 1990. The Jan. 26, 1992, effective date applies for the remaining transportation provisions.

Special exemption for small places of public accommodation

The ADA includes a special provision for small businesses regarding when suits can be brought under the act. While the act is effective for all covered entities (see ¶510), including small businesses, civil suits to enforce the provisions of the ADA cannot be filed against small businesses for six months or one year after Jan. 26, 1992, depending on the size of the business (§36.508(b) of the DOJ regulations).

If a business has fewer than 10 employees and less than $500,000 in gross receipts, then no civil action may be brought for any act or omission prohibited under the act during the first year after the effective date, or until Jan. 26, 1993. If a business has fewer than 25 employees and gross receipts of less than $1 million, then the ban on civil suits extends for six months after the effective date (or until July 26, 1992). This provision was inserted into the law after small businesses expressed concerns in House committee hearings. Amounts collected for sales taxes are not included in determining what constitutes gross receipts under this section.

This provision should not be interpreted as a blanket waiver of applicability of the law during the period when suits are banned. It is clear from the conference report that accompanied the final version of the ADA (H. Rpt. 101-596, p. 81) that small businesses are expected to make "good faith efforts to comply with the act during this additional phase-in period."

The exemption from lawsuits does not apply to new construction or alterations of small businesses (§36.508(b)).

¶503 Structural Accessibility in Public Accommodations

Section 302(b)(1)(A)(i) of the ADA requires that disabled people be given the "opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages or accommodations" of all public accommodations (see ¶510). This means that the goods, services, facilities, privileges, advantages or accommodations must be accessible to individuals with disabilities. The ADA specifically addresses the accessibility of commercial facilities and buildings open to the public (see Figure 503-A). It requires that:

- new structures be constructed so as to be accessible (§303(a)(1); see ¶540);

Figure 503-A
Required Structural Accommodations Under Title III

Covered Area	Applicability	Not Covered	Exceptions	Date Applicable
New construction	Public accommodations and commerical facilities	Residential buildings Railroad cars Private membership clubs Religious organizations	Elevators for structures of 3 stories or less and 3,000 sq. ft. unless Attorney General determines they are necessary	Public accommodations and commercial facilities that will be ready for first occupancy after Jan. 26, 1993
Existing facilities	For major alterations or renovations	Minor remodeling or redecorating	If cost of conforming alteration to accessible guidelines is disportionate to overall cost of alteration	For alterations made after Jan. 26, 1992
Existing facilities	Removal of architectural barriers	Residential buildings Railroad cars Private membership clubs Religious organizations	Only required if "readily achievable"	Jan. 26, 1992
Vehicles (shuttle services)	Private entities that are not in the principal business of transporting people but who operate a fixed-route system with vehicles with a seating capacity in excess of 16 passengers (including the driver)	Aircraft Vehicles with less than 16-passenger capacity	Private entities primarily engaged in business of transporting people are not covered under this section	Vehicles contracted for purchase after Aug. 25, 1990

• structural barriers in existing buildings be removed if readily achievable (§302(b)(2)(A)(iv); see ¶530);

• major renovations in existing structures be made accessible (§303(a)(2); see ¶550); and

• certain newly purchased vehicles used for public transportation be accessible (§303(b)(2)(B)(i) and §304(b); see ¶505 and Tab 400).

¶504 Vehicles

Section 302(b)(2) of the ADA and §36.310 of the regulations address accessibility in transportation services provided by public accommodations that are not primarily engaged in the business of transporting people (see ¶450). This would include hotel and motel airport shuttle services, customer shuttle bus services operated by private companies and shopping centers, student transportation, and shuttle operations of recreational facilities, such as stadiums, zoos, amusement parks and ski resorts. This list is only intended to provide examples of the types of services covered and is not exhaustive.

This section does not apply to private entities that are primarily engaged in the business of transporting people, such as charter bus companies, or to over-the-road buses (see Tab 400). Over-the-road buses are characterized by an elevated passenger deck located over a baggage compartment, according to section 301(5), and all such buses are subject to the requirements of sections 304 and 306 of the ADA.

Section 36.310 of the title III regulations requires public accommodations that offer transportation services to remove transportation barriers in existing vehicles to the extent it is "readily achievable" to do so (see ¶530 for a discussion of readily achievable). This section applies regardless of whether the transportation service offered is "fixed-route" (i.e., operates according to a schedule along a set route) or "demand-responsive" (does not run on a fixed schedule, but instead is dispatched when a passenger requests service).

The installation of hydraulic or other lifts is not required. Also, this section does not cover vehicles provided for employees only (such as employee van pools), although it would apply if employees and customers or clients are served by the same transportation system.

New vehicles

Public accommodations that provide transportation services are obligated under the ADA to ensure that new vehicles are accessible to disabled people, including people who use wheelchairs. Under the act (§302(b)(2)(B)(i)), it discriminatory for entities that offer fixed-route transportation to purchase or lease an inaccessible new vehicle that seats more than 16 people after Aug. 25, 1990.

This requirement also applies to vehicles that carry 16 or fewer passengers. However, an entity may purchase inaccessible vehicles if it can demonstrate that, when viewed in its entirety,

the system ensures a level of service to people with disabilities equivalent to the level of service provided to the general public.

Essentially, this means that a covered entity can purchase an inaccessible vehicle seating fewer than 16 people as long as there are enough accessible vehicles in its fleet to provide equivalent service to disabled patrons. For example, a hotel near an airport that provides a fixed-route shuttle service to the airport need not purchase new vehicles that are accessible, as long as it makes alternative equivalent arrangements for transporting people with disabilities who cannot board the inaccessible vehicles. The hotel could choose to own an accessible vehicle or contract with another hotel that has an accessible vehicle to meet the requirements of this section. (H. Rpt. 101-485, Part 1, p. 40.)

Demand-responsive systems

Section 302(b)(2)(C) of the act includes provisions for private entities that operate demand-responsive systems and that are not in the principal business of transporting people, and that are not subject to the provisions of section 304. The requirements for demand-responsive systems are the same as for fixed-route systems, except that the entity need not ensure that all its new vehicles that carry more than 16 passengers are accessible. It must, however, demonstrate that the system, when viewed in its entirety, provides a level of service to individuals with disabilities that is equivalent to that provided the general public.

The Department of Transportation has issued regulations concerning accessibility of privately operated transportation services. A full discussion is found in Tab 400.

¶505 Accessibility of Examinations and Courses

Section 309 of the ADA and §36.309 of DOJ's regulations require that certain examinations and courses be conducted in a place and manner accessible to disabled people. This includes any examinations or courses related to "applications, licensing, certification or credentialing for secondary or postsecondary education, professional or trade purposes." It is permissible to offer "alternative accessible arrangements" for disabled people (subject to the integrated setting requirement of §36.203), except where to do so would cause an "undue burden" or would fundamentally alter the nature of the goods or services being offered.

This provision complements the title II requirements on licensing and credentialing activities of state and local governments and the Rehabilitation Act (section 504) requirements on licensing and credentialing programs and activities that receive federal financial assistance.

It also closes a gap in coverage by requiring all providers of testing or credentialing to comply with the ADA's requirements. The Justice Department noted in the preamble to the

regulations that Congress included this provision so that disabled people are not "foreclosed from educational, professional or trade opportunities because an examination or course is conducted in an inaccessible site or without needed modifications."

Section 36.309(b)(1)(i) of the title III rules requires a private entity to assure that the results of its examination "accurately reflect an individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual or speaking skills" (except when that is the purpose of the test). Examinations specially designed for disabled people must be offered as often and in as timely a manner and in locations that are as convenient as other examinations (§36.309(b)(1)(ii)).

Entities offering examinations may be required to provide auxiliary aids for people with impaired sensory, manual or speaking skills (§36.309(b)(3)). Auxiliary aids include taped exams, braille or large print examinations and answer sheets, readers or interpreters. Entities are not required to offer auxiliary aids that would fundamentally alter "the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden."

Testing must be offered at an accessible site if possible. If necessary, a private entity offering such examinations must provide alternative comparable testing arrangements, such as testing at home with a proctor, administering the exams orally, or changing in the length of time permitted to complete the exam (§36.309(b)(4)).

In the preamble to its regulations, Justice notes that entities administering examinations can require disabled people to provide advance notice and appropriate documentation of their disabilities and any modifications they may need. Application deadlines, however, must be the same for both disabled and non-disabled people. Testing organizations cannot refuse to accommodate disabled people on the grounds that they are unable to perform the essential functions of the profession for which the exam is given.

Section 36.309(c) of the rules requires modifications to ensure that the place and manner in which courses are given are accessible. Possible modifications that might be required to accommodate disabled students include extending the time for completing the course, permitting oral rather than written delivery of assignments, providing cassettes of class handouts or prepared notes, etc. As with exams, entities that offer courses covered by this section are not required to incur undue administrative burdens or fundamentally alter the nature of the course.

Any alternative arrangements made for disabled people in exams or courses must provide comparable conditions to those provided to others, including lighting and room temperature. For example, an exam cannot be offered to a disabled person in a cold, poorly lit basement if non-disabled people take the test in a warm, bright classroom.

[The next page is Tab 500, Page 19.]

¶510 What Are Public Accommodations?

For purposes of the ADA, a public accommodation is generally a privately owned establishment that makes its services, programs or goods available to the public. The scope of title III is purposely broad to include a wide range of private individuals and businesses that may operate, own, or lease to or from any public accommodation.

The Justice Department title III regulations actually address three types of establishments, with differing requirements based on the nature of the establishment. The first important term is "place of public accommodation," which is an adaptation of the statutory term "public accommodation" (Section 301(7) of the ADA).

Under the title III rules (§36.104), a place of public accommodation is "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of 12 categories. The term "commerce" means travel, trade, traffic, commerce, transportation, or communication —

(A) among the several states;

(B) between any foreign country or any territory or possession and any state; or

(C) between points in the same state but through another state or foreign territory.

The regulations adopt from the statute a list of 12 categories of establishments that constitute places of public accommodation:

(A) an inn, hotel, motel or similar place of lodging (except where there are no more than five rooms for rent and the proprietor lives there);

(B) a restaurant, bar or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center or other sales or rental establishment;

(F) a laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital or other service establishment;

(G) a terminal, depot or other station used for specified public transportation;

(H) a museum, library, gallery or other place of public display or collection;

(I) a park, zoo, amusement park or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate or postgraduate private school, or other place of education;

Figure 510-A
Public Accommodations

Lodging	Eateries	Auditoriums	Public Meeting Places	Stores	Public Services
• hotels • motels • inns • any other similar place of lodging	• bars • restaurants • delis • other places serving food or drink	• theaters • motion picture houses • stadiums • other places of exhibition or entertainment	• auditoriums • convention centers • lecture halls	• bakeries • grocery stores • hardware stores • clothing stores • other similar retail sales establishments	• laundries • banks • barber or beauty shops • travel services • funeral parlors • gas stations • accountants, lawyers • pharmacies • insurance agencies • health care providers • dry cleaners • shoe repair
Transportation	**Public Exhibits**	**Parks**	**Schools**	**Social Services**	**Recreation**
• terminals used for public transportation • bus service • charter transportation • "shuttle" vans	• museums • libraries • galleries • other places of public display or collection	• parks • zoos	• nurseries • private schools: —elementary —secondary —undergraduate —postgraduate	• day care centers • senior citizen centers • homeless shelters • food banks • adoption programs • similar social service centers	• gymnasiums • health spas • bowling alleys • golf courses • similar places of exercise and recreation

Note: The above is not all-inclusive and makes no attempt to list all types of public accommodations, but lists the most common ones.

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course or other place of exercise or recreation.

Congress intended this list to provide examples of establishments that are "public accommodations" and specified that these categories should be interpreted "liberally, consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities" (Sen. Rpt. 101-116, p. 59). Thus tennis courts, swimming pools, beaches, campgrounds, fishing and boating facilities, and the like would be included in the statutory definition, along with bookstores, computer stores and pet stores, even though they are not specifically mentioned (see also ¶211).

A "public accommodation" is a private entity that "owns, leases (or leases to) or operates a place of public accommodation." It is the public accommodation — the store owner, the hotel company, the restaurant franchisee — that is responsible for complying with the general and specific non-discrimination requirements of the title III rules (Subparts B and C — see ¶520 and ¶530).

Public accommodations must also meet the accessibility requirements in subpart D of the rules if they build or alter a place of public accommodation (see ¶540 and ¶550).

Finally, the title III rules address commercial facilities, defined as facilities "(1) whose operations will affect commerce; (2) that are intended for nonresidential use by a private entity;" and are not aircraft, certain railroad rolling stock or facilities expressly exempt from the Fair Housing Act of 1968 (§36.104). Generally, this term covers warehouses, office buildings and other facilities used by employees of a business, but not otherwise open to the public.

Commercial facilities must comply with the regulatory provisions for new construction and alterations, and to the extent that they are also public accommodations, the non-discrimination requirements.

Limited coverage as public accommodations

While a private home is not included within any of these 12 categories, it would be considered a public accommodation if part of the home is open to the public for business. For example, the professional office of a doctor, lawyer or accountant located in a home is considered a place of public accommodation. The rules (§36.207) point out that that office, together with the areas that provide access to it, are subject to the ADA's accessibility requirements, even though it may also be used as a private residence. The rest of the home would not be covered by title III, however.

Similarly, public tours of commercial facilities that are not otherwise considered public accommodations, such as factory or movie production set tours, must be operated in accordance with the ADA.

In the preamble to its title III regulations, Justice specifies that wholesale establishments are considered public accommodations except in cases where they sell exclusively to businesses and not individuals. For example, a company that grows food produce and sells exclusively to food processing plants would not be considered a public accommodation. However, if that farm also operates a roadside stand, the roadside stand would be a sales establishment subject to the ADA. The stand would have to be accessible to disabled patrons and would have to remove access barriers to the extent that is readily achievable to do so, or provide alternative methods of making its produce available to disabled customers (such as delivering produce to a person's car).

Certain entities that are not normally considered public accommodations may become subject to the ADA if they lease space to hold public events. For example, Justice notes, trade associations or performing artists may become public accommodations if they lease space for a convention or performance in a hotel, convention center or stadium. They then would be responsible for providing auxiliary aids (e.g., interpreters or braille programs) for conference attendees or concert-goers.

Accepting donated space does not, however, constitute leasing under the rules. A Boy Scout troop, for example, does not become a public accommodation by accepting donated space in a convention center.

¶511 Exclusions

Certain facilities and programs are excluded from the title III provisions of the ADA because they are already covered under other non-discrimination laws and regulations. Excluded from the definition of public accommodations are establishments operated by federal, state and local governments, since they are not privately operated. The federal government is covered by provisions of the Rehabilitation Act of 1973, as amended. State and local governments are covered by Title II of the ADA.

Similarly, only non-residential entities, or portions of such establishments are covered by this title, because residential facilities are covered by the Fair Housing Act, as amended. For example, the private apartment wing of a large hotel would not be covered by this title (but would be covered by the Fair Housing Act). Further, according to the Senate committee report (Sen. Rpt. 101-116, p. 59), homeless shelters are covered by the ADA only to the extent they are not already covered by the provisions of the Fair Housing Act.

In the preamble to the title III rules, however, Justice notes that a homeless shelter that permits short-term stays and provides social services to its residents would be covered under the ADA either as a "place of lodging" or as a "social service center establishment," or as both.

The last distinction made in title III is in the coverage of private schools, including elementary and secondary schools. The legislative history of the ADA (Sen. Rpt. 101-116, p. 49) and the title III preamble make it clear that such schools are not expected to provide a "free appropriate education" or to develop individualized education programs (IEPs) for students as required by the regulations implementing the Individuals with Disabilities Education Act (formerly the Education for All Handicapped Children Act), unless they are subject to that statute. See ¶120 for a discussion of other federal statutes that prohibit discrimination on the basis of disability.

¶512 Scope of Application of ADA

As noted in ¶510, the title III regulations apply to "public accommodations," broadly defined to include private entities that own, lease, lease to or operate places of public accommodation. Section 36.102(b)(2) clarifies that the non-discrimination requirements (subparts B and C of the rules) only extend to the operations of a place of public accommodation, not to the parts of an entity's operations that are not public accommodations. For example, an employee-only cafeteria at a hotel is not subject to title III.

Public accommodations must comply with the new construction and alterations requirements (see ¶540 and ¶550) only with respect to facilities used or built as places of public accommodations or commercial facilities (§36.102(b)(3)). A nursery, for example, must ensure that a new greenhouse is accessible, but not the new storage shed next to it.

All commercial facilities are subject to the new construction requirements, whether or not they are owned or operated by a public accommodation (§36.102(c)).

Private clubs are generally exempt from this section, but they become subject to the ADA requirements if they make their facilities available to customers or patrons other than their own members (§36.102(e)). For example, a private club that rents space to a day care center that is open to the public incurs the same obligations as any other landlord of a public accommodation with respect to the day care center.

Religious organizations and entities are also exempt from the ADA. Groups that rent space from churches, however, are covered by the act if they operate public accommodations. For example, the requirements apply to a community group that leases a local church hall to run a day care center.

The Justice Department notes in the title III preamble that public accommodations that operate in mobile facilities, such as cruise ships, floating restaurants or mobile health units, are covered by subparts B and C of the rules. Consequently, they are subject to the same non-discrimination requirements as are stationary businesses (see ¶520 and ¶530).

Standards for new construction and alteration of mobile facilities were not included in the ADA Accessibility Guidelines (see ¶560). Therefore, the provisions of subpart D will not be applied to such facilities until specific requirements are developed.

¶513 Landlords and Tenants Under Title III

Section 36.201(b) of the title III regulations clarifies that both a landlord that owns a building that houses a place of public accommodation and the tenant that owns or operates the public accommodation are subject to the ADA's requirements. Allocating responsibility for complying with the various provisions of the act will depend on the terms of the lease or other contractual relationship between the two parties.

Determining who is responsible for ADA compliance — the landlord or tenant — proved to be one of the more difficult issues in developing the regulation. Justice had proposed that landlords be responsible for common areas, and that tenants be responsible for the space they lease. Many commenters to the proposed rule objected to that approach, contending that lease terms are often too complicated to allow such a simple division of responsibility.

As noted above, the final rule leaves all decisions regarding ADA compliance to the lease-negotiation process. If appropriate, however, the common space/leased space arrangement can be a viable approach. Therefore, a landlord would generally be responsible for making readily achievable changes and modifying policies and practices in common areas (e.g., entrances and concourses in shopping malls), while the tenant would be obligated to remove barriers and accommodate customers within its space.

Landlords, Justice notes in the preamble, should not be held responsible for the business practices of a tenant. For example, a restaurant tenant that refuses to seat a disabled patron would be liable for an ADA violation, not the landlord. But if the tenant refused to allow a person with a service dog into the restaurant because the landlord mandates a "no pets" policy, both the tenant and the landlord would be liable for discrimination.

[The next page is Tab 500, Page 27.]

¶520 Discrimination in Public Accommodations

Title III of the Americans with Disabilities Act (ADA) prohibits discrimination against individuals with disabilities in public accommodation (see ¶510). Essentially, §36.202 of the Justice Department regulations provides that individuals with disabilities cannot be denied the opportunity to participate in or benefit from public accommodations; the opportunity offered disabled people must be equal to that offered non-disabled people; and the participation or benefit cannot be offered separately, unless that is the only effective way that a disabled person can participate in the program.

Putting this basic concept of non-discrimination into practice, the Department of Justice title III rules require the following in regard to public accommodations:

- People with disabilities must be served by or admitted to public accommodations (§36.201).
- A person cannot be denied the services or goods of an establishment because he or she has an association or a relationship with a disabled person (§36.205 — see ¶523).
- If the policies, practices or procedures of an establishment have the effect of excluding disabled people, reasonable modifications to those policies, practices or procedures must be made unless they would fundamentally alter the nature of the business (§36.302 — see ¶571).
- Auxiliary aids and services must be provided to enable a person with a disability to use and enjoy the goods or services of an establishment as long as the provision of the auxiliary aids does not pose an undue burden or is not disruptive to business (§36.303 — see ¶572).
- Barriers to accessibility in existing buildings must be removed if the removal is readily achievable (§36.304 — see ¶530).
- If a building is inaccessible to disabled people and removal of the barriers is not readily achievable, alternative methods must be used to serve disabled people if such methods would not impose an undue burden (§36.305 — see ¶532).
- Examinations and courses for professional or educational applications, testing, licensing, credentialing or certification purposes must be accessible to disabled people (§36.309 — see ¶505).
- New buildings must be constructed so that they are accessible to and usable by disabled people (§36.401 — see ¶540).
- In buildings undergoing renovations, the renovated areas, and under some circumstances the path of travel and certain related facilities, must be accessible to disabled people (§36.402 and §36.403 — see ¶550).

Transportation companies

Privately operated entities that are primarily engaged in the business of transporting people (except by air), such as charter bus services, are prohibited from denying to individuals with disabilities the full and equal enjoyment of their services. This includes using criteria that tend to screen out individuals with disabilities or failing to make reasonable modifications, provide auxiliary aids or services, or remove barriers. These entities are also prohibited from purchasing or leasing new buses to provide public transportation services that are not accessible, unless they can prove they provide an equal level of service to disabled individuals. The requirements of title III concerning transportation companies are discussed more fully in Tab 400.

Equal opportunity vs. equal treatment

The ADA (§302(b)(1)(C)) requires that equal opportunity be provided, not merely equal treatment, to eliminate discrimination. In fact, identical treatment may itself constitute discrimination in some cases, because it would not provide disabled people the adjustments or accommodations they need to achieve equal opportunity. Different or separate treatment is permitted only where it is necessary to ensure equal opportunity and truly effective benefits and services. For example, a blind attorney could not take the same bar examination that non-disabled people take because it is written; the test must be provided in an alternative manner (perhaps orally or on audio tape) for the individual to have the same opportunity provided to non-disabled individuals.

¶521 "Most Integrated Setting" Required

Section 36.203(a) of the title III rules requires "goods, services, privileges, advantages, accommodations, and services" to be afforded to an individual with a disability in the "most integrated setting appropriate to the needs of the individual." Even though separate or different programs or activities may exist that comply with this section, individuals with disabilities may not be precluded from participating in programs or activities that are not different (§36.203(b)). The purpose of this requirement is to allow individuals to participate in existing programs and activities (i.e., those in which non-disabled people are participating) to the extent that a person is capable and desires to do so, and not restrict their participation to separate programs.

Accommodations or adjustments that are made for one disabled person may not be necessary or desirable for another who has a similar disability. Similarly, separate programs or activities that may be required to ensure equal opportunity for one disabled person may not be appropriate for another person with a similar disability.

Also, individuals should be free to participate in programs or activities with only slight modifications or adjustments, even in cases where major modifications are made for other people.

example, a sidewalk curb is not constructed with the intention of keeping people who use wheelchairs off the sidewalk, but unless appropriate curb cuts are included, it has the effect of discriminating against such disabled people. Section 36.204 of the regulations specifies that:

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.

This section prohibits discrimination against disabled people through contracts or other arrangements that might attempt to relieve the covered entity from responsibility under the ADA. Basically, it prevents entities from indirectly doing anything that they may not do directly under the terms of the law. So, for example, an entity may not permit a subcontractor or insurance carrier to use standards that would have the effect of discriminating against disabled individuals.

This "disparate impact" standard was incorporated to ensure that the legislative mandate to end discrimination does not "ring hollow," and is consistent with the Supreme Court's interpretation of Section 504 of the Rehabilitation Act (see ¶122) in *Alexander v. Choate*, 469 U.S. 287 (1985) (see Appendix V:5).

In *Choate*, disabled Medicaid recipients in Tennessee charged that the state's limitation on days of hospitalization covered in its Medicaid program violated section 504. The Court concluded that at least some unintentional discrimination caused by the disparate impact of an administrative standard can support a court challenge by those who were discriminated against. However, it ruled that such discrimination alone does not automatically mean that the discrimination is prohibited. Title I of the ADA, which governs employment discrimination, contains parallel provisions (see ¶335).

The disparate impact test is limited, however, by subpart C of the regulations in cases of necessity (§36.301(a) — see ¶525); safety (§36.301(b) — see ¶528); fundamental alteration (§36.302(a) — see ¶571); the readily achievable standard (§36.304(a) — see ¶531); and where the modification would cause undue burden (§36.303(a) — see ¶573).

¶523 Discrimination Based on Relationships With Disabled People

The ADA extends its protection to able-bodied individuals or entities who are discriminated against because they have a relationship with a disabled person. Section 36.205 of the title III rules states:

A public accommodation shall not 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.

This section covers, for example, situations where an individual is denied access to a public accommodation because a companion is known to have a communicable disease, or where services are denied to a family because a child is disabled. Similarly, a day care center cannot refuse admission to a child because her brother is infected with the HIV virus. A health care provider who serves disabled patients is protected from discrimination because of his professional association with those disabled patients. This is similar to the employment provision in Section 102(b)(4) of the ADA (see ¶310), which would prohibit an employer from refusing to hire an applicant solely because his wife is disabled and he might be required to miss work to care for her.

The Attorney General has made it clear that the protection of this section is not limited to family members of a disabled person. Therefore, if a restaurant refuses to seat a person with cerebral palsy and his or her companions, the companions have an independent right of action under the ADA (§36.205).

¶524 Criteria That Tend to Screen out Disabled People

The ADA prohibits any eligibility criteria that would tend to screen out disabled people, unless those criteria are necessary. According to section 36.301 of the rules, a public accommodation is prohibited from imposing or applying:

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.

Thus, it is discriminatory for an entity to impose requirements on disabled people that tend to burden them or limit their participation. Examples might include a restaurant that seats individuals with Down syndrome only at the counter, not in the dining room, a theater that requires a person who uses a wheelchair to have an adult attendant at all times, or a golf course that bars deaf persons from playing golf.

The title III regulations further prohibit policies or criteria that diminish a disabled person's chances to participate, even though they do not directly bar them. For example, consider the drugstore that refuses to accept checks to pay for prescriptions unless the purchaser presents a driver's license; no other form of identification is accepted. While this is not a criterion that mentions or identifies disability, it tends to screen out many disabled individuals because they are not eligible for and do not have licenses due to their visual impairments or other disabilities.

Consequently, it denies them access to the service available to other customers, and, therefore violates this §36.301(c).

Public accommodations are prohibited from unnecessarily identifying disabilities. For example, a department store could not ask on a credit application if a person has epilepsy or mental illness. A public accommodation, however, can impose neutral criteria necessary to safely operate its program even if those criteria do tend to screen out individuals with disabilities (§36.301(b)). Height restrictions for amusement park rides and a swimming proficiency requirement for boating or rafting trips are examples of permissible criteria, as long as such requirements are based on actual risks, not on speculation or stereotypes about people with disabilities.

While a public accommodation may not impose burdens on a disabled person that it does not require of others, such as requiring the company of an attendant (§36.301), it is *not* required to provide assistance in feeding, toileting or dressing a disabled patron or to furnish personal devices, such as eyeglasses or a wheelchair (§36.306).

Finally, public accommodations cannot charge disabled patrons for the costs they incur in barrier removal, alternatives to barrier removal, reasonable modifications, or the provision of auxiliary aids to make their premises accessible and usable (§36.301(c)). Refundable deposits for the use of specialized equipment (such as a deposit on assistive headphones in a theater) would not be considered surcharges and are allowed under this section.

Charging disabled customers for home delivery of goods is allowed, as long as the service is not provided as an alternative to barrier removal. If the store provides other alternatives, such as free curb, sidewalk or carry-out service, then it can charge for home delivery in accordance with its delivery pricing policies.

¶525 Reasonable Modifications and Undue Burden

Section 302(b)(2)(A)(ii) of the ADA requires entities to make "reasonable modifications" to their policies, practices or procedures to enable disabled people to enjoy all the goods, services and other opportunities they provide unless to do so would "fundamentally alter" the nature of those goods, services, facilities, privileges, advantages or accommodations or would pose an undue burden. These concepts are discussed fully in ¶570.

¶526 Accessibility

Sections 302(b)(2)(A)(iv) and 302(b)(2)(A)(v) of the ADA require covered entities to remove structural, architectural, communications and transportation barriers that would keep disabled people from using the goods or services of the entity, as long as the removal of the barriers is "readily achievable." If the removal of the barriers is not readily achievable, the entity must

provide alternative methods of making goods and services available. Any alterations or renovations must provide for access and use by disabled people. Barrier-removal provisions of the ADA are discussed more fully in ¶530.

¶527 "Direct Threat" to Health or Safety

Section 36.208 of the title III rules specifically states that public accommodations are not required to provide services to individuals who pose a direct threat to the health or safety of others. The term "direct threat" means a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."

This standard is a codification of the test applied by the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) (see Appendix V:2). In that case, a teacher with tuberculosis was dismissed from her job after a relapse of the disease. The Court held that an individual with a contagious disease is an "individual with handicaps" under Section 504 of the Rehabilitation Act (see ¶122) and is entitled to a determination whether the disease poses a direct threat to the safety or health of others.

As the title III rules stress, this determination may not be based on generalizations or stereotypes. Instead, public accommodations are required to (§36.208(c)): make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications or policies, practices, or procedures will mitigate the risk. (See also ¶242).

This provision establishes a strict standard that must be met before a person with a disability can be denied or before that person can be excluded from participation. However, under this standard, a person who uses a threatening or violent manner can be denied service in a public establishment — even if the behavior is the result of a disability — after making the requisite individual assessment. For a discussion of a similar provision that applies to employment situations, see ¶310.

Justice points out in the preamble to the regulations that the direct threat provision does not apply to people with short-term conditions, such as colds or the flu. These conditions are not disabilities under the ADA and, therefore, people suffering from them are not entitled to the act's protection.

¶528 Illegal Drug Use

Section 36.209 of the title III rules does not prohibit discrimination against people who *currently* use illegal drugs, although the standard for judging whether usage is "current" is not

clearly defined by those regulations. The conference report on the ADA (H.Rpt. 101-596) looked to whether the illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current, or that continuing use is a real and on-going problem.

Addiction to drugs is considered a disability under the ADA, and public accommodations may not discriminate against people who do not currently use illegal drugs and who:

- have successfully completed a drug rehabilitation program;
- are participating in a supervised drug rehabilitation program; or
- are erroneously regarded as engaging in drug use. (§36.209(a)(2)).

Further, health care providers and drug rehabilitation services cannot deny their services to an individual on the basis of current illegal drug use if that person is otherwise entitled to their services (§36.209(b)(1)). However, such programs can deny treatment to people who use illegal drugs while participating in their programs (§36.209(b)(2)). Many drug rehabilitation programs make non-use of drugs a condition of treatment.

This section does not prohibit a public accommodation from administering reasonable drug testing procedures to ensure that a former user is not currently using illegal drugs (§36.209(c)(1)).

¶529 Insurance

Sections 36.212(a) and 36.212(b) of the title III rules provide that the ADA does not restrict insurance companies and employers from underwriting, classifying or administering risks in insurance practices, as long as they do not evade the non-discriminatory purposes of the ADA. Public accommodations, however, cannot refuse to serve people with disabilities because of limits on their insurance coverage or rates (§36.212(c)).

While these sections specifically permit exclusions from coverage based upon legitimate safety concerns and classification of risks, it is also clear that any exclusion on the basis of disability must be based on permissible criteria, not on the terms of an insurance contract. For example, a person who is blind cannot be denied insurance coverage based on his blindness independent of actuarial risk classification. Similarly, insurance policies can be offered that limit coverage for certain procedures or treatments, but cannot entirely deny coverage to a person with a disability.

These provisions apply to unjustified discrimination in all types of insurance provided by public accommodations, including automobile, life and health insurance.

[The next page is Tab 500, Page 39.]

¶530 Removal of Architectural Barriers

The Americans with Disabilities Act (ADA) requires public accommodations to remove architectural and communications barriers (including barriers that are structural in nature) in existing facilities if such removal is "readily achievable" (§302(b)(2)(A)(iv)). This includes communications barriers that are an integral part of the physical structure of a facility, such as barriers posed by permanent signage or alarm systems, the failure to provide adequate sound buffers, or the presence of physical partitions that hamper the passage of sound waves. It does not include the obligation to provide communications equipment and devices that are more appropriately included as auxiliary aids and services (¶572).

¶531 "Readily Achievable" Barrier Removal

The term "readily achievable" is defined in §36.104 of the title III rules as "easily accomplishable and able to be carried out without much difficulty or expense." Factors to consider in determining whether an alteration is readily achievable include:

(1) the nature and cost of the action needed;

(2) the overall financial resources of the site(s) involved in the action; the number of persons employed at the site, the effect on expenses and resources, legitimate safety requirements necessary for safe operation, including crime prevention measures, or the impact of such action on the operation of the site;

(3) the geographic separateness and the administrative or fiscal relationship of the site(s) in question to the parent corporation or entity;

(4) if applicable, the overall financial resources of any parent corporation or entity, the number of employees of the parent corporation or entity, and the number, type and location of its facilities; and

(5) if applicable, the type of operation(s) of the parent corporation or entity, including the composition, structure and functions of the workforce of the parent corporation or entity.

These factors are also considered in determining whether a reasonable accommodation required in title I imposes an undue hardship on an employer (see ¶251), or whether providing an auxiliary aid or service causes an "undue burden" (see ¶573) on a public accommodation. However, the "readily achievable" standard requires less of a public accommodation than undue burden. If a public accommodation can demonstrate that barrier removal cannot be readily achieved, then it is not required, even if it might not result in an undue burden.

The obligation to remove readily achievable barriers does not extend to areas of a facility that are used by employees only.

Figure 531-A
Justice Department Examples of Steps To Remove Barriers*

CONDITION	APPROACHES
MOBILITY IMPAIRMENTS	• Install ramps • Make curb cuts in sidewalks and entrances • Reposition shelves • Rearrange tables, chairs, vending machines, display racks and other furniture • Reposition telephones • Widen doors • Install offset hinges to widen doorways • Eliminate a turnstile or provide an alternative accessible path • Intall grab bars in toilet stalls • Rearrange toilet partitions to increase maneuvering space • Insulate lavoratory pipes under sinks to prevent burns • Install a raised toilet seat • Install a full-length bathroom mirror • Reposition the paper towel dispenser • Create designated accessible parking spaces • Install a paper cup dispenser at a water fountain • Remove high pile, low density carpeting • Install vehicle hand controls
VISUAL IMPAIRMENTS	• Add raised marking on elevator control buttons
HEARING IMPAIRMENTS	• Install flashing light alarms

*These examples are incuded in §36.304(b) of DOJ's title III regulations.

Figure 531-B
Examples of Non-Structural Ways to Make Goods and Services Accessible*

CONDITION	APPROACHES
VISUAL IMPAIRMENTS	• Use large-letter signs • Remove displays or other objects in path of travel • Use "talking" calculators (or computers) • Raise low-hanging signs or lights • Increase frequency of existing oral announcements • Make optical magnifiers available • Install entrance indicators such as strips of textured material near doorways, elevators, etc. • Tape texts/menus • Have servers or sales clerks read menus or price tags
HEARING IMPAIRMENTS	• Provide written notice of oral announcements • Train employees in basic sign language • Provide small sound amplifiers for telephones • Purchase telecommunication devices for the deaf (cost can be $75 and up) • Rearrange work stations toward co-workers • Provide paper and pencils at sales counters • Improve sight lines by replacing oval tables with round tables
MENTAL/COGNITIVE IMPAIRMENTS	• Use large-letter signs • Use simple words or illustrations on signs • Color-code materials • Replace written job testing with on-the-job tryouts or verbal exams

*These may involve some minor alterations to a structure.

Figure 531-B (Continued)
Examples of Non-Structural Ways to Make Food and Services Accessible

CONDITION	APPROACHES
TACTILE/READING IMPAIRMENTS	• Use "Lazy Susans," which allow people to rotate equipment without reaching • Buy automatic electric staplers • Attach items or equipment with velcro

What the "readily achievable" standard means for any particular public accommodation depends on all the circumstances. The rules provide no numerical formula or cost threshold to distinguish between what is and is not readily achievable. Instead, such decisions must be made on a case-by-case basis.

For example, a small facility might have to place a ramp over one or two steps, add a grab bar, or install a paper cup dispenser to make a water fountain more accessible, but might not be required to make major modifications such as long ramps or completely remodeled rest rooms, if those changes could not be easily accomplished without much expense.

This requirement is deliberately designed to be flexible, depending on the size of the business. What can be easily accomplished by a large business might be impossible or tremendously costly for a small one. The ADA explicitly mandates that the size and the nature of the business be taken into account in determining what is readily achievable. Figure 531-A, taken from §36.304(b) of the title III rules, is a partial list of barrier removals that can be considered readily achievable (Figure 531-B provides other examples not included in the DOJ rules).

The ADA refines the concept of readily achievable to explicitly take into account the resources of a small, local facility (i.e. site-specific factors), as well as the resources of any parent company, and includes a provision that courts must consider the effect on the "expenses and resources" of the operation of a local facility in determining whether an action is readily achievable (§301(9)(b) of the act; H.Rpt. 101-485, Part 2, p. 109).

In the preamble to the title III regulations, however, the Justice Department makes clear that factors concerning parent-entity relationships must be considered on a case-by-case basis.

Standards for barrier removal in existing facilities differ from those in new construction, given the costs of making facilities accessible to disabled people. Renovating existing facilities to provide access could prove very costly, so a lesser degree of access is required than in the case of new construction or alterations, where accessibility can be economically incorporated in the initial stages of design and construction (§36.401–§406 of the regulations).

For example, to permit access to people who use wheelchairs, a restaurant could rearrange tables and chairs, or a department store might adjust its layout of display racks and shelves or widen aisles, as long as these actions could be carried out without much difficulty or expense and would not result in a significant loss of selling or serving space (§36.304(f)). But a place of public accommodation would not be required to provide extensive ramping or an elevator to provide access around a flight of steps. In small restaurants or stores, readily achievable changes might involve installing small ramps or grab bars in rest rooms.

It might be readily achievable for a bank with existing automatic teller machines (ATMs) to provide a small ramp to avoid a few steps, but raising or lowering the ATMs might be too difficult or expensive

On the other hand, an ATM at a newly constructed bank would have to be "readily accessible to and usable by" people with disabilities, since the costs of providing that access could be economically included in the design and construction of the bank. (See ¶540 for a discussion of new construction requirements.)

The Justice Department makes it clear that public accommodations have an ongoing obligation to remove architectural barriers and should recognize that what is not initially readily achievable may later be required because of changed circumstances. While not required, the department urged public accommodations to develop a procedure to assess ongoing compliance with barrier removal requirements, including consulting with individuals with disabilities or disability organizations, to diminish the threat of litigation and identify the most efficient means of providing access.

Justice recommends (but does not require) that public accommodations develop an implementation plan to achieve compliance before Jan. 26, 1992. If appropriately designed and carried out, such plans could be evidence of a good-faith effort to comply with the readily achievable provision, the department said.

Public accommodations must maintain facilities and equipment that are required to be readily accessible to people with disabilities (§36.211). Such maintenance is obviously important to providing access, but it may be even more critical where safety equipment is concerned. This does not mean that isolated or temporary breakdowns are prohibited, but such conditions cannot

linger. For example, it would be prohibited under the rules to keep an elevator that provides essential access for people in wheelchairs out of service for two months.

Priorities for barrier removal

Recognizing that adequate resources may not be available to remove all barriers at one time, the Justice Department sets out priorities for barrier removal in the title III regulations (§36.304(c)) to determine which types of barriers should be addressed first. According to the department, "the purpose of these priorities is to facilitate long-term business planning and to maximize, in light of limited resources, the degree of effective access that will result from any given level of expenditure."

(1) Physical access to a facility is listed as the first priority. "Getting through the door" from public sidewalks, public transportation and parking areas is preferable to any other barrier removals that might be made.

(2) The next priority, once patrons have gained access to the facility, is to provide access to areas where the goods and services are made available to the public. Thus, customers with disabilities should be given access to the customer service areas and the retail display areas in a store.

(3) The third priority is to make rest room facilities accessible when they are offered on "more than an incidental basis." For example, in restaurants and shopping centers where patrons generally use restrooms, it is important for people with disabilities to be able to use the facilities equally. In some types of facilities (including dry cleaners, convenience stores, video stores, etc.) patrons infrequently have access to rest rooms, if at all. In those cases the priority to make rest rooms accessible would not apply.

(4) The fourth priority mandates public accommodations to take any other measures necessary to remove any other remaining barriers. Generally, alterations or other measures taken by a public accommodation to comply with the barrier removal requirements must also comply with the requirements for alterations in §36.404–§36.406. However the "path of travel" requirements (see ¶550) will not be triggered by measures taken solely to remove barriers.

Section 36.304(d)(2) of the rules provides some flexibility to public accommodations where the measures needed to remove a barrier would not be readily achievable. In such cases, the public accommodation may take other steps that do not fully comply with the accessibility requirement. For example, a public accommodation could install a ramp with a steeper slope or widen a doorway that does not quite meet the alterations requirements. However, "no measure shall be taken . . . that poses a significant risk to the health or safety of individuals with disabilities or others."

Portable ramps may be used where installation of a permanent ramp is not readily achievable. Section 36.304(e) of the rules requires that portable ramps include safety features such as nonslip surfaces, railings, anchoring and strength of materials.

Section 36.304(g) specifies that the degree of barrier removal required of public accommodations may be less than, and need not exceed, the standards for alterations under the ADA Accessibility Guidelines (ADAAG — see ¶560 and Appendix IV). The barrier removal standard is intended to be substantially less rigorous than that for new construction or alterations. Consequently, a hotel would not be required to remove access barriers in a higher percentage of guest rooms than is mandated by the ADAAG.

¶532 Alternative Services

If barrier removal is not "readily achievable," §302(b)(2)(A)(v) of the ADA specifies that the public accommodation must "make such goods, services, facilities, privileges, advantages or accommodations available through alternative methods, if such methods are readily achievable."

The title III rules (§36.305) list examples of alternative methods of providing services, including providing curb service or home delivery, retrieving merchandise from inaccessible shelves or racks, and relocating activities to accessible locations.

Alternative methods could also include:

- having a clerk meet a disabled patron at the door to pick up or drop off dry cleaning;
- allowing a disabled patron to be served beverages without dinner at a table, even though non-disabled people who order only drinks are served only at an inaccessible bar;
- providing assistance to retrieve items from an inaccessible location, such as a store clerk helping a disabled patron reach merchandise on high shelves;
- delivering prescription and non-prescription pharmacy orders;
- rotating movies in a multi-theater building between an accessible first-floor screening room and an inaccessible second-floor theater, with advance public notice of the movie's location in advertisements; or
- filling a gas tank at inaccessible self-service gas stations.

Public accommodations cannot charge customers or clients with disabilities for these additional services that are used as an alternative to barrier removal.

Section 36.306 states that public accommodations are not obligated to provide "personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; or services of a personal nature including assistance in eating, toileting or dressing."

¶533 Communications Barriers

Individuals who are blind or deaf face communications barriers in addition to the physical barriers that challenge many individuals with mobility impairments. Section 302(b)(2)(A)(iv) of the act requires the removal of communications barriers if the removal is "readily achievable" (see ¶530). If the removal of the barriers is not readily achievable, a public accommodation is required to provide the good or service through "alternative methods" if they are available (§302(b)(2)(A)(v)).

Removing many communications barriers requires only sensitivity and a logical approach to problem solving to meet the needs of each individual. Grocery stores that routinely place temporary advertising displays in the aisles should consider that a vision-impaired person could be injured by such an obstacle.

Similarly, doors that may lead to stairs, fire escapes, janitorial closets, stages, catwalks, etc., should be clearly marked, and made tactilely different, if possible, to alert a blind person of potential danger if entered. Doorways in office buildings should be clearly marked on either side with raised-letter or braille numbers or letters to designate room numbers and office names. Such tactile signs should be mounted low enough to be "read" by individuals in wheelchairs.

Some of the barriers faced by individuals who are blind or deaf, however, can be life-threatening. For example, fire alarms that ring in a hotel go unheard by deaf people. For that reason, warning alarms in public buildings should include both visible and audible signals. (The visual alarms must be set so that they do not trigger seizures in people with epilepsy.) In addition, hotel facilities should make an effort to individually notify disabled individuals of emergency situations and help them exit the facility if required.

Another significant communication barrier that disabled people face involves information exchange, says the House and Senate committee reports on the ADA. One of the cornerstones of our free society, and of equal opportunity and access, is access to time-sensitive print information and news. With the tremendous changes in information technology, federal agencies charged with implementing the ADA will take a special interest in information dissemination and technical assistance programs.

¶534 Who Bears the Cost?

The general prohibitions restricting public accommodations from discriminating against people with disabilities apply to any private entity that owns, leases or leases to, or operates a place of public accommodation. This broad language, as noted in section 36.201(a) of the title III rules, covers sublessors and management companies, as well as the landlords and tenants of buildings that house public accommodations.

Recognizing that both parties may have some measure of legal responsibility to share these burdens, the rules (§36.201(b)) state that landlords and tenants can determine the responsibility for removing readily achievable barriers by lease or other contract. The parties are free to allocate these responsibilities as they choose.

One suggested approach is to allocate responsibilities according to the type of space involved. For example, a landlord would generally be responsible for making readily achievable changes and providing auxiliary aids and services in common areas and for altering policies, practices or procedures that apply to all tenants. Tenants, on the other hand, would generally be responsible for removing any readily achievable barriers within their premises, as well as providing auxiliary aids or services and modifying policies, as permitted by the landlord, and paying for those changes.

For example, in a medical office building, the tenant that operates a doctor's office logically would be responsible for removing furniture or temporary walls within the office, if readily achievable, to permit access. The landlord would be responsible for making readily achievable modifications to the entrance of the building and the common areas, such as installing a ramp or making curb cuts, adding raised or braille lettering to elevator buttons, providing signs with large letters, or lowering lobby telephones.

However, if a landlord withholds permission to make architectural changes, then the responsibility to remove barriers would fall back on the landlord.

While the final rule leaves allocation of responsibilities to lease negotiations, Justice notes that landlords should not be held accountable for discriminatory acts by a tenant. For example, if a restaurant refuses to seat a patron, the restaurant should be held accountable for the discriminatory policy, not the landlord. Similarly, the tenant and the landlord share responsibility to modify a "no pets" rule to allow service animals to enter the restaurant with a disabled patron.

¶535 Tax Credits for Barrier Removal

As part of the Omnibus Budget Reconciliation Act of 1990 (OBRA '90), Congress created a new tax credit to assist certain small businesses in complying with the ADA. During the debate over the act, small business groups sought expanded tax credits as a fair exchange for not being exempted from the public accommodations provisions.

OBRA '90 gives small business owners an annual tax credit to cover expenses incurred from making their facilities and programs accessible to disabled people. Eligible businesses may claim a tax credit equal to 50 percent of the "access expenditures" between $250 and $10,250 they incur to comply with the ADA. Only businesses earning less than $1 million during the taxable year and employing 30 or fewer full-time workers are eligible for the credit.

Specifically, the law allows a business to recover one-half the costs of:

- removing architectural, communication, physical or transportation barriers that make a business inaccessible;
- providing qualified interpreters or other effective methods to make aural materials available to hearing-impaired people;
- acquiring or modifying equipment and devices for disabled individuals; and
- providing "other similar services, modifications, materials or equipment."

The access credit is limited to the taxable year, and unused portions from one year cannot be carried over to the next. It does not apply to costs incurred from new construction.

Existing tax deduction reduced

OBRA '90 reduced from $35,000 to $15,000 an existing tax deduction which all businesses can take to cover the costs of removing architectural barriers from their facilities (Internal Revenue Code §190(c)). This includes changes made to buildings, equipment, walkways, roads and parking lots, and also applies to businesses that make their public transportation vehicles accessible to disabled riders.

For an expense to be deductible, it must meet standards established by the Internal Revenue Service. In general, the expense must be incurred for removing barriers that:

- pose a substantial barrier to disabled people;
- affect at least one major class of disabled people (such as blind, deaf or wheelchair-using people); and
- are removed without creating new barriers.

In addition, for the expense to be deductible, the removal of barriers must conform to detailed qualification standards to ensure accessibility.

Deductions must be claimed in the year that alterations are made and cannot be claimed for new construction or complete renovation. For more detailed information on the existing tax deductions, order "Tax Information for Handicapped and Disabled Individuals," IRS Publication No. 907, from your local IRS office, or call 1-800-424-FORMS.

[The next page is Tab 500, Page 55.]

¶540 New Construction

The Americans with Disabilities Act (ADA) requires all non-residential construction that will be used for public access by patrons, clients or employees to be accessible to disabled people. Subpart D of the Justice Department's title III regulations (§36.401(a)) addresses new construction and alterations. It requires public accommodations and commercial facilities that will be ready for first occupancy after Jan. 26, 1993, to be designed and constructed so that they are "readily accessible to and usable by individuals with disabilities" (see ¶541), unless an entity can demonstrate that it is structurally impracticable to do so.

Section 36.406 cites the ADA Accessibility Guidelines (ADAAG — see ¶560 and Appendix IV) developed by the Architectural and Transportation Barriers Compliance Board as standards that should be followed for accessible new construction.

"Commercial facilities" are defined in §36.104 as facilities that are intended for non-residential use and whose operations will affect commerce. Commercial facilities would include warehouses and office buildings used only by employees, as opposed to public accommodations, which are open to the public. Structures subject to the Fair Housing Act of 1968, as amended, aircraft and certain railroad cars and locomotives are specifically excluded from the definition.

This part of the law is purposefully broad to ensure that all new facilities built are accessible to all individuals. For example, office buildings, factories and other places where employees will work come within the scope of this section. Over time, accessibility will become the rule, not the exception. A new facility is subject to subpart D if the last application for a building permit or permit extension is certified to be complete (or received) by a state or local government after Jan. 26, 1992, and if the certification for first occupancy is issued after Jan. 26, 1993 (§36.401(a)(2)(i–ii)).

Anticipatory discrimination

The ADA provides remedies to a disabled person who has "reasonable grounds" to believe that he or she is about to be subjected to discrimination in new construction (§308(a)(1)). This would apply if a disabled person discovered that the plans for a new covered facility (e.g., a medical complex) did not include any accessible features (e.g., elevators, ramps to entrances, visual fire alarms). See §36.501(a) of the title III rules, which includes the provisions for preventive relief in cases of anticipatory discrimination, and Tab 600, which discusses in general the ADA's enforcement and penalties provisions.

¶541 "Readily Accessible to and Usable by Individuals with Disabilities"

The phrase "readily accessible to and usable by" has been applied in the Architectural Barriers Act of 1968, the Fair Housing Amendments Act of 1988 and the regulations implementing Section 504 of the Rehabilitation Act. It is also included in the standards used by federal agencies and private industry: the Uniform Federal Accessibility Standards (UFAS) and the American National Standards Institute (ANSI) standards for buildings and facilities.

Essentially, the Justice Department notes in the preamble to the title III regulations, the term means that patrons and employees of public accommodations and commercial facilities must be able to approach, enter and use the facility easily and conveniently. It does not necessarily require every part of every area of a facility to be accessible, but it does require a high degree of accessibility, including access to a primary entrance, parking areas, accessible routes into and from the facility, usable bathrooms and water fountains, and access to the goods, services and programs of the facility. For a store, this means that patrons can reach the store, enter it, and reach the areas where goods are sold. For employees, the same degree of access is required to allow a path of travel around the work area and adequate space to use office furniture and equipment.

A facility that is constructed to meet the ADAAG standards will be considered to comply with the rule. However, a private entity, through its policies or practices, could render an otherwise "accessible" building inaccessible and thus violate section 302 of the ADA. For example, if the only accessible entrance were open only during limited hours, or if a wheelchair user were required to get a special key to operate a lift, people needing those services would be restricted in violation of the ADA. Similarly, it would violate the ADA to limit a person in his or her choice of a range of hotel or restaurant accommodations.

The ADA does not require all bathroom stalls or parking spaces to be accessible, but it does require that a reasonable number of such facilities be accessible, depending on factors such as their use, location and number. For example, ADAAG requires that a certain percentage of check-out lanes in a supermarket be wide enough to accommodate wheelchairs. (Examples of ADAAG scoping requirements for specific situations are provided in Figure 541-A.)

However, the House and Senate committee reports that accompanied the ADA (Sen. Rpt. 101-116, p. 69; H. Rpt. 101-485, Part 2, p. 118) point out that when the facilities involved do not serve identical functions, then each facility must be made accessible.

Individual workstations need not be constructed to be accessible or be outfitted with fixtures to make them accessible. Modifications such as this would be required as a form of reasonable accommodation to the needs of a specific individual with a disability who applies for a specific job, and would be governed by the undue hardship standard (see ¶251).

However, the ADAAG standards require all employee work areas to be constructed so that individuals with disabilities can approach, enter and exit the area. Further, employee lounges, cafeterias and other common areas must meet the accessibility requirements.

For instance, in building a hotel, the act requires full access to the public and common-use areas. All doors and doorways must allow passage into and within all hotel public rooms and public bathrooms for individuals in wheelchairs. Similarly, a percentage of each class of rooms must be accessible, and should include grab bars in baths and at toilets, as well as accessible counters. Hotels must also install audio loops in meeting areas, emergency flashing lights and alarms, braille or raised letter words and numbers in elevators, and handrails on stairs or ramps (Sen. Rpt. 101-116, p. 70; H. Rpt. 101-485, Part 2, p. 118).

The act does not mandate that unusual spaces such as catwalks and furnace rooms be made accessible.

Because it is always less expensive to make a new building accessible than to modify it later, public accommodations are urged to give consideration in new construction to placing fixtures and equipment at a convenient height for accessibility if it would not affect the usability or enjoyment by the public.

Congress recognized the ease with which accessibility can be accomplished in the design and construction stages and did not limit the accessible new construction provisions to commercial facilities of any specific size or with any specific number of employees. The rationale for this is that small businesses can grow into large ones, or property might later be leased or sold to a larger covered entity.

Commercial facilities in private residences

Section 36.401(b) of the regulations applies to commercial facilities that are located in private residences. Just as public accommodations located in private residences are subject to the new construction and alterations requirements, newly constructed areas for use exclusively as a commercial facility, or for use as both a commercial facility and a private residence, are also required to be accessible. This includes areas used to enter the commercial facility, such as the front sidewalk and doorway, hallways, bathrooms, and any other areas used by employees or visitors (§36.401(b)(2)).

¶542 Exceptions

Section 36.104 of the rules exempts the following types of structures and facilities from the definition of "commercial facilities": residential structures subject to the Fair Housing Act of 1968 (42 U.S.C. §3601–§3631), aircraft or railroad rolling stock covered in Section 242 of the

ADA, and railroad rights of way. Also, Section 304(c) of the Act specifically exempts historical or antiquated rail cars or stations. The ADA's provisions affecting rail cars and stations are discussed more fully in Tab 400.

Structural impracticability

Section 36.401(c) provides an exemption from the new construction requirements to entities that can demonstrate that it is structurally impracticable to make a new building fully accessible. Congress intended this narrow exception to apply only in those rare circumstances where the terrain poses unique building problems, such as a building constructed on stilts. This is consistent with the provisions of the Fair Housing Amendments Act of 1988, which has a similar narrow exemption for special site considerations. In the preamble to the title III regulations, the Justice Department specifically excludes hilly terrain or areas with steep grades from this section.

However, if a new facility cannot be made entirely accessible, the portions that can be made accessible must comply (§36.401(c)(2)). Thus, a building on stilts (due to marshland terrain), while unable to be ramped or at grade level for people with mobility impairments, could still be accessible to vision- or hearing-impaired people (§36.401(c)(3)).

Elevators

Elevators do not need to be installed in buildings that have fewer than three stories or have less than 3,000 square feet per story (§36.410(d)). Thus a two-story office building is not required to install an elevator even if it has 5,000 square feet per floor. Similarly, a five-story office building with 2,800 square feet on each floor qualifies for the exemption.

Shopping centers, shopping malls and professional offices of a health care provider are not entitled to the elevator exemption, even if they fall within the space requirements. Shopping centers and malls are defined in the rules (§36.401(d)(ii)) as a building with five or more sales or rental establishments or a series of buildings on a common site with five or more sales or rental establishments.

Additionally, public transportation stations and airport passenger terminals must have elevators (§36.401(d)(2)(ii)). All common areas in these terminals or stations that are open to the public must be located on an accessible route from an accessible entrance.

Although certain facilities are specifically exempt from the elevator requirement, this exemption does not limit their obligation to comply with the other accessibility requirements under the ADA (§36.401(d)(3)). And if an entity installs an elevator, the elevator must meet accessibility standards.

[The next page is Tab 500, Page 65.]

¶550 Alterations to Existing Structures

Section 303(a)(2) of the Americans with Disabilities Act requires that if "alterations that affect or could affect the usability of the facility" are made in an existing facility, they must be made so that "to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities." Essentially, this provision applies the ADA's principles of accessibility in new construction (see ¶540) to alterations of an existing commercial facility made after Jan. 26, 1992. (Section 36.402(a)(2) of the Justice Department's title III rules specifies that physical alterations which begin after that date will trigger the requirement).

The provision does not require alterations; it applies only when "a facility is altered by, on behalf of, or for the use of an establishment" (§303(a)(2) of the act). The title III rules (§36.402(b)) define this as "a change to a public accommodation or commercial facility that affects or could affect the usability of the facility or any part thereof." This includes "remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions" (§36.402(b)(1)). Alterations such as installing new floors, relocating electrical outlets or plumbing controls, replacing heating systems that requires other changes, and relocating or replacing door and other hardware would trigger the requirement if they affect the usability of the facility.

Minor remodeling or redecorating changes such as painting or papering walls, replacing ceiling tiles, re-roofing, normal maintenance, asbestos removal, changes to mechanical systems, and other similar modifications that do not affect the usability of the facility do not trigger the access requirements (§36.402(b)(1)). This view is consistent with requirements under the Rehabilitation Act and Architectural Barriers Act (see ¶121).

Each element or area that is altered must comply with the ADA Accessibility Guidelines (ADAAG — see ¶560 and Appendix IV). If full compliance with this part is impossible, the facility must provide the maximum feasible accessibility (§36.403(c)). Any altered parts or features of the facility that can be made accessible must be made so. For example, it may be impossible to make alterations accessible to people who use wheelchairs, but not for people with visual impairments.

"Anticipatory" discrimination

The ADA provides remedies to a disabled person who has "reasonable grounds" to believe that he or she is about to be discriminated against regarding renovations of existing public accommodations or commercial facilities. This would apply if a disabled person discovered that a

covered establishment, such as a movie theater, was renovating its facilities and did not plan to make its rest rooms accessible (§36.501).

¶551 Primary Function Areas

When alterations are made to an area that contains a "primary function" of the facility, then, "to the maximum extent feasible," the ADA (§303(a)(2)) requires that that the "path of travel to the altered area and the bathrooms, telephones and drinking fountains serving the altered area" must also be made readily accessible.

The title III rules (§36.403(b)) define primary function as "a major activity for which the facility is intended." Areas covered by this include customer service lobbies, dining areas, meeting rooms and viewing galleries, as well as other offices and work areas where the activities of the public accommodation or entity are carried out. The concept is similar to the Uniform Federal Accessibility Standards (section 3.5) provision addressing "the rooms or spaces in a building or facility that house the major activities" (Appendix IV).

Alterations that affect the usability of a primary function include remodeling a merchandise display or employee work areas in a department store, replacing inaccessible flooring in the customer service or employee work areas of a bank, redesigning the assembly line area of a factory, or installing a computer center in an accounting firm (§36.403(c)(1)).

Path of travel

If these types of alterations are made to a primary function area, the "path of travel" requirements are triggered. For example, if a shoe store located in a shopping center completely remodels its display and customer service area, it would have to make the path of travel leading to the area accessible. However, a tenant's alterations do not trigger path of travel obligations for a landlord — the requirement would not extend to the rest of the mall (unless that, too, was being altered).

Section 36.403(e) of the rules defines path of travel as: a continuous, unobstructed way of pedestrian passage by means of which an altered area may be approached, entered, used, and exited; and which connects an altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility.

This may include walks and sidewalks, pedestrian ramps (including curb ramps) clear floor paths through lobbies, halls, rooms, and other areas, parking access aisles, elevators, or a combination of these items. It is analogous to the "accessible route" and "circulation path" concepts in UFAS (section 3.5). For purposes of the ADA, "path of travel" also includes rest rooms, telephones and drinking fountains that serve altered areas (§36.403(e)(3)).

As an example of how the primary function standard might apply, it would violate the ADA to alter a bank lobby by installing automated teller machines (ATMs) and fail to make them

readily accessible to and usable by disabled people. Even though a person with a disability could conduct business inside the bank, the ATMs provide an additional primary function that must be accessible.

Areas that do not contain a primary function might include mechanical rooms, boiler rooms, supply storage rooms, janitorial closets, employee lounges and locker rooms, entrances and rest rooms. However, a rest room at a roadside rest stop could be considered a primary function of the facility and would have to be accessible (§36.403(b)).

¶552 Disproportionate Costs

Congress recognized that conforming path-of-travel alterations to accessibility guidelines could produce substantial additional costs, and that in comparison with the total alteration undertaken, the costs could render the requirement unreasonable. Consequently, the ADA (§303(a)(2)) does not require alterations to the path of travel or the bathrooms, telephones and drinking fountains serving the altered area if they would be "disproportionate to the overall alterations in terms of cost and scope."

The Justice Department regulations (§36.403(f)) specify that alteration costs will be considered disproportionate if they exceed 20 percent of the total cost of the alteration. The following can be included in calculating the cost of providing an accessible path of travel:

- costs of making an entrance and route accessible (ramping, doorway widening);
- costs of making rest rooms accessible (installing grab bars, enlarging toilet stalls, insulating pipes, installing accessible faucet controls);
- costs of providing accessible telephones; and
- costs of relocating inaccessible drinking fountains.

Even if the cost of meeting the access requirements is disproportionate to the total alteration cost, the commercial facility or public accommodation must still provide whatever accessible features are not disproportionate. The goal is to provide as many of the accessible features as possible without exceeding the "disproportionate" limit.

Where choices must be made, alterations that provide the greatest use of the facility should be selected (§36.403(g)(2)). For example, an accessible bathroom would have greater priority than an accessible drinking fountain; an accessible entrance is the most important of the path of travel features. Even if the path of travel cannot be made accessible, rest rooms, drinking fountains and telephones should be made accessible for individuals with disabilities who can negotiate steps but who may need other features to use the facilities, such as grab bars.

Commercial facilities and public accommodations cannot perform a series of small alterations to avoid the access requirements if those alterations could have been performed at the same time.

In that situation, the total cost of the alterations made during the past three years can be considered in determining whether the cost of providing an accessible path of travel, restrooms, etc., is disproportionate (§36.403(h)(2)). Only alterations undertaken after Jan. 26, 1992, can be considered in determining whether the cost of providing an accessible path is disproportionate.

As with new construction, elevators generally are not required in alterations of facilities with fewer than three stories or less than 3,000 square feet per story, or where the cost to install the elevator would be disproportionate in cost and scope to the cost of the total project (§36.404)). Elevators are required, however, if the building is a shopping center or mall, the professional offices of a health care provider, a terminal, depot or other public transportation station or an airport passenger terminal, unless the cost of installing an elevator is disproportionate to the total cost of the project.

¶553 Who Bears Responsibility for Alterations?

Many public accommodations today are operated from leased or rented spaces. Congress considered which of the parties involved in a particular public accommodation should be responsible for providing access when alterations are made, recognizing that either the landlord or the tenant may have the legal obligation to ensure accessibility, depending on the contract or other agreement between them (see ¶534).

For example, under some rental agreements, the tenant may be permitted to make certain alterations to the premises without approval of the landlord. Other contracts might prohibit the tenant from making alterations. In most cases, the landlord has full control over the public and common areas of the facility and is obligated to make those areas accessible. Consequently, the contract or lease usually spells out who has the legal authority for making alterations of rented or leased premises readily accessible.

Section 36.403(d) of the rules clarifies that if alterations are made by a tenant to leased premises that would trigger the path of travel requirements, only the entity that is undertaking the renovations or alteration is subject to the accessibility requirements. The example in ¶552 of a shoe store that makes alterations to leased premises in a shopping mall applies here as well. The landlord will not be responsible for modifying the path of travel in other areas of the mall unless renovations are also being made to the common areas of the mall.

¶554 Historic Preservation

Section 36.405 of the regulations specifies that when alterations are made to properties eligible for listing in the National Register of Historic Places or are designated as historic under state or local law, priority must be given to providing physical access to people with disabilities

by complying with the ADA Accessibility Guidelines (ADAAG — see ¶560 and Appendix IV). However, where it is impossible to make a historic property fully accessible without threatening or destroying its historic features, those facilities must still incorporate as many accessible features into the alterations as possible (§36.405(b)).

[The next page is Tab 500, Page 75.]

¶560 Accessibility Standards

To ensure that new construction and major renovations are accessible to disabled people as required by Title III of the Americans with Disabilities Act (ADA), it is necessary for public accommodations to follow established building standards for accessibility. The Justice Department incorporated as an appendix the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG), which were developed and issued by the Architectural and Transportation Barriers Compliance Board (A&TBCB).

Thus, the ADAAG serve as the standards for accessible design under title III. (The Justice Department's regulations are reprinted in Appendix III of the *ADA Compliance Guide*, and the ADAAG are reprinted in Appendix IV.)

¶561 History of the Accessibility Standards

The Architectural Barriers Act of 1968 required that any facility designed, constructed, leased or altered by the federal government or with the use of federal funds be accessible to physically disabled people. It authorized the administrator of the U.S. General Services Administration to prescribe standards for the design, construction and alteration of buildings to ensure whenever possible that physically disabled people have ready access to, and use of, such buildings.

Under the Rehabilitation Act Amendments of 1978, the A&TBCB was authorized to issue accessibility guidelines and requirements under the Architectural Barriers Act. These minimum guidelines, known as the Minimum Guidelines and Requirements for Accessible Design (MGRAD), were published Aug. 11, 1982.

The MGRAD served as the basis for uniform accessibility standards that were issued in August 1984 by four federal agencies with extensive construction responsibilities — the Departments of Defense and Housing and Urban Development, the General Services Administration and the U.S. Postal Service. These Uniform Federal Accessibility Standards (UFAS) specify the technical design and construction requirements to ensure accessibility in federal and federally supported construction, and are now the accepted standards under the Architectural Barriers Act (see Appendix IV).

The UFAS standards meet or exceed the requirements in the A&TBCB's minimum guidelines and also include features from the American National Standards Institute (ANSI) standard for buildings and facilities. The ANSI standard had been the acceptable standard for compliance with Section 504 of the Rehabilitation Act, which prohibits discrimination in federally assisted programs and activities. UFAS has, for all practical purposes, replaced ANSI as the section 504 standard.

Figure 561-A
User's Guide to ADA Accessibility Guidelines*

	Subparts A-D	ADAAG
Application, General.	36.102(b)(3): public accommodations. 36.102(c): commercial facilities. 36.102(e): public entities. 36.103 (other laws). 36.401 ("for first occupancy"). 36.402(a) (alterations).	1, 2, 3, 4.1.1.
Definitions.....	36.104: commercial facilities, facility, place of public accommodation, private club, public accommodation, public entity, religious entity. 36.401(d)(1)(ii), 36.404(a)(2): shopping center or shopping mall. 36.401(d)(1)(i), 36.404(a)(1): professional office of a health care provider. 36.402: alteration; usability. 36.402(c): to the maximum extent feasible.	3.5 Definitions including, addition, alteration, building, element, facility, space, story. 4.1.6(j), technical infeasibility.
New Construction: General.....	36.401(a) General. 36.401(b) Commercial facilities in private residences. 36.207 Places of public accommodation in private residences.	4.1.2. 4.1.3.
Work Areas.....		4.1.1(3).
Structural Impracticability.	36.401(c).....	4.1.1(5)(a).
Elevator Exemption.	36.401(d)..... 36.404.....	4.1.3(5).
Other Exceptions.	.....	4.1.1(5), 4.1.3(5) and throughout.
Alterations: General.	36.401(b): commercial facilities in private residences. 36.402..... 36.403.....	4.1.6(1). 4.1.6(2).
Alterations Affecting an Area Containing A Primary Function; Path of Travel; Disproportionality.		
Alterations: Special Technical Provisions.	.....	4.1.6(3)
Additions.....	36.401-36.405.....	4.1.5.
Historic Preservation.	36.405.....	4.1.7.
Technical Provisions.	.....	4.2 through 4.35.
Restaurants and Cafeterias.	.....	5.
Medical Care Facilities.	.....	6.
Business and Mercantile	.....	7.
Libraries.....	.....	8.
Transient Lodging (Hotels, Homeless Shelters, Etc.)	.....	9.
Transportation Facilities.	.....	[10, Reserved].

*Reprinted from §36.406 of the title III regulations.

The ADAAG now serves as the standard for compliance with the accessibility requirements in Title III of the ADA. Sections 1–3 contain general provisions and definitions. Section 4 contains the scoping provisions and technical specifications applicable to all covered buildings and facilities, and incorporates most of the illustrations and text of the ANSI standard A117.1. Sections 5–9 contain special requirements for restaurants, medical facilities, businesses, libraries and lodgings. The ADAAG should be used in conjunction with subpart D of the regulations. A chart is included in §36.406 of the regulations (and reprinted as figure 561-A) to assist users in determining the requirements for a particular facility.

¶562 Historic Properties

Section 504(c) of the ADA addresses historic properties and adopts by reference Section 4.1.7 of the UFAS in regard to alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities. The ADAAG follows this section as well.

A qualified historic building or facility is defined as a building or facility eligible for listing on the National Register of Historic Places, or deemed as historic under state or local law. For purposes of the ADA, the accessibility provisions of Part 4 of the ADAAG apply to qualified historic buildings or facilities.

The Advisory Council on Historic Preservation will determine if compliance with the requirements of ADAAG part 4 (for accessible exterior and interior routes, ramps, entrances, toilets, parking, and displays and signage) would threaten or destroy the historic nature or significance of a particular building (§4.1.7(1)(b)). This is done on a case-by-case basis.

The "special application provisions" of ADAAG Section 4.1.7(2) can be followed to make accessible alterations if the advisory council makes a written determination that alterations required by part 4 would threaten or destroy a particular historic property.

Alterations to buildings on state or local historic registers (but not on the national register) must comply with the minimum requirements in ADAAG Section 4.1.7(2).

¶563 Certification of State and Local Building Codes

Entities should also consult state barrier-free laws and local building codes when renovating or constructing new facilities. If state standards are more strict than those prescribed by the federal standard, the state standards apply. Information concerning a state's accessibility requirements can be found by contacting state offices such as the state architect, division of vocational rehabilitation or governor's commission or council on the disabled. (See Tab 700 for a discussion of state disability laws.)

Under the ADA (§308(b)(1)(a)(ii)), the U.S. attorney general (after public hearing and consultation with the A&TBCB) can certify that state and local building codes meet the accessibility and usability requirements in title III of the act. If a code is certified, compliance with the ADA can be assured simply by meeting the certified code.

Certification process

Subpart F of the Justice Department's title III regulations spells out in some detail the process states and localities must follow to have their building codes certified as meeting the ADA's accessibility requirements.

Under §36.602 of the regulations, the assistant attorney general for civil rights at the Justice Department has the authority to certify that a state or local building code meets or exceeds the ADA's minimum accessibility requirements for public accommodations and commercial facilities. The department will not accept requests for certification until after Jan. 26, 1992.

Before filing for certification, a "submitting official" (defined in §36.601 as the state or local official responsible for administering a building code and filing a request for certification) must take several initial steps. As outlined in §36.603(b), the official must:

(1) provide adequate public notice that the jurisdiction intends to file for certification;

(2) make copies of the proposed request available to the public; and

(3) hold a hearing locally (on the record, with transcripts, and although not stipulated in the regulations, presumably at an accessible site) to obtain input from the public about the request.

Once these steps are taken, the official can submit an application, in duplicate, to the Justice Department. Under §36.603(c), the application must include:

- the text of the jurisdiction's code, the law creating and empowering the submitting agency, any manuals or technical materials explaining the code, and any formal opinions of the state attorney general or chief local legal official pertaining to the code;
- any model code or statute on which the local code is based, including an explanation of any differences between the two;
- a transcript of the public hearing; and
- any additional information the submitting officer wishes to include. The Justice Department may request additional information as well.

Preliminary determinations

After receiving an application for code certification from a state or local government, the Justice Department (in consultation with the Architectural and Transportation Barriers Compliance Board) can take either of two initial steps — a preliminary determination of equivalency or a preliminary determination to deny certification.

If the department decides to give a preliminary certification, it must publish a notice in the *Federal Register*, giving the public 60 days to provide comments on whether a final certification should be issued (§36.305(a)). The department will then hold a hearing in Washington, D.C., to give people the opportunity to express their opinions on the proposed certification. After all of this information is processed, the department (in consultation with the A&TBCB) will make a final determination on whether or not to approve the application and publish its decision in the *Federal Register*.

The Justice Department can also make a preliminary determination to deny certification (in the notice of denial, the department may offer ways in which the code could be amended to qualify for certification). A jurisdiction denied certification will have 15 days to submit data, views or arguments to support its application. Justice is not required to take further action if the jurisdiction fails to submit any materials, but will review any information that is submitted and make another determination.

Effect of certification

Certifications are only effective for those features or elements that are both (1) covered by the certified code and (2) addressed by the standards against which equivalency is measured (§36.607). This means, for example, that if children's facilities are not addressed in the ADA standards, and the building in question is a private elementary school, certification will not be effective for parts of the building used by children. And if the ADA regulations address equipment but the local code does not, the building's equipment would not be covered by the certification.

Code certification applies only to the edition of the code that is submitted (§36.607(b)). Any subsequent changes made to the code will not be covered by the certification, but the jurisdiction can apply to have the amended portions certified (§36.607(c)).

Certifications will not cover instances in which a state or local building official in a jurisdiction with a certified code waives a particular accessibility requirement for a new facility. According to Justice, "certification of a code is effective only with respect to the standards in the code; it is not to be interpreted to apply to a state or local government's application of the code."

Model codes

Finally, the regulations (§36.608) address model building codes. Model codes are nationally recognized documents, produced by private entities, that state or local governments use in developing their building codes. States and municipalities typically incorporate model codes, with or without amendments, as their particular standards. Organizations that develop model codes include the American National Standards Institute (ANSI), Building Officials and Code Administrators International (BOCA) and the Board for the Coordination of Model Codes (BCMC).

Model code organizations can apply to the Justice Department to review their codes concerning whether and to what extent they are consistent with the ADA's requirements. Because many state and local governments rely on model codes, such guidance will help state and local building officials determine the extent to which their codes meet the ADA's standards.

[The next page is Tab 500, Page 85.]

¶570 Reasonable Modifications to Policies, Practices and Procedures

Title III of the Americans with Disabilities Act (ADA) states that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation" (§302(a)). While this involves the removal of structural barriers (see ¶530) so that disabled people have physical access to goods and services, the law goes far beyond that to require that the policies and procedures of places of public accommodations be free of discrimination. Section 36.302 of the Justice Department's title III regulations requires public accommodations 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.

Modifications are not considered reasonable and do not have to be made if they would alter the fundamental nature of the goods or services being provided or if making them would place an undue burden on the public accommodation (see ¶573).

Taken together, the requirement to modify policies and procedures (see ¶571) and a requirement in §36.303 to provide "auxiliary aids and services" to remove communication barriers (see ¶572) embody the same concept as "reasonable accommodation" in the employment setting (see ¶250 and ¶330).

¶571 Modifications to Policies and Practices

The ADA requires places of public accommodation to make "reasonable modifications" to their policies, practices and procedures to enable disabled people to have access to all the goods, services and other opportunities they provide, unless those modifications would "fundamentally alter" the nature of the goods or services being provided. Many of these modifications entail simple policy changes, such as:

- permitting (but not requiring) a mobility-impaired patron of a restaurant or lounge to be served only beverages at a table, even though the facility's policy is to serve customers who are not ordering food only at the inaccessible bar;
- allowing patrons to produce alternate proof of identity or age, rather than requiring a driver's license, when writing personal checks or purchasing alcoholic beverages;
- modifying a department store policy to allow a disabled person to be accompanied into a dressing room for assistance;

- modifying a parking garage policy barring vans with raised roofs if a wheelchair user operating such a van wishes to park in the facility and overhead structures are actually high enough to accommodate the height of the van;
- adopting a hotel policy of keeping an accessible room unoccupied until a disabled person arrives to check in, assuming a proper reservation was made; or
- recognizing that a child with a mobility impairment can participate in a recreation class with non-disabled children, rather than requiring the child to attend a similar class for mobility-impaired children.

In addition to these suggested methods, the regulations (§36.302(d)) specifically require stores with check-out aisles to ensure that an adequate number of accessible aisles is kept open during store hours. If this is not possible, the store must change its policies in other ways to provide a comparable level of service for its disabled customers. One possibility would be to allow people in wheelchairs to use the one accessible aisle, normally reserved for express service, to make all their purchases.

Public accommodations are expected to examine their policies, procedures and practices and eliminate barriers to equal program access. They are not, however, required to make modifications to policies that would "fundamentally alter" the nature of the goods and services or that would cause an "undue burden" (see ¶573). For example, the Justice Department explains in the preamble, a museum would not be required to modify its policy of not allowing patrons to touch delicate works of art for a person who is blind if the touching would threaten the integrity of the work.

Nor are public accommodations required to alter inventory to stock special or accessible items that they do not normally carry (§36.307). A bookstore would not be required to stock or order books in braille if it does not do so in the normal course of its business. But it would have to order a braille book if it normally makes special orders for unstocked goods, and if the braille book could be obtained through its normal supplier.

A public accommodation is allowed to refer disabled people to other businesses if the customer is seeking a service it does not normally provide or specialize in (§36.302(b)). For example, a physician could refer a disabled person to another physician if she would normally refer other, non-disabled patients with the same condition to another physician or if the patient's disability itself raises complications requiring the expertise of a different practitioner (§36.302(b)(2)). Similarly, a drug rehabilitation clinic could refuse to treat a person who was not a drug addict, although it could not refuse to treat a person who is a drug addict simply because the patient tests positive for the HIV virus.

Section 36.302(c) of the title III rules requires public accommodations to permit disabled people to be accompanied by a service animal unless to do so would fundamentally alter the

nature of the goods and services provided or would jeopardize operational safety. This includes guide dogs, signal dogs or any other animals specially trained to guide a person with disabilities. The facility need not, however, make provisions for the supervision or care of the animal, even if the owner and dog are separated.

¶572 Auxiliary Aids and Services

A public accommodation must provide auxiliary aids and services to disabled people if necessary for the disabled person to use the entity's goods or services (§36.303). However, the auxiliary aids and services would not be required if they would "fundamentally alter" the nature of the goods or services, or if they would result in an undue burden (see ¶573).

As defined in section §36.303(b) of the regulations, "auxiliary aids and services" include:

(l) qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices and systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDDs), videotext displays, or other effective methods of making aurally 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 actions.

The list is not meant to be exhaustive, but provides general guidance on the responsibilities public accommodations face under this section. Entities should consult with the disabled individual before providing a particular aid or service, because he or she may only require a simple adjustment or aid.

The fundamental consideration implicit in this section is a public accommodation's duty to effectively communicate with all its customers, clients, patients or participants who have impaired hearing, vision or speech. In §36.303(c) of the title III regulations, Justice incorporates language from the section 504 regulations that requires appropriate auxiliary aids be furnished where needed to ensure effective communication. The most advanced, expensive technology is not required, as long as effective communication is ensured.

For example, providing materials in braille or large print is an option under the ADA. However, a restaurant need not provide braille menus for blind patrons if a waiter or other person could be available to read the menu. Similarly, stores need not make all price tags or books in braille, or lower all shelves so that an individual who uses a wheelchair can reach all the items,

as long as a salesclerk can assist a customer by reading prices and titles or retrieving unreachable items.

In another example, an establishment need not automatically assume that a deaf person needs an interpreter. The deaf person may not know sign language or may prefer the greater privacy afforded by note writing, as opposed to having an interpreter present. Interpreter services involve a cost, whereas note writing does not. Thus, some costs may be avoided by checking with the disabled person.

If an interpreter is provided, the interpreter must be qualified to provide interpretive services. This means the interpreter "is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary" (§36.104).

It is important to determine whether the communication is effective. For example, note writing may not be effective in a doctor's office, where major issues such as decisions about surgery are discussed, or in a wide range of other areas involving complicated health, legal or financial matters. Yet even in such cases, it is possible that a computer terminal where messages can be exchanged may be an effective means of communication.

Not every blind person can read braille. Therefore, audio recordings might be necessary to effectively communicate visually delivered materials. Some equipment or devices may require modification to make them effective for visually impaired persons. For example, a museum that provides audio cassettes and tape players for guided tours of the museum may have to add braille or raised-letter labels to the buttons on some of their tape players so a blind person could operate them.

In the preamble to the title III regulations, the Justice Department strongly encourages consultation with disabled people to determine what specific auxiliary aids or services they might require. It also emphasized that public accommodations are obligated to secure aids and services that are effective and appropriate where necessary.

Public accommodations are not permitted to apply surcharges to people with disabilities to cover the costs of providing these auxiliary aids or services. However, they are allowed to impose refundable deposits on items.

Auxiliary aids for people with hearing impairments

Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments must be provided under title III. "Other effective methods" could include telephone handset amplifiers, telephones that are compatible with hearing aids, telecommunication devices for deaf persons (TDDs), closed or open captions and decoders (see Figure 572-A). The extent to which public accommodations must provide these auxiliary aids depends on the nature and type of services offered.

Figure 572-A
Summary of Assistive Listening Devices

System	Advantages	Disadvantages	Typical Applications
Induction Loop Transmitter: Transducer wired to induction loop around listening area. Receiver: Self-contained induction receiver or personal hearing aid with telecoil.	Cost-effective Low maintenance Easy to use Unobtrusive May be possible to integrate into existing public address system. Some hearing aids can function as receivers.	Signal spills over to adjacent rooms. Susceptible to electrical interference. Limited portability Inconsistent signal strength. Head position affects signal strength. Lack of standards for induction coil performance.	Meeting areas Theaters Churches and temples Conference rooms Classrooms TV viewing
FM Transmitter: Flashlight-sized worn by speaker. Receiver: With personal hearing aid via DAI or induction neck-loop and telecoil; or self-contained with earphone(s).	Highly portable Different channels allow use by different groups within the same room. High user mobility Variable for large range of hearing losses.	High cost of receivers Equipment fragile Equipment obtrusive High maintenance Expensive to maintain Custom fitting to individual user may be required.	Classrooms Tour groups Meeting areas Outdoor events One-on-one
Infrared Transmitter: Emitter in line-of-sight with receiver. Receiver: Self-contained. Or with personal hearing aid with DAI or induction neckloop and telecoil.	Easy to use Insures privacy or confidentiality Moderate cost Can often be integrated into existing public address system.	Line-of-sight required between emitter and receiver. Ineffective outdoors Limited portability Requires installation	Theaters Churches and temples Auditoriums Meetings requiring confidentiality TV viewing

Original Source: National Institute on Disability Research and Rehabilitation, U.S. Department of Education.

Reprinted from ADA Accessibility Guidelines (see Appendix IV).

Where establishments offer the opportunity to make outgoing calls on more than an incidental basis, as in hotels and hospitals, a similar opportunity should be afforded for hearing-impaired customers. Section 36.303(d) of the regulations mandates that such establishments "make available, upon request, a TDD for the use of an individual who has impaired hearing or a communication disorder." Similarly, where entry into a place of public accommodation requires use of a security entrance telephone, a TDD or other effective aid must be provided. Thus hospitals, hotels and other similar establishments must provide TDDs upon request because they offer the opportunity to non-disabled patrons to make outgoing calls on a regular basis.

This does not mean, however, that individual retail stores, doctors' offices, or restaurants (or other similar establishments that do not rely as much on telephone contact) must provide TDDs. Hearing-impaired individuals will be able to make inquiries, appointments or reservations at these types of establishments through the relay system to be established under Title IV of the ADA (see ¶270).

While open-captioning of feature films shown in movie theaters is not required by the ADA, film makers are encouraged to produce and distribute open-captioned versions of films. Theaters are also encouraged to show captioned versions of films on a pre-announced basis. However, Justice points out in the preamble that public accommodations must make information imparted through films and slide shows available to people with disabilities. This would include historical presentations at museums, places of historical interest, tourist information centers and the like. Captioning is one means of making information accessible to people with disabilities.

The regulations (§36.303(b)(3)) contemplate the acquisition and modification of equipment or devices to provide auxiliary aids or services. A hotel conference center may need to provide portable or permanent assistive listening systems. Museums may have to attach brailled adhesive labels to buttons on tape players used for audio-guided tours. The regulations also require hotels, hospitals and other places of lodging that provide televisions in more than five guest rooms to also provide, on request, a means of decoding captions for hearing impaired clients or patients (§36.303(e)).

¶573 Undue Burden

Auxiliary aids and services must be provided by public accommodations unless it would result in a "fundamental alteration" in the nature of the goods and services offered (see ¶570) or would create an "undue burden" (§36.303(f)). The term "undue burden" is similar to the term "undue hardship" which is used in the employment-related provisions of Title I of the ADA; this concept is taken from the regulations governing Section 504 of the Rehabilitation Act and is generally defined in the regulations as "significant difficulty or expense" (§36.303(a) and §36.303(f)). (See ¶251 for a more detailed discussion of these concepts.)

Essentially, the question of whether providing auxiliary aids or services imposes an "undue burden" is to be determined on a case-by-case basis. Some factors to be considered include (§36.104):

(1) the nature and cost of the action needed;

(2) the overall financial resources of the site(s) involved in the action; the number of persons employed at the site; the effect on expenses and resources, legitimate safety requirements that are necessary for safe operation, including crime prevention, or the impact of the action on the operation of the site;

(3) the geographic separateness, and the administrative or fiscal relationship of the site(s) in question to any parent corporation or entity;

(4) if applicable, the overall financial resources of any parent corporation or entity; the number of employees of the parent corporation or entity; and the number, type, and location of its facilities; and

(5) if applicable, the type of operation(s) of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

Even though provision of a particular auxiliary service or aid would be unduly burdensome for the entity, it may still be required to furnish an alternative auxiliary aid, if available, that would not result in such a burden (§36.303(f)). Public accommodations are not required, however, to provide "customers, clients or participants with individually prescribed devices, such as prescription eyeglasses or hearing aids, or with services of a personal nature including assistance in eating, toileting or dressing" (§36.306).

As technological advances enhance the options available to individuals with disabilities in the future, public accommodations will be expected to provide auxiliary aids and services that would no longer pose an undue burden.

[The next page is Tab 600, page 1.]

AMERICANS WITH DISABILITIES ACT

ADA COMPLIANCE GUIDE

MONTHLY BULLETIN

Vol. 2, No. 11 November 1991

Local governments unaware, confused about ADA employment requirements

A sleeper issue has emerged from the morass of ADA regulations issued last July. Local government officials, particularly those from small cities and towns, face a fast-approaching, federally imposed mandate to make all their programs, facilities and activities — including employment — accessible to disabled people.

The problem, according to local government interest groups and leaders, is that many small-town officials aren't even aware that the requirement exists.

All programs are covered

Title II of the Americans with Disabilities Act requires public services to be accessible to disabled people. The law, which becomes effective Jan. 26, 1992, applies to all state and local governments, agencies and departments regardless of size, and to all programs they offer.

Included in this coverage is employment. When the U.S. Justice Department issued its regulations to implement title II last July (see August 1991 *Monthly Bulletin*), it made clear that state and local governments cannot discriminate against their disabled employees and job applicants. This means that public agencies must make all employment practices — from hiring to wages and benefits — accessible to disabled people. They must also provide reasonable accommodations to disabled workers and applicants, unless that would impose an undue financial or administrative hardship.

That employment practices would be covered by the ADA was fairly well known among state and local officials when the law was enacted. But what has caught some off-guard is the fact that *all* governments must comply with the act's employment provisions. Phased-in compliance and exemptions that are available under the act to small private employers were not extended to small public employers.

Non-discrimination in employment

Municipal interest groups say local leaders have been surprised, at best, to learn that they would not be entitled to the same considerations given to their small-staffed colleagues in the private sector.

The confusion stems in part from a change in how the federal government decided to treat public sector employment. The ADA (title I) requires private employers with 25 or more employees to make their employment practices accessible to disabled people as of July 26, 1992. The effective date for businesses with 15 to 24 employees is July 26, 1994. Businesses with staffs of fewer than 15 are exempt.

See ***States****, Page 7*

Justice announces ADA technical assistance grants winners

Fifteen organizations were awarded grants totaling more than $2.6 million to provide technical assistance on the Americans with Disabilities Act, the Justice Department announced last month.

The grantees, representing industry, research and advocacy groups, are charged with developing information to help businesses comply with the ADA, as well as to help disabled people understand their new rights. The projects will

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Justice

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target certain priority areas, such as lodging, restaurants, health care, day care, law enforcement, and state and local courts.

Telephone hotlines, manuals, pamphlets, training courses and videos are among the products to be developed with the money.

"Providing high quality technical assistance in the ADA's early months is critical if we are to achieve our goal of making the ADA's promise of equal opportunity for individuals with disabilities a reality while keeping costly litigation at a minimum," said Assistant Attorney General John R. Dunne.

Grants were awarded to the following business groups: the National Restaurant Association, the Council of Better Business Bureaus Foundation, the Food Marketing Institute, the Building Owners and Managers Association, the American Hotel and Motel Association and the Police Executive Research Forum.

Disability-related groups to receive grants are: the Disability Rights and Education Defense Fund, the Association for Retarded Citizens, the American Foundation for the Blind/Gallaudet University (National Center for Law and the Deaf), the National Federation for the Blind, the Association of Handicapped Student Service Programs in Postsecondary Education and the National Association of Protection and Advocacy Systems.

Eastern Washington University, the Institute for Law and Policy Planning, and the Foundation on Employment and Disability round out the list of grantees. ❑

ADA revives the self-evaluation for state and local governments

One of the first issues state and local governments have to contend with under the ADA is conducting self-evaluations of their programs and policies.

A throwback to the general revenue sharing days, the self-evaluation is intended to help public agencies figure out which, if any, of their programs and policies violate the non-discrimination requirements of the ADA, and then determine ways to correct that. Federal grantees, including revenue sharing recipients, were required to conduct self-evaluations when Section 504 of the Rehabilitation Act was being implemented in the late 1970s and early 1980s.

Only public entities are required to conduct self-evaluations under the ADA. They must be completed by Jan. 26, 1993. All public entities must do a self-evaluation, although only those with 50 or more employees are required to keep it on file (for three years).

Technically, public entities need only assess programs that weren't covered by section 504 or included in original self-evaluations. But while not required, public officials may find it just as practical and easy to take a comprehensive approach.

"The department expects that a great many public entities will be re-examining all of their policies and programs," the U.S. Department of Justice says. "Programs and functions may have changed, and actions that were supposed to have been taken to comply with section 504 may not have been fully implemented or may no longer be effective."

Conducting a self-evaluation

For many communities, conducting the ADA self-evaluation will mean dusting off the old forms from the section 504 days. Other towns and agencies, however, may be new

*See **Self-evaluation**, Page 3*

Americans with Disabilities Act
ADA Compliance Guide

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Self-evaluation

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to the process. Below is a checklist of some things a public agency should look for when conducting a self-evaluation. It is not official or exhaustive, but merely a starting point. (A formal self-evaluation and checklist is being prepared and will be sent to subscribers as part of the *ADA Compliance Guide*. In addition, subscribers will also recieve Tab 800, State and Local Governments, with their December 1991 mailing.)

Program Accessibility

- What's the nature of the program (its participants, purpose, general activities)?
- How do you recruit for or advertise the program?
- What are the eligibility requirements for the program? Are any tests required? If so, do they (or could they) discriminate on the basis of disability?
- Are alternative criteria/methods available that would not have an adverse effect on disabled people?
- Are accommodations available for any required interview or application form?

Program participants

- What services are available to program participants (i.e., orientations, transportation, housing, counseling services, social activities)?
- Are there any barriers that do or could render these services inaccessible to disabled participants?
- Are accommodations or auxiliary aids available to help disabled participants overcome barriers?
- Are program staff aware of non-discrimination policies? If so, how is this communicated?
- Are program participants aware of non-discrimination policies? If so, how is this communicated?

Facilities

- What facilities are used for activities or programs?
- Based on the Uniform Federal Accessibility Standards or ADA Accessibility Guidelines (both reprinted in Appendix IV), what features limit program accessibility?
- Is future construction planned, and if so, will accessible design be incorporated into the buildings/facilities?
- Are there non-structural means to make programs accessible to overcome inaccessible spaces, provided that equal services are offered in the most integrated setting possible?
- Are structural changes required to achieve program accessibility?

Employment

- What safeguards are taken to ensure employment decisions are made without discrimination on the basis of disability?
- Considering every phase of the employment process and all employment practices, what steps are taken to ensure that disability discrimination does not (or will not) exist?
- What are the essential functions of a job?
- What are the marginal functions of a job?
- What reasonable accommodations have been or can be made in a particular position to ensure that a qualified disabled person can perform the essential functions?
- Are medical exams required for entering employees? (Under the ADA, pre-employment exams may be given only on a post-offer, conditional basis, and must be given to all incoming employees in that position — see ¶324.) ❑

Local government officials discuss readiness for ADA compliance

Beginning Jan. 26, 1991, all state and local governments must make all of their programs and services accessible to disabled people. Many of these jurisdictions are at least aware of the basic changes which will need to be made come January. But many others — especially the smaller communities — weren't subject to Section 504 of the Rehabilitation Act, or have not had to comply for several years. For them, the new ADA mandates may presage trouble.

Officials from three governments of small cities agreed that, for the most part, small-town America might not yet be ready to comply with the ADA.

Warner Robins, Ga.

Roy T. Bankston, program coordinator for Warner Robins, Ga., said ADA compliance for his city, which has a population of 70,000 should prove to be no problem. He plans to be part of a committee that will perform the ADA self-evaluation.

"Since we've done them once already [under section 504], there should be no problem going over them again, I hope," he said. "There are a few things which will be different, such as needing a TDD phone system, and taking a look at swimming pools."

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Small town

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Bankston said that Warner Robins is well prepared for the administrative changes mandated by title II, but cautioned that he believes not all cities are in the same state of readiness, due to a lack of awareness of the new law's scope.

"We try to stay on top of things as they happen," he said. "Most of our changes, since section 504, are planned, programmed, in the works, or done. I'm sure if I were a smaller city, I'd be ticked off."

Schaumburg Township, Ill.

Gerry Bartnicke, the director of disabled services for Schaumburg Township, Ill., agreed that many cities are not ready to implement title II simply because they are unaware that the law will affect them.

Bartnicke started a disabled advocacy division of the Township Officials of Illinois in 1984, which gives yearly seminars on various aspects of disability policy administration. Notably, she said, attendance at a recent seminar on how to comply with ADA was low.

"When we try to tell them how cheap and easy it is to implement an advisory council, for example, attendance is low," Bartnicke said. "What their priorities are, I don't know.

"I think a great deal of the very small governments take an attitude of 'We take care of our own, so don't worry about it,'" she said. "I don't see any progressive thinking toward people with disabilities, or any promotion of accessible housing or employment."

In addition, a dearth of state and local funds will hamper local efforts to comply with title II, she said.

Springville City, Utah

A lack of governmental knowledge about the scope of the new law is "frightening," said Richard Manning, city recorder for Springville City, Utah.

"Not many people talk about it, because they are unaware of the law. They won't realize anything is amiss until there's a lawsuit, and then there will be a great deal of catching up" on the part of local government, he said. Manning said that the city has complied with section 504, and is gearing up for ADA compliance.

Manning believes that the most difficult facet of ADA compliance for small government will be attitudinal change.

"If they hire a secretary who uses a wheelchair, and they have six-foot high filing cabinets, then they're going to need to step back and be creative," he said. "The biggest hardship is going to be the mental hurdles that will need to be crossed." ❑

A consumers' perspective: Accessing services of a bank

In an effort to help readers prepare for the upcoming Jan. 26, 1992, ADA compliance deadline, we have initiated a series of articles on making certain types of public accommodations accessible—from a consumer's perspective. Much of the information in these articles was gathered from a series of "focus groups" Thompson Publishing Group held last summer, in which individuals with disabilities discussed their experiences accessing the services of various businesses. Each focus group pulled together a group of consumers with a related type of disability: individuals who are hearing-impaired; individuals who are vision-impaired; individuals who have mobility impairments; individuals with hidden disabilities; and individuals who have mental impairments.

What difficulties do disabled individuals encounter at banks — and what special services, if any, do they need to overcome them?

Disabled people encounter barriers in banks at a number of different points — filling out loan applications, cashing checks, working with tellers, using the ubiquitous automated teller machines. But, as our focus group participants pointed out, removing these barriers need not involve expensive, structural changes. Often a simple, open-minded attitude is all it takes for someone to do what he or she needs done.

The list below is in large part a product of the focus group. It is not exhaustive, nor does it explain what *must* be done under the ADA. Rather, these are some readily identifiable problems and possible service-oriented solutions that were proffered during the group discussions — from a consumer's perspective.

Access to the Building

Problem: Front entrance doors are too heavy and difficult to open for people with mobility or dexterity impairments.

Possible solution: Have someone available to help individuals who have difficulty opening the door. If this

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Perspective

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approach is taken, be sure that someone is always on hand to assist customers.

Installation of appropriate hardware may also be a possible solution.

Problem: Lack of a cleared pathway from the front door to teller and service desks.

Possible Solution: Ensure an accessible, obstruction-free path between the bank's entrance and the teller windows, customer service representatives, and other routine services (e.g., safe deposit boxes).

Problem: High curbs leading to the bank from the parking area.

Possible solution: An informal survey of the "site," including the area around and leading to the entrance to the bank, could be done. Surveys could review all of the ways an individual gets to the bank, e.g., from the street, parking lot, etc. Surveys can help identify if removing any structural barriers is readily achievable and the responsibility of the bank. If not, alternative-delivery steps may have to be investigated.

Teller Operations

Problem: Teller windows are too high for individuals in wheelchairs to use.

Possible solution: Allow individuals who cannot get to or conduct business at a teller counter/window to conduct business at a customer service desk, or in some unobtrusive (fairly private) area of the lobby. Instruct bank personnel to suggest to people who have difficulty conducting business at a teller window that a customer service representative or manager can help them in a different, perhaps more accessible part of the bank.

Problem: Glass front and height of teller windows impede communication between people with a variety of speech or hearing impairments and tellers.

Possible solution: The same approach used for people with mobility impairments (e.g., conduct business in a different part of the bank) may be effective for people with speech and hearing impairments.

Problem: Blind and visually impaired individuals may not see the light flashing indicating when there is an available teller.

Possible solution: Instruct tellers to verbally announce when they are available to help an individual who may not be responding to the flashing light.

Problem: Individuals with certain visual impairments are unsure about the money that is returned to them after they have completed a transaction.

Possible solution: Tellers could be instructed to be precise about counting money back to a customer who is blind or visually impaired. Indicating denominations as bills are being handed to the customer may be helpful.

Check Cashing

Problem: Requiring proper I.D. to cash checks or open an account. Certain individuals with disabilities, such as people with visual impairments or epilepsy, cannot obtain drivers' licenses.

Possible solution: Banks could be flexible in their check cashing procedures or policies. For example, if you accept only a driver's license as proper I.D. for check cashing, you may consider modifying that policy to also accept non-driver's I.D.s (such as age of majority cards) that are often provided by local jurisdictions.

Problem: Acceptance of only cursive writing signatures for check-cashing purposes. Some people have disabilities — sometimes physical, sometimes mental — that affect their ability to write. Printing is often easier for these individuals.

Possible solution: Again, flexibility is key. Under certain circumstances, the bank could accept a printed signature as adequate for check-cashing purposes.

Problem: Unavailability of braille checking.

Possible solution: Offering braille checking is an individual decision for banks. Remember, however, that not all individuals who are blind or visually impaired read braille. Therefore, making braille checking available may not relieve you of the responsibility to accommodate individuals who need special services because of visual impairments.

Banking by Phone

Problem: Inability of a deaf person to bank by phone or to make telephone inquiries regarding account information.

Possible solution: The bank may consider purchasing a telecommunication device for the deaf (TDD). If you take this route, be sure to publicize your TDD number, and be sure that the TDD is operated by knowledgable staff. As an interim measure, a deaf or hearing-impaired customer could access your service using a telephone relay service. However, because of the nature of bank business, there might be some security concerns with using a third-party to conduct such business. Also, relay services frequently are slow and not yet available in all states.

Problem: Banking by phone was found to be a popular method of banking by persons with visual impairments, but it is not available at all banks.

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Banking

Continued from Page 5

Possible solution: Banks may wish to consider offering some or more services to customers via the telephone.

Transaction Forms and Other Printed Material

Problem: Inability of persons with visual or manual impairments to complete transaction forms.

Possible solution: Availability of a customer assistance representative to help individuals complete the necessary forms (e.g., deposit/withdrawal slips, etc.) as necessary.

Problem: Lack of accessible material for visually impaired people that explains the array of services offered by the bank.

Possible solution: Banks could consider making information on the bank's services available on tape. If taped text is provided, be sure to advertise it. Also, telephone representatives could be instructed to inform callers who identify themselves as being unable to read the printed material about the availability of taped services.

ATMs

Problem: Although many individuals who are blind and visually impaired can and do use ATMs, some expressed an interest in having a bank representative take the time to show them the first time how to use the machine and explain to them the series of procedures, questions asked, and default settings on its ATMs.

Possible solution: By request, the bank could conduct training sessions on using its ATMs for individuals with special needs. Be sure to advertise the availability of such sessions. Perhaps this could be done when an individual opens a new account and receives a first ATM card with the bank. Another approach is to make instructions on using the ATM available on tape or in braille.

Problem: Certain individuals with mental disabilities cannot easily remember an assigned PIN number.

Possible solution: Banks could adopt a policy that would allow some individuals to choose their own PIN number. In this way, individuals who may otherwise have difficulty remembering such a number could choose a combination of numbers that would be more easy for them to remember.

Privacy/Confidentiality

Problems: Because of the nature of the business being transacted, certain hearing-impaired participants expressed concern about fully understanding all that is involved with a complicated transaction, such as obtaining a mortgage.

Possible solution: Lending officers could be instructed to take the time to communicate effectively with deaf and hearing-impaired individuals. To many non-bankers, the terminology and procedures used in certain banking transactions are unfamiliar. For this reason, it is usually important for the customer to understand precisely what is taking place during meetings with the loan officer. Paper and pencil would likely not be an effective means of communicating with such individuals. Ascertain if interpreter services are needed. If the customer is a lip reader, be sure to position yourself directly in front of the person when you are speaking.

The bank may also wish to try to have as much information as possible about the transaction available in writing ahead of time and allow the individual to take the information home for review prior to an important meeting.

Attitudinal Training

Perhaps the overarching concern — and suggestion — that emerged from the focus groups was that of "sensitizing" employees who deal with customers about the possible special needs of disabled people. A customer service representative — or any bank personnel — could be trained to approach disabled individuals and ask if special help is needed. Tellers, for example, could be instructed to assist customers with special needs as appropriate, and when the necessary assistance is beyond their abilities, to politely refer the person to a customer service representative who can better satisfy his or her needs at the time.

Banks should remember that disabled people may not need any special assistance, and thus such assistance should not be forced on anyone by bank staff. What sort of special assistance is used by one individual may not be needed, or indeed appropriate, for another individual. Such things must be approached on a case-by-case basis.

Instituting some customer service training on the ADA could also serve to smooth over some attitudinal barriers that may exist toward people with disabilities. This is especially true for people with hidden disabilities, or whose disability is not readily apparent, but who may need some special services to conduct his or her banking. Contacting individuals with disabilities from the community to assist in this effort could be one approach to take. ❑

States

Continued from Page 1

The Justice Department had proposed to use this arrangement for state and local governments when it issued draft title II rules last February. But in the final regulations the department changed course and, citing congressional intent, said public sector employment would be treated as a "program or activity" subject to the Jan. 26, 1992, effective date. Thus, all public agencies, big and small, are covered.

Apparently word of this change has not filtered down to small entities. Jeff Schiff, executive director of the National Association of Towns and Townships (NATaT), senses that many local officials don't realize that they're not exempt, and isn't sure that they appreciate the task facing them.

"The advice from federal agencies, while not misleading, could have been more clear" that small governments must comply, Schiff said. "When the leaders of small communities become fully aware of the ADA's requirements, I think the reaction will be negative."

Randy Arndt, spokesperson for the National League of Cities agreed, noting that "there is a great deal of misunderstanding among public officials about the applicability of the employment section.

"There was the implicit assumption that the [small employer] exemption would apply to them," he said. Realizing that it doesn't has been the "biggest bolt of lightning" to hit public officials about the act.

The overlooked provision

In many ways title II has been the overlooked provision of the ADA, with the focus instead put on other parts of the law. Much attention was spent on how the law would affect private businesses, many of which never had formally addressed disability issues. Compared to the private sector, though, state and local governments were seen as veterans.

For more than a decade, jurisdictions that receive federal funds have been subject to Section 504 of the Rehabilitation Act, which requires them to make programs and activities accessible to disabled people. Because the ADA and section 504 share many common terms, it was thought that public entities would have a relatively easy transition to ADA compliance.

> ***The employment coverage is the 'biggest bolt of lighting' to hit state and local officials.***
>
> —Randy Arndt
> National League of Cities

But the two are different laws. The ADA applies to areas not covered by section 504. For example, many town halls and courtrooms never received federal funds and thus weren't required to be accessible. They are now. Also, public agencies that deal with citizens over the phone (including "911" services) must now be accessible to people with hearing impairments. This means having aids, such as telecommunication devices for the deaf, on hand.

John Wodatch, head of the Justice Department's Office on the Americans with Disabilities Act said: "Many state and local officials didn't think title II held much more for them than section 504. They were unaware of the scope of the ADA." As a result, some local officials have been surprised and upset that they weren't involved in developing the title II regulations.

However, he added, these concerns were tempered by a familiarity with section 504 or state laws already on the books. "The regulations implementing title II include the section 504 concept that [accommodations aren't required] if they impose undue financial or administrative burdens," Wodatch pointed out.

A question of fairness

Still, some question whether small towns should have been entitled to the same considerations as small businesses. Since the demise of the federal revenue sharing program in 1986, small-town America has generally not had the benefit — and responsibilities — of receiving federal funds. And in the current economic situation, many of the smaller jurisdictions are struggling to maintain basic services.

"I believe, many times, issues for small governments and small businesses are 'twinned' in federal policy," said NATaT's Schiff, noting that small governments and businesses share common concerns such as limited staffs, budgets and access to resources.

While noting that NATaT is "strongly in favor of the ADA," Schiff expressed concern that the issue "boils down to another unfunded mandate" from the federal government.

"What intrigues us is what caused [the federal government] to consider small governments differently," he said. "Congress found something different between a 'Mom and Pop' grocery store and IBM, and we believe similar differences exist between large and small local governments."

Justice's Wodatch said small governments need only turn to the section 504 experience for guidance on how to proceed under the ADA. "The program accessibility standard takes into account limits," he said. "What would be an undue burden for small towns would be different than that for large governments." ❑

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ADA COMPLIANCE GUIDE

Filing Instructions: November 1991

In this month's update you'll find the latest issue of your ADA Monthly Bulletin newsletter. After reading it, the newsletter should be placed behind the "Monthly Bulletins" tab in your manual.

To add the other pages in this month's mailing, follow the directions below, discarding the old pages and adding the new ones as appropriate.

Pages to Remove (Dated)	Pages to Add (Dated November 1991)	Description of Changes
p. xiii (October 1991)	p. xiii	Update to Current Contents page
Tab 100 p. 65 (April 1991)	Tab 100 p. 65	Update to ¶150, State and Local Governments

DISCARD THIS SHEET AFTER CHANGES HAVE BEEN MADE

CURRENT CONTENTS

ADA Compliance Guide

Current Contents as of November 1991

The following is a list of all pages that make up the *ADA Compliance Guide*.

¶150 State and Local Governments

*The Americans with Disabilities Act (ADA) affects all state and local governments, regardless of size. Exemptions and grace periods given to small business owners are not extended to state and local governments in their capacity as operators of a public facility. In addition, U.S. Justice Department regulations implementing title II of the act (28 C.F.R. Part 35) provide that exemptions for small private employers do not apply to state and local governments as employers (see ¶¶303 and 370).

The ADA makes some significant changes regarding federal non-discrimination requirements on state and local governments. The law imposes its non-discrimination mandate on all programs and activities of all governments, whether or not they receive federal funds.

State and local governments that receive federal grants are required by Section 504 of the Rehabilitation Act to make their programs and facilities accessible to the disabled. During the revenue-sharing era of the 1970s and early 1980s, most local governments were subject to section 504 because they received federal funds under the Revenue Sharing Act. After the act was repealed, many small towns, which did not receive any other federal aid, lost their federal nexus and thus were no longer subject to section 504's requirements.

No immunity against suit

States may not claim an 11th Amendment immunity against lawsuits filed under the ADA. The law provides the same remedies for actions brought against private entities in suits filed against states (see ¶620).

Finally, the ADA does not limit or invalidate any state or local disability rights law that provides greater protection for disabled people. The ADA applies to situations in which the state or local law has less stringent requirements. (See ¶700 for a discussion of state disability discrimination laws.)

*Indicates new or revised material.

[The next page is Tab 100, Page 75.]