DCN 1600

Memorandum to Sheila Cheston, General Counsel
From: Jeff Patterson, Assistant Counsel
Date: May 28, 1993
Re: Telephone Conversation with DOJ Attorney

This afternoon I spoke with Dan Searing, Attorney-Advisor, Department of Justice, Office of Coordination and Review, Civil Rights Division, regarding the potential applicability of the Rehabilitation Act of 1973 to the Commission. The Office of Coordination and Review is the department of the DOJ that has been delegated, inter alia, the responsibility for coordinating the implementation and enforcement of §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794). The Attorney General was originally charged with this responsibility pursuant to Executive Order 12250 (1980).

Mr. Searing informally suggested (he did not offer formal advice) that the Commission do the following:

(1) Continue including in our "notice of hearing" appearing in the Federal Register a sentence stating that anyone requiring special accommodations must contact our office prior to the hearing;

(2) Ensure that the facilities where our hearings take place are handicap accessible;

(3) Contact his office asking for a legal analysis regarding the applicability of the Act to the Commission <u>only after</u> the Commission has received a complaint from someone who feels they have been discriminated against on the basis of their handicap.

[Mr. Searing stated that of course we could contact his department requesting a legal analysis at any time.]

(4) Promulgate regulations only upon the occurrence of one of the following:

(a) DOJ determines that the Act applies to the Commission as a result of their legal analysis performed pursuant to (3) above; or

(b) DOJ notifies the Commission, after performing a periodic review of small agencies/department, that we are required to issue regulations.

If it is determined that the Commission is required to issue regulations pursuant to §794, we can do so in the form of a "joint publication" in which several smaller agencies/departments promulgate regulations together. The DOJ coordinates such efforts.

Mr. Searing does not suggest that the Commission promulgate regulations immediately because by the time the regulations would become effective, the Commission's 1995 mandate would have expired.

Mr. Searing noted that we are doing more than most small agencies/departments in that we're at least aware of the Act and have been including the aforementioned paragraph in our "notice of hearing."

Mr. Searing stated that he is a Level 15 attorney-advisor.

Mr. Searing's direct telephone number is 202/307-2215.

Document Separator

Memorandum to Sheila Cheston, General Counsel
From: Jeff Patterson, Assistant ~~General~~ Counsel
Date: May 17, 1993

To avoid confusion w/ MAH, let's call you Asst Cnsl.

This memorandum discusses two federal statutes, the Rehabilitation Act of 1973 and the Americans with Disability Act of 1990, which prohibit discrimination against handicapped individuals, and their ~~affect their provisions have on~~ potential application to the Defense Base Closure and Realignment Commission ("Commission").

I. REHABILITATION ACT OF 1973

The Rehabilitation Act of 1973[1] was enacted to ensure that ~~the~~ federal executive agencies ~~government~~, federal contractors and recipients of federal funds do not discriminate against handicapped persons. Section 794(a) of the Act states that a handicapped individual shall not, based solely on his or her handicap, be excluded from participation in, denied benefits of, or subjected to discrimination pursuant to any program or activity receiving federal financial assistance or conducted by any executive agency.

A. Applicability to the Commission

According to its language, the Act's provisions are applicable to the Commission <u>if</u> the Commission's work is found to ~~be (1)~~ a "program or activity" ~~which~~ that receives federal funds; or (2) a "program or activity" ~~of~~ conducted by an executive agency.[2]

It is the opinion of Paul Koffsky, Esq., DoD Office of General Counsel, ~~that~~ informally stated that in his view, §794(a) would apply ~~ies~~ to the Commission because ~~as~~ the Commission receives federal funding.[3] Mr. Koffsky's view, however, overlooks §794(b), which defines "program or activity" as the operations of (i) instrumentalities of a State or of a local government; (ii) postsecondary institutions; (iii) business entities; or (iv) any entity formed by a combination of two or more of those listed in (i) through (iii), which receives federal funding.[4] The Commission

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[1] 20 U.S.C. §§701 *et seq.* (West Supp. 1993).

[2] <u>Id.</u> at §794(a).

[3] There is no provision in the Defense Base Closure and Realignment Act of 1990, P.L. 101-510, exempting the Commission from the provisions of 20 U.S.C. §794(a) or making it applicable.

[4] §794(b) states in its entirety:
For the purposes of this section, the term "program or activity" means all of the operations of--

there are other explanations

does not fall within any of these four categories.

When §794(b)'s definition of "project or activity" is read in conjunction with "executive agency," it appears to make no sense. In fact, the definition speaks in terms of operations receiving federal funds. As such, while no case law could be found on point, most cases, as well as the Act's legislative history, tend to treat the "project and activity conducted by the executive agency" language as meaning any operations of the executive agency.[5]

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"Executive agency" is statutorily defined as an executive department, a government corporation or an independent establishment (an establishment of the executive branch which is not an executive or military department, government corporation, or part of another independent establishment[6]).[7] Accordingly, a strong argument could be made for the proposition that the Commission is an executive agency, as it is an independent

but is §104 & 105 applic to debate Act?

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(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

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

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

(B) a local educational agency (as defined in section 2891(12) of Title 20) system of vocational education, or other school system;

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

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

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

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

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

any part of which is extended Federal financial assistance. 29 U.S.C. §794(b).

[5] See supra notes 8-10 and accompanying text.

[6] 5 U.S.C. §104 (1977).

Don't all support

[7] 5 U.S.C. §105 (1977).

establishment of the executive branch.

Whereas the Act as originally enacted was not clear on its application to the federal government, it was amended in 1978 to explicitly extend its coverage to executive agencies[8]. While the 1978 amendments also expanded the remedies of handicapped individuals, its legislative history illustrates Congress' intentions to enlarge, not reduce, the reach of the Act.[9] Case law interpretations further support this view.[10] Accordingly, it can be argued that the reach of the Act's provisions should be read as being broad, thereby including the Commission within its coverage.

B. Obligations Imposed by the Act

Assuming for the sake of analysis that the Act applies to the Commission, §794(a) further requires each agency to promulgate regulations implementing the purpose of the statute. Because the Commission has not yet done so, and in an attempt to save valuable time and resources, Mr. Koffsky suggested that the Commission adopt the DoD regulations germane to its objective.[11] A copy of DoD's regulations and internal directive are attached.

As such, the Commission's hearings would be required to be

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[8] At the request of the Department of Health, Education and Welfare, the Justice Department had issued an opinion concluding the federal government was exempt from the Act's provisions. See Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1381 n.13 (11th Cir. 1982).

[9] For example, Congressman Jeffords proclaimed "[t]his amendment removes [the exemption for the federal government] and applied [§794] to the Federal Government . . . and should go a long way toward developing a uniform and equitable national policy for elimination of discrimination." 124 Cong.Rec. H13901 (daily ed., May 16, 1978). Furthermore, Senator Stafford exclaimed that "The bill allows the rehabilitation program to grow and serve more handicapped individuals and provide those individuals with greater opportunities to maximize their potential." 124 Cong.Rec. S30311 (daily ed., Sept. 20, 1978).

[10] See John and Jane Doe, et al. v. Devine, Blue Cross/Blue Shield Association and Aetna Life Insurance Company, 545 F.Supp. 576, 585 (D.D.C. 1982)(quoting Doe v. Colautti, 454 F.Supp. 621, 629, aff'd 592 F.2d 704 (3d Cir. 1979)), Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1381 (11th Cir. 1982).

[11] 32 CFR Part 56. Mr. Koffsky states that DoD's regulations are typical of most agencies.

accessible to handicapped persons,[12] with reasonable accommodations being made to known physical or mental handicaps of an individual.[13] The Commission would be excepted from this requirement if it could establish that the requested accommodation would impose an undue hardship on the operation of its program.[14]

Only if DoD's refused approved

Mr. Koffsky assured me that complying with the Act is not as arduous as it sounds. To satisfy its obligation, the Commission would need only to include in its notice of hearings a statement that any individual requiring special accommodations must contact the Commission prior to the hearing to assure that his or her special needs will be met. Upon receipt of such requests, the Commission would be required to determine the burden they impose.

II. The Americans with Disabilities Act of 1990

The Americans with Disabilities Act of 1990[15], whose mission is to eliminate discrimination against individuals with disabilities, is not applicable to the federal government.[16] Accordingly, the statute's provisions have no affect on the Commission.

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[12] 32 CFR §56.8(c)(2) states that each program or activity shall operate in such a way that, when viewed in its entirety, is readily accessible to and usable by handicapped persons.

[13] 32 CFR §56.8(d).

[14] Id.

[15] 42 U.S.C. §§12101 *et seq.* (1993).

[16] See 42 U.S.C. §§ 12111(5), 12131(1).

Document Separator

Memorandum to Sheila Cheston, General Counsel
From: Jeff Patterson, Assistant Counsel JP
Date: May 28, 1993
Re: Telephone Conversation with DOJ Attorney

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Mr. Searing informally suggested (he did not offer formal advice) that the Commission do the following:

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[Mr. Searing stated that of course we could contact his department requesting a legal analysis at any time.]

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Mr. Searing noted that we are doing more than most small agencies/departments in that we're at least aware of the Act and have been including the aforementioned paragraph in our "notice of hearing."

Mr. Searing stated that he is a Level 15 attorney-advisor.

Mr. Searing's direct telephone number is 202/307-2215.

Memorandum to Sheila Cheston, General Counsel
From: Jeff Patterson, Assistant Counsel JP
Date: June 1, 1993

This memorandum discusses two federal statutes, the Rehabilitation Act of 1973 and the Americans with Disability Act of 1990, which prohibit discrimination against handicapped individuals, and their potential application to the Defense Base Closure and Realignment Commission ("Commission").

I. REHABILITATION ACT OF 1973[1]

The Rehabilitation Act of 1973[2] was enacted to ensure that federal executive agencies, federal contractors and recipients of federal funds do not discriminate against handicapped persons. Section 794(a) of the Act states that a handicapped individual shall not, based solely on his or her handicap, be excluded from participation in, denied benefits of, or subjected to discrimination pursuant to any program or activity receiving federal financial assistance or conducted by any executive agency.

A. Applicability to the Commission

According to its language, the Act's provisions are applicable to the Commission if the Commission's work is found to be a program or activity (1) that receives federal financial assistance; or (2) conducted by an executive agency.[3]

(i) "Program or Activity"

The first step in ascertaining whether the Act is applicable to the Commission is to determine if its operations are a "program or activity." The Civil Rights Restoration Act of 1987[4] amended the Act by providing the definition of "program or activity" as the operations of (i) instrumentalities of a state or of a local government; (ii) postsecondary institutions; (iii) business entities; or (iv) any entity formed by a combination of two or more of those listed in (i) through (iii), which receives federal

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[1] There is no provision in the Defense Base Closure and Realignment Act of 1990, P.L. 101-510, exempting the Commission from the provisions of 20 U.S.C. §794(a) or making it applicable.

[2] 20 U.S.C. §§701 *et seq.* (West Supp. 1993).

[3] Id. at §794(a).

[4] 20 U.S.C. §1687 (1993).

funding.[5] The Commission does not fall within any of these four categories and thus cannot be classified as a program or activity that receives federal funding.

Courts appear reluctant to expand this definition, applying instead a literal interpretation of the statute.[6] Accordingly,

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[5] §794(b) states in its entirety:
For the purposes of this section, the term "program or activity" means all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or
(B) a local educational agency (as defined in section 2891(12) of Title 20) system of vocational education, or other school system;
(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--
(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or
(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance. 29 U.S.C. §794(b).

[6] See Schroeder v. City of Chicago, 715 F.Supp. 222, 225-26 (N.D.Ill. 1989)(the court denied expanding the definition of "program or activity" to include an entire city, stating that 'nothing in the amendment's legislative history suggest that Congress contemplated classifying an entire municipality like the City of Chicago as a "program or activity" subject to [§794] of the Rehabilitation Act.'), Williams v. Meese, et al., 926 F.2d 994, 997 (10th Cir. 1991)(plaintiff, incarcerated in a federal penitentiary, was denied relief under the Rehabilitation Act because 'the Federal Bureau of Prisons does not fit the definition of "program or activities"' supplied by §794(b)), Johnston v. Capt. Horn, Commander Puget Sound Naval Shipyard, et al., 875 F.2d 1415, 1420-

even if the Commission qualifies as either a recipient of "federal financial assistance" or as an "executive agency" as used by the statute, its operations must still qualify as a "program or activity" in order for the Act's provisions to apply. Therefore, based on the preceding discussion, the Commission's operations, including the holding of hearings, employing of staff,[7] and operating a library available to the public, would not be considered a "program or activity" pursuant to the Act.

(ii) "Federal Financial Assistance"

To reiterate, one way to come within the mandate of §794 is to operate a program or activity that receives federal financial assistance. Whereas the Act fails to provide a definition for "federal financial assistance," federal courts have broadly construed the term to encompass assistance of any kind, whether it be direct or indirect.[8] The Supreme Court, however, has limited its meaning to those who actually "receive" such assistance, as opposed to those who merely benefit from it.[9] Furthermore, Congress sought to impose §794 coverage as a condition of the

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21 (9th Cir. 1989)(denying coverage of §794 to federal employers or employees, as the statutory definition of "program or activities" does not refer to these parties).

[7] As an aside, while employment is not within the breadth of §794, §791 involves the consideration of employment of individuals with disabilities. Section 791 creates a private cause of action for a federal employee discriminated against by a federal employer because of his or her handicap. Specifically, §791(b) states that "[e]ach department, agency, and instrumentality . . . in the executive branch shall . . . submit . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality." 29 U.S.C. §791(b). See Johnston v. Capt. Horne, Commander Puget Sound Naval Shipyard, et al., 875 F.2d at 1421 ('If Postal Service employees, mentioned specifically in §794, may not sue, it follows that federal employees may not'), Boyd v. United States Postal Service, 752 F.2d 410, 413 (9th Cir. 1985)([§791] is exclusive remedy for federal employees). Whereas §791 is not within the scope of this memorandum, no further discussion of this provision will be made.

[8] Independent Housing Services of San Francisco v. Fillmore Center Associates, No. C 91-1220 RFP (D. Calif. Oct. 16, 1991) (Lexis 14960), and Arline v. School Board of Nassau County, 772 F.2d 759, 762 (11th Cir. 1985), cert. granted and limited on other ground, 475 U.S. 1118 (1986).

[9] Department of Transportation v. Paralyzed Veterans, 477 U.S. 597 (1986)(holding that commercial airlines are not recipients of federal financial assistance under [§794], but merely 'beneficiaries' of funding granted to airports).

recipient's agreement to accept federal funds.[10] The Tenth Circuit has also contributed to the development of this definition by holding that an entity receives such assistance when it receives a subsidy, as opposed to compensation for goods and services received, even if the compensation is in excess of the fair market value of the goods and services.[11]

Because the Commission's operating funds are authorized and appropriated by the federal government, these resources could be classified as "federal financial assistance," as they are a direct subsidy. As additional support for this notion, Mr. Paul Koffsky, Attorney, Office of General Counsel, Department of Defense, informally stated that in his view, §794(a) would apply to the Commission because "the Commission receives federal funding." However, this argument can be countered because the Commission was not given the opportunity to accept or reject these funds, being a creature of legislation, and with it the obligations imposed by §794.

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[10] Id. at 605. This contractual arrangement imposes §794's obligations upon those who are in a position to accept or reject them as part of the decision to accept federal funds. Id. See Glanz v. Beth Israel Corporation, 756 F.Supp. 632 (D.Mass. 1990)(agreeing with the reasoning of the Fifth Circuit in United States v. Baylor Univ. Medical Center, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985), and holding that the receipt of Medicare or Medicaid payments by a hospital constituted 'receiving federal financial assistance'), Arline at 762 (finding that since impact aid--aid which is provided to school systems whose populations have been substantially enlarged by the attendance of federal employees' children, but which have reduced tax revenues due to the presence of federally-owned property in the district--does not fall within a specific exception to the Act, 'it must be defined as "federal financial assistance" in order to give effect to the broad legislative intent expressed in [§794]'), Nolley v. County of Erie, 776 F.Supp. 715, 742-43 (W.D.N.Y. 1991)(declaring that because federal funds received by the county did not exceed the fair market value of the cost to detain federal prisoners, it did not qualify as federal financial assistance).

[11] DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1382 (10th Cir. 1990). Mass v. Martin Marietta Corp., 805 F.Supp. 1530, 1542 (D.Colo. 1992), upheld DeVargas as being the applicable rule, noting the "result is consistent with the definition of 'federal financial assistance' used in federal regulations" which specifically excludes procurement contracts (citing 14 C.F.R. §1251.102(f)(1992)(NASA regulation); 32 C.F.R. §56.3(b)(1991)(DoD regulation)).

(iii) "Executive Agencies"

Title 5 of the U.S. Code[12] defines "executive agency" as an executive department, a government corporation or an independent establishment.[13] Whereas the Rehabilitation Act as a whole does not explicitly incorporate the definitions of Title 5, §794a (Remedies and Attorney Fees) adopts the procedures of Title VII of the Civil Rights Act of 1964[14] for the remedies, procedures and rights to be followed for complaints brought under §791 of the Act (Employment of Handicapped Individuals), that in turn incorporates the definition of executive agencies found in 5 U.S.C. 102 into its statutory language.

Although a tenuous connection, it could be argued that the Rehabilitation Act incorporates the definitions supplied by Title 5, specifically that of "executive agency." Coupled with Congress' intent to provide the statute with a broad reach,[15] it's arguable

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[12] Title 5 is entitled 'Government Organization and Employees.'

[13] 5 U.S.C. §105 (1977). An independent establishment is defined as an establishment of the executive branch which is not an executive or military department, government corporation, or part of another independent establishment. 5 U.S.C. §104 (1977).

[14] Specifically, 42 U.S.C. 2000e-16 (Section 717, Employment by Federal Government).

[15] Whereas the Act as originally enacted was not clear on its application to the federal government, it was amended in 1978 to explicitly extend its coverage to executive agencies. See Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1381 n.13 (11th Cir. 1982).

While the 1978 amendments also expanded the remedies of handicapped individuals, its legislative history illustrates Congress' intentions to enlarge, not reduce, the reach of the Act. For example, Congressman Jeffords proclaimed "[t]his amendment removes [the exemption for the federal government] and applied [§794] to the Federal Government . . . and should go a long way toward developing a uniform and equitable national policy for elimination of discrimination." 124 Cong.Rec. H13901 (daily ed., May 16, 1978). Furthermore, Senator Stafford exclaimed that "The bill allows the rehabilitation program to grow and serve more handicapped individuals and provide those individuals with greater opportunities to maximize their potential." 124 Cong.Rec. S30311 (daily ed., Sept. 20, 1978). Court interpretations further support this view. See John and Jane Doe, et al. v. Devine, Blue Cross/Blue Shield Association and Aetna Life Insurance Company, 545 F.Supp. 576, 585 (D.D.C. 1982)(quoting Doe v. Colautti, 454 F.Supp. 621, 629, aff'd 592 F.2d 704 (3d Cir. 1979)), Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1381 (11th Cir. 1982).

that the Commission is an executive agency, as it is an independent establishment of the executive branch.

B. Office of Coordination and Review, Department of Justice

To alleviate all questions regarding the applicability of the Act to the Commission, the Commission could formally request from the Office of Coordination and Review,[16] Civil Rights Division, Department of Justice, a legal analysis, according to Dan Searing, Attorney-Advisor, with that office.

Mr. Searing informally suggested that the Commission continue including in its "notice of hearing" a statement requesting anyone requiring special accommodations to contact its office prior to the hearing, as well as ensuring the facilities where its hearings take place are handicap accessible. He also suggested that the Commission contact his office asking for a legal analysis <u>only after</u> the Commission has received a complaint from someone who feels they have been discriminated against on the basis of their handicap.[17]

Therefore, according to Mr. Searing, the Commission should promulgate regulations only upon such determination by the DoJ as a result of their legal analysis or upon notification by the DoJ based on their periodic review of small agencies and departments.

C. Obligations Imposed by the Act

Upon a determination that the Rehabilitation Act applies to a specific "program or activity," §794(a) further requires each agency to promulgate regulations implementing the purpose of the statute. Whereas one would presume that this would result in a multitude of varied and conflicting provisions, it has not, as most agencies have generally duplicated the Equal Employment Opportunity Commission's regulations.[18]

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[16] The Office of Coordination and Review is the department of the DoJ which has been delegated, inter alia, the responsibility for coordinating the implementation and enforcement of §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794). The Attorney General was originally charged with this responsibility pursuant to Executive Order 12250 (1980).

[17] The basis of Mr. Searings suggestion to wait until after a complaint has been received to issue regulations is his belief that the Commissions 1995 mandate would have expired by the time the regulations would become effective.

[18] <u>Overton v. Reilly</u>, 977 F.2d 1990, 1193-94 (7th Cir. 1992). The EEOC's regulations are found at 29 CFR Ch.XIV, Subpart G (§§1613.701-.709)(1991)(copy attached).

Assuming for the benefit of analysis that the DoD's regulations are typical of those promulgated by most agencies,[19] the Commission's hearings would be required to be accessible to handicapped persons,[20] with reasonable accommodations[21]n being made to known physical or mental handicaps of an individual.[22] The Commission would be excepted from this requirement if it could establish that the requested accommodation would impose an undue hardship on the operation of its program.[23]

In issuing regulations, Mr. Searing of the DoJ stated that the Commission could do so in the form of a "joint resolution" in which several small agencies and departments promulgate regulations together in an effort to save time and resources.[24] The Office of Coordination and Review would organize such efforts.

D. Recommendation

Whereas an argument could be made both for and against the application of the Rehabilitation Act to the Commission, it may be in the best legal interest of the Commission to formally request

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[19] 32 CFR Part 56. A copy of DoD's internal directive is attached.

[20] 32 CFR §56.8(c)(2) states that each program or activity shall operate in such a way that, when viewed in its entirety, is readily accessible to and usable by handicapped persons.

[21] 32 CFR §56.8(d)(2) states that reasonable accommodation includes "(i) making facilities . . . readily accessible to and usable by handicapped persons; (ii) . . . the provision of readers or certified sign-language interpreters; and similar actions." The same language is found in EEOC's regulations at 29 CFR §1613.704(b).

The determination of whether an accommodation is reasonable is fact-specific and requires the court to perform individualized examinations to ensure that the justifications "reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives . . . ." Arline, 772 F.2d at 765. For example, in Wonder v. Department of Energy, 35 M.S.P.R. 209 (1987), the Merit Systems Protection Board stated that "where the ability of a qualified handicapped individual to understand and communicate . . . with regard to proceedings before the Board is impaired, the Board is obligate to provide an interpreter" pursuant to §794. Id.

[22] 32 CFR §56.8(d).

[23] Id.

[24] The agencies and departments involved would utilize a prototype prepared by the Department of Justice pursuant to Executive Order 12250 and initially issued to executive agencies. See n.18.

from the Department of Justice a legal analysis to decide this issue. The DoJ's determination would be conclusive and permit the Commission, if required, to begin promulgating regulations. In the alternative, if the Commission is not required to issue regulations, the issue will be permanently resolved. This approach may be preferred to that of waiting for a complaint before asking for review, because the issue will be decided and no further time will be expended on its regard. Furthermore, if compliance with the Act is required, it is to the advantage of the Commission to do so as quickly as possible rather than incur any further risk of litigation.

II. THE AMERICANS WITH DISABILITIES ACT OF 1990

The Americans with Disabilities Act of 1990[25], whose mission is to eliminate discrimination against individuals with disabilities, is not applicable to the federal government.[26] Accordingly, the statute's provisions have no affect on the Commission.

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[25] 42 U.S.C. §§12101 *et seq.* (1993).

[26] See 42 U.S.C. §§ 12111(5), 12131(1).

(d) An appeal shall be deemed timely if it is delivered in person or post-marked before the expiration of the filing period, or if, in the absence of a legible postmark, it is received by the Commission by mail within five days of the expiration of the filing period. The Office of Federal Operations' review will be made upon the existing record to determine if the agency decision is in accord with applicable law, Executive order, or Civil Service regulations, rules, and instructions and is supported by substantial evidence.

[52 FR 41932, Oct. 30, 1987, as amended at 56 FR 6983, Feb. 21, 1991]

§ 1613.632 Reopening and reconsideration by the Commissioners.

The Commissioners may reopen and reconsider any previous decision of a Commission office on their own motion or at the request of either party in accordance with provisions of § 1613.235.

[52 FR 41932, Oct. 30, 1987]

Civil Actions

§ 1613.641 Statutory right.

(a) An agent who has filed a complaint or a claimant who has filed a claim for relief based on race, color, religion, sex, and/or national origin discrimination is authorized to file a civil action in an appropriate U.S. district court:

(1) Within 30 calendar days of his/her receipt of notice of final action taken by his/her agency on a complaint or claim;

(2) After 180 calendar days from the date he/she filed a complaint or claim with his/her agency if there has been no decision on the complaint or claim;

(3) Within 30 calendar days of his/her receipt of the decision of the Office of Federal Operations on his/her appeal; or

(4) After 180 calendar days from the date he/she filed an appeal with the Office of Federal Operations, if there has been no Office of Federal Operations decision.

For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees and costs. If a determination to award attorneys fees is made the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

(b) An agent who filed a complaint or a claimant who has filed for relief based on age discrimination, is authorized to file a civil action in an appropriate U.S. district court.

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24133, Apr. 9, 1980; 56 FR 6983, Feb. 21, 1991]

§ 1613.642 Notice of right.

When the agent alleges that the agency discriminated against a class on the basis of race, color, religion, sex, national origin, and/or age, or a claimant files for relief, the agency or the Commission shall notify him/her of his/her right to file a civil action in any final action on a complaint, or claim, under §§ 1613.604, 1613.612, 1613.614, or 1613.631.

§ 1613.643 Effect on administrative processing.

The filing of a civil action by an agent involving a complaint filed under this subpart terminates processing of that complaint. The filing of a civil action by a claimant involving a claim filed under this subpart, terminates processing of that claim.

[52 FR 41933, Oct. 30, 1987]

Subpart G—Prohibition Against Discrimination Because of a Physical or Mental Handicap

Authority: 5 U.S.C. 7153; § 5.1 of the Civil Service Rules; 29 U.S.C. 791.

Source: 43 FR 12295, Mar. 24, 1978, unless otherwise noted. Redesignated at 43 FR 60901, Dec. 29, 1978.

General Provisions

§ 1613.701 Purpose and applicability.

(a) *Purpose.* This subpart sets forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on account of physical or mental handicap and the regulations under which an agency will process complaints of discrimination based on a physical or mental handicap.

(b) *Applicability.* (1) This subpart applies to executive agencies as defined in section 105 of title 5 of the United States Code and to those positions in the legislative and judicial branches of the Federal Government and the government of the District of Columbia which are in the competitive service.

(2) This subpart applies to the U.S. Postal Service and Postal Rate Commission.

(3) This subpart applies only to applicants and employees who have a handicap as defined in § 1613.702(a).

§ 1613.702 Definitions.

(a) *Handicapped person* is defined for this subpart as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

(b) *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; cardiovascular; reproductive; digestive; genito-urinary; 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.

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

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

(e) *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 an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in paragraph (b) of this section but is treated by an employer as having such an impairment.

(f) *Qualified handicapped person* means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used:

(1) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

§ 1613.703 General policy.

Agencies shall give full consideration to the hiring, placement, and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person.

§ 1613.704 Reasonable accommodation.

(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities 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, appropriate adjustment or modification of examinations, the provision

of readers and 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 the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

§ 1613.705 Employment criteria.

(a) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified handicapped persons or any class of handicapped persons unless: (1) The test score or other selection criterion, as used by the agency, 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 Civil Service Commission's Director of Personnel Research and Development Center to be available.

(b) An agency shall select and administer tests concerning employment so as to insure 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 ability to perform the position or type of positions in question 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).

§ 1613.706 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, an agency may not conduct a preemployment medical examination and 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. An agency may, however, make preemployment inquiry into an applicant's ability to meet the medical qualification requirements, with or without reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question. The Civil Service Commission may also make an inquiry as to the nature and extent of a handicap for the purpose of special testing.

(b) Nothing in this section shall prohibit an agency 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 or when the preemployment medical questionnaire used for positions which do not routinely require medical examination indicates a condition for which further examination is required because of the job-related nature of the condition, and (2) the results of such an examination are used only in accordance with the requirements of this part. Nothing in this section shall be construed to prohibit the gathering of preemployment medical information for the purposes of special appointing authorities for handicapped persons.

(c) To enable and evaluate affirmative action to hire, place, or advance handicapped individuals, the agency may invite applicants for employment to indicate whether and to what extent they are handicapped, if: (1) The agency 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 conjunction with affirmative action and (2) the agency states clearly that the information is being requested on a voluntary basis, 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.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be kept confidential except that: (1) Managers, selecting officials, and others involved in the selection process or responsible for affirmative action may be informed that the applicant is a handicapped individual eligible for affirmative action; (2) supervisors and managers may be informed regarding necessary accommodations; (3) first aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; (4) government officials investigating compliance with laws, regulations, and instructions relevant to equal employment opportunity and affirmative action for handicapped individuals shall be provided information upon request; and (5) statistics generated from information obtained may be used to manage, evaluate, and report on equal employment opportunity and affirmative action programs.

[43 FR 12295, Mar. 24, 1978. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 46 FR 11285, Feb. 6, 1981]

§ 1613.707 Physical access to buildings.

(a) An agency shall not discriminate against qualified handicapped applicants or employees due to the inaccessibility of its facility.

(b) For the purpose of this subpart, a facility shall be deemed accessible if it is in compliance with the Architectural Barriers Act of 1968.

Agency Regulations for Processing Complaints of Discrimination

§ 1613.708 General.

An agency shall provide regulations governing the acceptance and processing of complaints of discrimination based on a physical or mental handicap which comply with the principles and requirements in §§ 1613.213 through 1613.283 and §§ 1613.601 through 1613.643. Nothing in the foregoing shall be construed to postpone the effective date of this rule.

[46 FR 51384, Oct. 20, 1981]

§ 1613.709 Coverage.

(a) An agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against because of a handicap as defined in § 1613.702.

(b) An agency must process complaints of discrimination based on acts or actions that occurred 1 year prior to the effective date of these regulations *Provided:* (1) The complaint of discrimination was brought to the attention of the agency within 30 calendar days of the alleged discriminatory act, or, if a personnel action, within 30 calendar days of its effective date, (2) the complaint of discrimination was not adjudicated under some other grievance or appeals procedure, and (3) the complaint of discrimination is filed within 180 calendar days of the effective date of these regulations. Complaints of discrimination based on alleged discriminatory acts or personnel actions that occurred on or after the effective date of these regulations are subject to the time restraints set forth in § 1613.214(a).

(c) Notwithstanding the provision of subsection (b), a complainant may request an agency to process allegations of handicap discrimination which had been filed as a discrimination complaint or as a grievance, and were pending with the agency, the Civil Service Commission or in a Federal Court on April 10, 1978. Such requests for processing of allegations of handicap discrimination must be brought to the attention of the agency EEO counselor not later than 180 days from the publication of this subsection in final form in the Federal Register.

[43 FR 12295, Mar. 24, 1978. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 41634, June 20, 1980]

Subpart H—Regulations for Processing Appealable Actions, Alleging Prohibited Discrimination, Pending on or Before January 10, 1979

Authority: 42 U.S.C. 2000e-16; 29 U.S.C. 633a; 29 U.S.C. 791; Reorganization Plan No. 1 of 1978.

Source: 44 FR 50541, Aug. 28, 1979, unless otherwise noted.

§ 1613.801 Scope.

This subpart establishes regulations for the processing of an allegation that an action otherwise appealable to

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< CONFIRMATION REPORT >

03-01-1994(TUE) 11:19

[TRANSMIT]

NO.	DATE	TIME	DESTINATION	PG.	DURATION	MODE	RESULT
8257	3-01	11:11	301-564-3206	13	0°07'49"	NORM.E	U05000
				13	0°07'49"		

WRONG PAGE COUNT.

(d) An appeal shall be deemed timely if it is delivered in person or post-marked before the expiration of the filing period, or if, in the absence of a legible postmark, it is received by the Commission by mail within five days of the expiration of the filing period. The Office of Federal Operations' review will be made upon the existing record to determine if the agency decision is in accord with applicable law, Executive order, or Civil Service regulations, rules, and instructions and is supported by substantial evidence.

[52 FR 41932, Oct. 30, 1987, as amended at 56 FR 6983, Feb. 21, 1991]

§ 1613.632 Reopening and reconsideration by the Commissioners.

The Commissioners may reopen and reconsider any previous decision of a Commission office on their own motion or at the request of either party in accordance with provisions of § 1613.235.

[52 FR 41932, Oct. 30, 1987]

CIVIL ACTIONS

§ 1613.641 Statutory right.

(a) An agent who has filed a complaint or a claimant who has filed a claim for relief based on race, color, religion, sex, and/or national origin discrimination is authorized to file a civil action in an appropriate U.S. district court:

(1) Within 30 calendar days of his/her receipt of notice of final action taken by his/her agency on a complaint or claim;

(2) After 180 calendar days from the date he/she filed a complaint or claim with his/her agency if there has been no decision on the complaint or claim;

(3) Within 30 calendar days of his/her receipt of the decision of the Office of Federal Operations on his/her appeal; or

(4) After 180 calendar days from the date he/she filed an appeal with the Office of Federal Operations, if there has been no Office of Federal Operations decision.

For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees and costs. If a determination to award attorneys fees is made the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

(b) An agent who filed a complaint or a claimant who has filed for relief based on age discrimination, is authorized to file a civil action in an appropriate U.S. district court.

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24133, Apr. 9, 1980; 56 FR 6983, Feb. 21, 1991]

§ 1613.642 Notice of right.

When the agent alleges that the agency discriminated against a class on the basis of race, color, religion, sex, national origin, and/or age, or a claimant files for relief, the agency or the Commission shall notify him/her of his/her right to file a civil action in any final action on a complaint, or claim, under §§ 1613.604, 1613.612, 1613.614, or 1613.631.

§ 1613.643 Effect on administrative processing.

The filing of a civil action by an agent involving a complaint filed under this subpart terminates processing of that complaint. The filing of a civil action by a claimant involving a claim filed under this subpart, terminates processing of that claim.

[52 FR 41933, Oct. 30, 1987]

Subpart G—Prohibition Against Discrimination Because of a Physical or Mental Handicap

AUTHORITY: 5 U.S.C. 7153; § 5.1 of the Civil Service Rules; 29 U.S.C. 791.

SOURCE: 43 FR 12295, Mar. 24, 1978, unless otherwise noted. Redesignated at 43 FR 60901, Dec. 29, 1978.

GENERAL PROVISIONS

§ 1613.701 Purpose and applicability.

(a) *Purpose.* This subpart sets forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on account of physical or mental handicap and the regulations under which an agency will process complaints of discrimination based on a physical or mental handicap.

(b) *Applicability.* (1) This subpart applies to executive agencies as defined in section 105 of title 5 of the United States Code and to those positions in the legislative and judicial branches of the Federal Government and the government of the District of Columbia which are in the competitive service.

(2) This subpart applies to the U.S. Postal Service and Postal Rate Commission.

(3) This subpart applies only to applicants and employees who have a handicap as defined in § 1613.702(a).

§ 1613.702 Definitions.

(a) *Handicapped person* is defined for this subpart as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

(b) *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; cardiovascular; reproductive; digestive; genito-urinary; 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.

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

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

(e) *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 an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in paragraph (b) of this section but is treated by an employer as having such an impairment.

(f) *Qualified handicapped person* means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used:

(1) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

§ 1613.703 General policy.

Agencies shall give full consideration to the hiring, placement, and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person.

§ 1613.704 Reasonable accommodation.

(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities 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, appropriate adjustment or modification of examinations, the provision

of readers and 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 the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

§ 1613.705 Employment criteria.

(a) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified handicapped persons or any class of handicapped persons unless: (1) The test score or other selection criterion, as used by the agency, 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 Civil Service Commission's Director of Personnel Research and Development Center to be available.

(b) An agency shall select and administer tests concerning employment so as to insure 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 ability to perform the position or type of positions in question 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).

§ 1613.706 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, an agency may not conduct a preemployment medical examination and 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. An agency may, however, make preemployment inquiry into an applicant's ability to meet the medical qualification requirements, with or without reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question. The Civil Service Commission may also make an inquiry as to the nature and extent of a handicap for the purpose of special testing.

(b) Nothing in this section shall prohibit an agency 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 or when the preemployment medical questionnaire used for positions which do not routinely require medical examination indicates a condition for which further examination is required because of the job-related nature of the condition, and (2) the results of such an examination are used only in accordance with the requirements of this part. Nothing in this section shall be construed to prohibit the gathering of preemployment medical information for the purposes of special appointing authorities for handicapped persons.

(c) To enable and evaluate affirmative action to hire, place, or advance handicapped individuals, the agency may invite applicants for employment to indicate whether and to what extent they are handicapped, if: (1) The agency 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 conjunction with affirmative action and (2) the agency states clearly that the information is being requested on a voluntary basis, 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.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be kept confidential except that: (1) Managers, selecting officials, and others involved in the selection

process or responsible for affirmative action may be informed that the applicant is a handicapped individual eligible for affirmative action; (2) supervisors and managers may be informed regarding necessary accommodations; (3) first aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; (4) government officials investigating compliance with laws, regulations, and instructions relevant to equal employment opportunity and affirmative action for handicapped individuals shall be provided information upon request; and (5) statistics generated from information obtained may be used to manage, evaluate, and report on equal employment opportunity and affirmative action programs.

[43 FR 12295, Mar. 24, 1978. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 46 FR 11285, Feb. 6, 1981]

§ 1613.707 Physical access to buildings.

(a) An agency shall not discriminate against qualified handicapped applicants or employees due to the inaccessibility of its facility.

(b) For the purpose of this subpart, a facility shall be deemed accessible if it is in compliance with the Architectural Barriers Act of 1968.

Agency Regulations for Processing Complaints of Discrimination

§ 1613.708 General.

An agency shall provide regulations governing the acceptance and processing of complaints of discrimination based on a physical or mental handicap which comply with the principles and requirements in §§ 1613.213 through 1613.283 and §§ 1613.601 through 1613.643. Nothing in the foregoing shall be construed to postpone the effective date of this rule.

[46 FR 51384, Oct. 20, 1981]

§ 1613.709 Coverage.

(a) An agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against because of a handicap as defined in § 1613.702.

(b) An agency must process complaints of discrimination based on acts or actions that occurred 1 year prior to the effective date of these regulations *Provided:* (1) The complaint of discrimination was brought to the attention of the agency within 30 calendar days of the alleged discriminatory act, or, if a personnel action, within 30 calendar days of its effective date, (2) the complaint of discrimination was not adjudicated under some other grievance or appeals procedure, and (3) the complaint of discrimination is filed within 180 calendar days of the effective date of these regulations. Complaints of discrimination based on alleged discriminatory acts or personnel actions that occurred on or after the effective date of these regulations are subject to the time restraints set forth in § 1613.214(a).

(c) Notwithstanding the provision of subsection (b), a complainant may request an agency to process allegations of handicap discrimination which had been filed as a discrimination complaint or as a grievance, and were pending with the agency, the Civil Service Commission or in a Federal Court on April 10, 1978. Such requests for processing of allegations of handicap discrimination must be brought to the attention of the agency EEO counselor not later than 180 days from the publication of this subsection in final form in the Federal Register.

[43 FR 12295, Mar. 24, 1978. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 41634, June 20, 1980]

Subpart H—Regulations for Processing Appealable Actions, Alleging Prohibited Discrimination, Pending on or Before January 10, 1979

Authority: 42 U.S.C. 2000e-16; 29 U.S.C. 633a; 29 U.S.C. 791; Reorganization Plan No. 1 of 1978.

Source: 44 FR 50541, Aug. 28, 1979, unless otherwise noted.

§ 1613.801 Scope.

This subpart establishes regulations for the processing of an allegation that an action otherwise appealable to

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Memorandum to Sheila Cheston, General Counsel
From: Jeff Patterson, Assistant Counsel
Date: May 28, 1993
Re: Telephone Conversation with DOJ Attorney

This afternoon I spoke with Dan Searing, Attorney-Advisor, Department of Justice, Office of Coordination and Review, Civil Rights Division, regarding the potential applicability of the Rehabilitation Act of 1973 to the Commission. The Office of Coordination and Review is the department of the DOJ ~~which~~ that has been delegated, inter alia, the responsibility for coordinating the implementation and enforcement of §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794). The Attorney General was originally charged with this responsibility pursuant to Executive Order 12250 (1980).

~~Upon discussing the issue concerning the application of the Act to the Commission,~~ Mr. Searing informally suggested (he did not offer formal "advise") that the Commission do the following:

(1) Continue including in our "notice of hearing" appearing in the Federal Register a ~~paragraph~~ sentence stating that anyone requiring special accommodations must contact our office prior to ~~that~~ the hearing;

(2) Ensure that the facilities where our hearings take place are handicap accessible;

(3) Contact his office asking for a legal analysis regarding the applicability of the Act to the Commission <u>only after</u> the Commission has received a complaint from someone who feels they have been discriminated against on the basis of their handicap.

[Mr. Searing stated that of course we could contact his department requesting a legal analysis at any time.]

(4) Promulgate regulations only upon the occurrence of one of the following:

(a) ~~The~~ DOJ determines that the Act applies to the Commission as a result of their legal analysis performed pursuant to (3) above; or

(b) ~~The~~ DOJ notifies the Commission, after performing a periodic review of small agencies/department, that we are required to issue regulations.

If it is determined that the Commission is required to issue regulations pursuant to §794, we can do so in the form of a "joint publication" in which several smaller agencies/departments promulgate regulations together. The DOJ coordinates such efforts.

~~The only reason~~ Mr. Searing does~~n't~~ not suggest that the Commission promulgate regulations immediately ~~is that~~ (1993) by the time the regulations would become effective, the Commission's because mandate would have expired.

~~Although it has no legal significance,~~ Mr. Searing noted that we are doing more than most small agencies/departments in that we're at least aware of the Act and have been including the aforementioned paragraph in our "notice of hearing."

Mr. Searing stated that he is a Level 15 attorney-advisor.

Mr. Searing's direct telephone number is 202/307-2215.

Document Separator

March 31, 1982
NUMBER 1020.1

Department of Defense Directive

ASD(MRA&L)

SUBJECT: Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of Defense

References:
(a) Section 504 of Public Law 93-112, "Rehabilitation Act of 1973," September 26, 1973 (29 U.S.C. 794) (1976)
(b) Section 111 of Public Law 93-516, "Rehabilitation Act Amendments of 1974," December 7, 1974 (29 U.S.C. 706, 780, 790) (1976)
(c) Section 119 of Public Law 95-602, "Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978," November 6, 1978 (29 U.S.C. 794) (Supp. III 1979)
(d) Department of Justice Regulation, "Implementation of Executive Order 12250, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs," August 11, 1981 (28 CFR 41)
(e) Title 44, United States Code, Chapter 35

A. PURPOSE

This Directive implements references (a) through (d) to prohibit discrimination based on handicap in programs and activities receiving federal financial assistance disbursed by the Department of Defense and in programs and activities conducted by the Department of Defense.

B. APPLICABILITY AND SCOPE

1. This Directive applies to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the National Guard Bureau, and the Defense Agencies (hereafter referred to as "DoD Components") insofar as they:

a. Disburse federal financial assistance to programs and activities that affect handicapped persons in the United States and that are covered by this Directive (See section B., enclosure 1); or

19. Title 33, United States Code, Section 701g (1976): provision of specialized services by the Army Corps of Engineers to reduce flood damage.

20. Title 24, United States Code, Sections 44c and 47 (1976): United States Soldiers' and Airmen's Home.

21. Title 10, United States Code, Chapter 55, as implemented by DoD 6010.8-R, "Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)," January 10, 1977.

C. All programs and activities conducted by the Department of Defense that affect handicapped persons in the United States are subject to this Directive. They include:

1. Promulgation of rules and regulations for public comment in a manner that grants handicapped persons a reasonable opportunity for such comment (such as by making cassette recordings of proposed rules).

2. Public meetings, conferences, or seminars sponsored or conducted by a DoD Component but held in nongovernment buildings.

3. Public meetings, conferences, or seminars sponsored or conducted by a DoD Component or by a non-DoD organization but held in a DoD building.

4. Open houses, memorial services, tours, or other ceremonies held on or in DoD property.

5. Military museums.

6. Historic vessels.

7. Historic buildings and properties maintained by a DoD Component and properties designated as historic under a statute of the appropriate state or local governmental body.

8. Schools operated by the Department of Defense within the United States pursuant to Section 6 of P.L. 81-874, Title 20, United States Code, Section 241 (1976).

DEFINITIONS

1. Facility. All or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or any interest in such property.

2. Federal Financial Assistance. Any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the federal government provides or otherwise makes available assistance in the form of:

a. Funds.

b. Services performed by federal personnel, including technical assistance, counseling, training, and provision of statistical or expert information.

c. Real and personal property or any interest in or use of such property, including:

(1) Transfers or leases of such property for less than fair market value or for reduced consideration.

(2) 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.

3. Handicapped Person. 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. For purposes of this Directive as it relates to employment programs of recipients, such term does not include any individual who is an alcoholic or drug abuser and whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question, or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or to the safety of others. As used in this paragraph:

a. Physical or Mental Impairment. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal and special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning

GUIDELINES FOR DETERMINING DISCRIMINATORY PRACTICES

A. GENERAL PROHIBITIONS AGAINST DISCRIMINATION

1. No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefit of, or otherwise be subjected to discrimination under any program or activity that is conducted by the Department of Defense or that receives or benefits from federal financial assistance disbursed by the Department of Defense.

2. A recipient or DoD Component may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

a. Provide different or separate aid, benefits, or services to handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are equal to those provided to others;

b. Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

c. 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;

d. Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that afforded to others; or

e. Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity granted to others receiving the aid, benefit, or service.

3. A recipient or DoD Component may not deny a qualified handicappped person the opportunity to participate in programs or activities that are not separate or different from regular programs or activities, even if such separate or different programs and activities are permissible under paragraph A.2.a., above.

4. A recipient or DoD Component may not provide 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 or activity.

11. Recipients and DoD Components shall take appropriate steps to ensure that no handicapped individual is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under any program or activity receiving or benefiting from federal financial assistance disbursed by the Department of Defense or under any program or activity conducted by the Department of Defense because of the absence of auxiliary aids, such as certified sign-language interpreters, telecommunication devices (TDDs), or other telephonic devices for individuals with impaired sensory, manual, or speaking skills.

B. PROHIBITIONS AGAINST EMPLOYMENT DISCRIMINATION BY RECIPIENTS

1. 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 disbursed by the Department of Defense.

2. The prohibition against discrimination in employment applies to the following:

a. Recruitment, advertising, and processing of applications for employment.

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 recipient.

g. Selection and financial support for training, including apprenticeship, professional meetings, conferences and other related activities, and selection for leaves of absence for training.

h. Programs and activities sponsored by the employer, including social and recreational programs.

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

8. 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 if:

a. All entering employees are subjected to such an examination, regardless of handicap.

b. The results of such an examination are used only in accordance with this Directive, which prohibits discrimination against a qualified handicapped person on the basis of handicap.

9. Information obtained under this section concerning the medical condition or history of applicants shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

a. Supervisors and managers may be informed about restrictions on the work or duties of handicapped persons and about necessary accommodations.

b. First aid and safety personnel may be informed, when appropriate, if a handicapping condition might require emergency treatment.

c. Government officials investigating compliance with Section 504 and this Directive shall be provided relevant information upon request.

C. PROGRAM ACCESSIBILITY

1. General Requirements. No qualified handicapped person shall, because a recipient's or DoD Component's facilities are inaccessible to or not usable 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 disbursed by the Department of Defense or under any program or activity conducted by the Department of Defense.

2. Existing Facilities

a. A recipient or DoD Component 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 does not necessarily require a recipient or DoD Component to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons. For guidance in determining the accessibility of facilities, see Chapter 18 of DoD 4270.1-M, "Department of Defense Construction Criteria Manual," June 1, 1978, and Department of the Army, Office of the Chief of

accessible buildings; assignment of aides to beneficiaries, such as readers or certified sign-language interpreters; home visits; delivery of health, welfare, or other services at accessible alternate sites; alteration of existing facilities and construction of new facilities in conformance with this subsection and subsection C.3., below; or any other method that results in making the program or activity of the recipient or DoD Component accessible to handicapped persons.

d. A recipient or DoD Component is not required to make structural changes in existing facilities when other methods are effective in achieving compliance with this section.

e. In choosing among available methods for meeting the requirements of this section, a recipient or DoD Component shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate with nonhandicapped persons.

3. New Construction. New facilities shall be designed and constructed to be readily accessible to and usable by handicapped persons. Alterations to existing facilities shall be designed and constructed, to the maximum extent feasible, to be readily accessible to and usable by handicapped persons. For guidance in determining the accessibility of facilities, see Chapter 18 of DoD 4270.1-M and Department of the Army, Office of the Chief of Engineers, Manual EM 1110-1-103. Inquiries about specific accessibility design problems may be addressed to the ASD(MRA&L), or designee.

4. Historic Properties

a. In the case of historic properties, program accessibility shall mean that, when viewed in their entirety, programs are readily accessible to and usable by handicapped persons. Because the primary benefit of historic properties is the experience of the property itself, DoD Components and recipients shall give priority to those methods of achieving program accessibility that make the historic property, or portions thereof, physically accessible to handicapped persons.

b. Methods of achieving program accessibility include:

(1) Making physical alterations that give handicapped persons access to otherwise inaccessible areas or features of historic properties.

(2) Using audiovisual materials and devices to depict otherwise inaccessible areas or features of historic properties.

5. Military Museums

a. In the case of military museums, program accessibility shall mean that exhibits, displays, tours, lectures, circulating or traveling exhibits, and other programs of military museums are accessible to and usable by handicapped persons. Methods of meeting this requirement include the following:

(1) Museum programs may be made accessible to deaf and hearing-impaired persons by means such as training museum staff, such as docents, in sign language; providing qualified sign-language interpreters to accompany deaf or hearing-impaired visitors; ensuring that clear, concise language is used on all museum signs and display labels; providing amplification devices; or providing printed scripts for films, videotapes, lectures, or tours. DoD Components are encouraged to use "Museums and Handicapped Students: Guidelines for Educators," published by the National Air and Space Museum, Smithsonian Institution, Washington, D.C. 20560.

(2) Museum programs may be made accessible to blind and visually-impaired persons by means such as providing museum catalogues in a large-print edition printed over braille; providing cassette tapes, records, or discs for museum tours or exhibits; providing readers to accompany blind or visually impaired visitors; using large-print and braille display cards at exhibits; providing raised-line maps of the museum building; using raised-line drawings, reproductions, or models of large exhibits to facilitate tactile experiences when touching exhibits is prohibited; placing large-print and braille signs to identify galleries, elevators, restrooms, and other service areas; and permitting guide dogs in all museum facilities.

(3) Museum programs may be made accessible to other physically impaired persons by means such as lowering display cases; spacing exhibits to facilitate movement; using ramps in galleries; increasing lighting in exhibit areas to facilitate viewing from a distance; providing places to sit in exhibit areas; making restrooms accessible; using large-print exhibit display cards to facilitate reading from a distance; and sensitizing museum staff to consider the needs of handicapped visitors when organizing exhibits.

b. DoD Component guidelines developed in accordance with enclosure 4 of this Directive shall identify military museums subject to this subsection and shall contain a plan for making museum programs accessible to handicapped persons. Technical assistance in the preparation and content of these plans may be obtained from the National Access Center, 1419 27th Street, N.W., Washington, D.C. 20007 ((202) 333-1712 or TTY (202) 333-1339). In addition, community organizations that serve handicapped persons and handicapped persons themselves shall be consulted in the preparation of these plans.

ENSURING COMPLIANCE WITH THIS DIRECTIVE IN FEDERAL FINANCIAL ASSISTANCE PROGRAMS AND ACTIVITIES

A. SUPPLEMENTARY GUIDELINES ISSUED BY DOD COMPONENTS

1. Whenever necessary, DoD Components shall publish supplementary guidelines for each type of program or activity to which they disburse federal financial assistance within 120 days of the effective date of this Directive or of the effective date of any subsequent statute authorizing federal financial assistance to a new type of program or activity. DoD Components shall obtain approval of these supplementary guidelines from the ASD(MRA&L), or designee, before issuing them. Prior to their issuance, the ASD (MRA&L), or designee, shall submit supplementary guidelines prepared pursuant to this subsection to the Coordination and Review Section, Civil Rights Division, Department of Justice, for review and approval. To the extent that supplementary guidelines issued by DoD Components deal with the employment of civilians in programs and activities subject to this Directive, the ASD(MRA&L), or designee, shall also obtain the approval of the Equal Employment Opportunity Commission (EEOC) in accordance with Executive Order 12067.

2. The ASD(MRA&L), or designee, and DoD Components shall ensure that their supplementary guidelines conform to the requirements of this Directive and that they provide:

a. A description of the types of programs and activities covered.

b. Examples of prohibited practices likely to arise with respect to those types of programs and activities.

c. A list of the data collection and reporting requirements of the recipients.

d. Procedures for processing and investigating complaints.

e. Procedures for hearings to determine compliance by recipients with this Directive.

f. Requirements or suggestions for affirmative action on behalf of qualified handicapped persons.

g. Requirements for the dissemination of program and complaint information to the public.

conducted in accordance with this Directive and supplementary guidelines promulgated by DoD Components. If a recipient fails to provide an assurance that conforms to the requirements of this section, the DoD Component shall attempt to effect compliance pursuant to sections F. through H., below, provided that if assistance is due and payable to the recipient based on an application approved prior to the effective date of this Directive, the DoD Component shall continue the assistance while any proceedings required by sections N. through V, below, are pending.

2. DoD Components shall advise each recipient of the required elements of the assurance and, with respect to each program or activity, of the extent to which those receiving assistance from recipients shall be required to execute similar assurances.

3. DoD Components shall ensure that each assurance:

a. Obligates the recipient to advise the DoD Component of any complaints received that allege discrimination against handicapped persons.

b. Obligates the recipient to collect and provide the items of information that the DoD Component lists in its supplementary guidelines pursuant to paragraph A.2.c., above.

c. Is made applicable to any federal financial assistance that might be disbursed by a DoD Component without the submission of a new application.

d. Obligates the recipient, when the financial assistance is in the form of property, for the period during which the property is used under a financial assistance agreement or is possessed by the recipient.

e. Includes a provision recognizing that the U.S. Government has the right to seek judicial enforcement of Section 504 and this Directive.

C. SELF-EVALUATION AND CONSULTATION WITH INTERESTED PERSONS AND ORGANIZATIONS

1. DoD Components shall require recipients to conduct, within 6 months of the effective date of this Directive or of first receiving federal financial assistance disbursed by the Department of Defense, a self-evaluation with the assistance of interested persons, including handicapped persons or organizations that represent them. When appropriate, DoD Components also shall require recipients to consult at least annually with such persons. The "Department of Health, Education and Welfare Section 504 Technical Assistance Reserve Directory," April 1980,

of the policy described in subsection D.1., above. This may be accomplished by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

3. Understandable materials developed in accordance with this section shall be provided to ensure that all beneficiaries and employees of the recipient understand the information. In addition, recipients shall disseminate appropriate and comprehensive information about formal and informal complaint and appeal procedures, including directions on how and where to file complaints and to appeal DoD Component decisions.

E. INTIMIDATION AND INTERFERENCE

Recipients and DoD Components shall take reasonable steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of retaliating against, interfering with, or discouraging the filing of a complaint, furnishing of information, or assisting or participating in an investigation, compliance review, hearing, or other activity related to the administration of this Directive.

F. STAFF RESPONSIBILITIES

All DoD Component determinations of recipient compliance with this Directive shall be subject to reviews by the ASD(MRA&L), or designee. When responsibility for approving applications for federal financial assistance disbursed by a DoD Component is assigned to regional or area offices of the DoD Component, personnel in such offices shall be designated to perform the functions described in sections H. and N. through V., below.

G. ACCESS TO RECORDS AND FACILITIES

Each recipient shall permit access to its premises by DoD officials during normal business hours when such access is necessary for conducting onsite compliance reviews or complaint investigations, and shall allow such officials to photograph facilities and to inspect and copy any books, records, accounts, and other material relevant to determining the recipient's compliance with this Directive. Information so obtained shall be used only in connection with the administration of this Directive. If the recipient does not have the information requested, it shall submit to the DoD Component a written report that contains a certification that the information is not available and describes the good-faith efforts made to obtain the information.

4. Postapproval Reviews. DoD Components shall:

a. Establish and maintain effective programs of post-approval reviews.

b. Conduct such reviews of each recipient, the frequency and the nature of which shall be prescribed in the DoD Component supplementary guidelines implementing this Directive.

c. Require recipients periodically to submit compliance reports to them.

d. Record the results of the reviews, including findings of fact and recommendations.

5. A DoD Component shall complete a review within 180 calendar days of initiating it unless an extension of time is granted by the ASD(MRA&L), or designee, for good cause shown, and shall either:

a. Find the recipient to be in compliance and notify the recipient of that finding; or

b. Notify the recipient and the ASD(MRA&L), or designee, of a finding of probable noncompliance, pursuant to section O., below.

I. FILING OF COMPLAINTS AGAINST RECIPIENTS

1. DoD Components shall establish and publish in their supplementary guidelines procedures for the prompt processing and disposition of complaints against recipients, consistent with this section.

2. A DoD Component shall consider all complaints that:

a. Are filed with it within 180 days of the alleged discrimination or within a longer period of time if an extension is granted for good cause by the DoD Component with the approval of the ASD(MRA&L), or designee.

b. Include the name, address, and telephone number, if any, of the complainant; the name and address of the recipient committing the alleged discrimination; a description of the acts or omissions considered to be discriminatory; and other pertinent information.

c. Are signed by the complainant or the complainant's authorized representative (legal counsel or a person with power of attorney granted by the complainant).

a. Ensure that the recipient investigates the complaints in accordance with the standards, procedures, and requirements prescribed in section J., above.

b. Require the recipient to submit a written report of each complaint and investigation to the DoD Component.

c. Retain a review responsibility over the investigation and disposition of each complaint.

d. Ensure that each complaint investigation is completed within 180 calendar days of the receipt of the complaint by the proper DoD Component, unless an extension of time is granted for good cause by the ASD(MRA&L), or designee.

e. Require the recipient to maintain a log of all complaints filed against it, as described in subsection G.1. of this Directive.

2. DoD Components that require or permit complaint investigations to be conducted by recipients shall review recipient complaint investigations pursuant to this section and section L., below.

L. RESULTS OF INVESTIGATIONS

1. Within 180 days of the receipt of a complaint, the DoD Component, recipient, or the ASD(MRA&L), or designee, shall give written notification:

a. Of the disposition of the complaint to the complainant and, as the case may be, to the recipient or DoD Component.

b. To the complainant that within 30 calendar days of receipt of the written notification, the complainant may request that the ASD(MRA&L), or designee, review the findings in the notification pursuant to section M, below.

2. If the complaint investigation results in a determination by the DoD Component that a recipient is not complying with this Directive, the DoD Component shall proceed as prescribed in sections N. through V, below. If the DoD Component determines that the recipient is in compliance, the DoD Component shall submit the complete case file to the ASD(MRA&L), or designee, within 15 calendar days after the notification of the disposition of the investigation to the complainant.

M. REVIEWING COMPLETED INVESTIGATIONS

1. The ASD(MRA&L), or designee, may review all completed investigations.

1. Describes the apparent violation and the corrective actions necessary to achieve compliance.

2. Extends an offer to meet informally with the recipient.

3. Informs the recipient that failure to respond to the notice within 15 calendar days of its receipt shall result in the initiation of enforcement procedures described in sections R. through V., below.

P. ATTEMPTING TO ACHIEVE VOLUNTARY COMPLIANCE BY RECIPIENTS

1. If a DoD Component issues a notice pursuant to section O., above, the DoD Component shall attempt to meet with the recipient and shall attempt to persuade it to take the steps necessary to achieve compliance with this Directive.

2. If a recipient agrees to take remedial steps to achieve compliance, the DoD Component shall require that the agreement be in writing and:

a. Be signed by the head of the DoD Component concerned, or designee, and by the principal official of the recipient.

b. Specify the action necessary to achieve compliance.

c. Be made available to the public upon request.

d. Be subject to the approval of the ASD(MRA&L), or designee.

3. If satisfactory adjustment or a written agreement has not been achieved within 60 calendar days of the recipient's receipt of the notice issued pursuant to section O., above, the DoD Component shall notify the ASD(MRA&L), or designee, and state the reasons therefor.

4. The DoD Component shall initiate the enforcement actions prescribed in sections R. through V., below, if:

a. The recipient does not respond to a notice pursuant to section O., above, within 15 calendar days of its receipt and satisfactory adjustments are not made within 45 calendar days of the date of the recipient's response; or

b. The DoD Component or the ASD(MRA&L) determines at any time within 90 days after the recipient receives a notice pursuant to section O., above, that, despite reasonable efforts, it is not likely that the recipient will comply promptly and voluntarily.

b. The action has been approved by the Secretary of Defense.

c. Ten calendar days have elapsed since the mailing of a notice informing the recipient of its continuing failure to comply with this Directive, the action necessary to achieve compliance, and the sanction to be imposed.

d. During those 10 calendar days the DoD Component has made additional efforts to persuade the recipient to comply.

R. HEARINGS FOR RECIPIENTS

1. General. When, pursuant to paragraph Q.2.b., above, an opportunity for a hearing is given to a recipient, the DoD Component involved shall follow the procedures prescribed in subsections R.2. through R.6., below.

2. Notice. The DoD Component concerned shall notify the recipient of the opportunity for a hearing by registered or certified mail, return receipt requested, when the recipient denies a tentative finding of noncompliance with this Directive.

a. The DoD Component shall ensure that the notice:

(1) Describes the proposed sanctions to be imposed.

(2) Cites the section of this Directive under which the proposed action is to be taken.

(3) States the name and office of the DoD Component official who is responsible for conducting the hearing (hereafter referred to as the "responsible DoD official").

(4) Outlines the issues to be decided at the hearing.

(5) Advises the recipient either of a date, not less than 20 calendar days after the date that the notice is received, by which the recipient may request that the matter be scheduled for a hearing, or of a reasonable time and place of a hearing that is subject to change for good cause shown.

b. When a time and place for a hearing are set, the DoD Component shall give the recipient and the complainant, if any, reasonable notice of such time and place.

3. Waiver of a Hearing. A recipient may waive a hearing and submit to the responsible DoD official, in writing, information or arguments on or before the date stated pursuant to subparagraph R.2.a.(5), above.

by the responsible DoD official pursuant to subsection R.4., above, the hearing examiner shall either:

a. Make an initial decision, if so authorized, that conforms to the requirements of subsection S.4., below; or

b. Certify the entire record and submit to the responsible DoD official recommended findings and a proposed decision.

2. Review of Initial Decisions. Initial decisions made by a hearing examiner pursuant to paragraph S.1.a., above, shall be reviewed as follows:

a. A recipient may file exceptions to an initial decision within 30 calendar days of receiving notice of such initial decision. Reasons shall be stated for each exception.

b. If the recipient does not file exceptions pursuant to paragraph S.2.a., above, the responsible DoD official may notify the recipient within 45 calendar days of the initial decision that the responsible DoD official will review the decision.

c. If exceptions are filed pursuant to paragraph S.2.a., above, or a notice of review is issued pursuant to paragraph S.2.b., above, the responsible DoD official shall review the initial decision and, after giving the recipient reasonable opportunity to file a brief or other written statement of its contentions, issue a final decision that addresses each finding and conclusion in the initial decision and each exception, if any.

d. If the exceptions described in paragraph S.2.a., above, are not filed and the responsible DoD official does not issue the notice of review described in paragraph S.2.b., above, the initial decision of the hearing examiner shall constitute the final decision of the responsible DoD official.

3. Decisions by the Responsible DoD Official Who Conducts a Hearing or Receives a Certified Record. If a hearing examiner who is designated by the responsible DoD official certifies the entire record and submits recommended findings and a proposed decision to the responsible DoD official pursuant to paragraph S.1.b., above, or if the responsible DoD official conducts the hearing, after giving the recipient a reasonable opportunity to file a brief or other written statement of its contentions, the responsible DoD official shall render a final decision that conforms to subsection S.4., below.

4. Contents of Decisions. Each decision of a hearing examiner or responsible DoD official shall state all findings and conclusions and identify each violation of this Directive. The final decision may contain an order pursuant to section Q.,

U. INTERAGENCY COOPERATION AND DELEGATION

1. When several recipients are receiving assistance for the same or similar purposes from a DoD Component and another federal agency, the DoD Component shall notify the ASD(MRA&L), or designee. Such notification shall be in writing and shall contain:

a. A description of the programs and activities involved.

b. A statement of the amount of money expended on the programs and activities in the previous and current fiscal year by the DoD Component and the agency.

c. A list of the known primary recipients.

2. The ASD(MRA&L), or designee, shall attempt to negotiate with the federal agency a written delegation agreement that designates the agency or the DoD Component as the primary agency for purposes of ensuring compliance with Section 504 of P.L. 93-112, as amended, and this Directive, depending upon which of them administers a larger financial assistance program with the common recipients and other relevant factors. If necessary, the agreement shall establish procedures to ensure the enforcement of Section 504 of P.L. 93-112, as amended, and this Directive. The ASD(MRA&L), or designee, shall provide written notification to recipients of an agreement reached under this subsection.

3. When several recipients are receiving assistance for the same or similar purposes from two or more DoD Components, the DoD Components may negotiate a proposed written delegation agreement that:

a. Assigns responsibility for ensuring that the recipient complies with this Directive to one of the DoD Components.

b. Provides for the notification to recipients and the responsible program officials of the DoD Components involved of the assignment of enforcement responsibility.

4. No delegation agreement reached in accordance with subsection U.3., above, shall be effective until it is approved by the ASD(MRA&L), or designee.

5. When possible, existing delegation agreements relating to Title VI of the Civil Rights Act of 1964 shall be amended to provide for the enforcement of this Directive.

6. Any DoD Component conducting a compliance review or investigating a complaint of an alleged violation by a recipient shall notify any other affected agency or DoD Component through the ASD(MRA&L), or designee, upon discovery that the

ENSURING COMPLIANCE WITH THIS DIRECTIVE IN PROGRAMS AND ACTIVITIES CONDUCTED BY THE DEPARTMENT OF DEFENSE

A. SUPPLEMENTARY GUIDELINES

1. Whenever necessary, the ASD(MRA&L), or designee, shall publish supplementary guidelines for programs and activities that are conducted by DoD Components and that are subject to this Directive. Prior to their issuance, the ASD(MRA&L), or designee, shall submit supplementary guidelines prepared pursuant to this subsection to the Coordination and Review Section, Civil Rights Division, Department of Justice, for review.

2. The heads of DoD Components, or designees, shall be responsible for keeping the supplementary guidelines described in this section current and accurate. When a DoD Component head determines that a program or activity should be added to or deleted from the guidelines, that official shall notify the ASD(MRA&L), or designee, in writing.

B. STAFF RESPONSIBILITIES

The ASD(MRA&L), or designee, shall determine DoD Component compliance with this Directive as it pertains to programs and activities that are conducted by DoD Components and are subject to this Directive.

C. FILING OF COMPLAINTS

1. Complaints of discrimination in a program or activity conducted by a DoD Component may be filed directly with the ASD(MRA&L), or designee.

2. DoD Components shall develop procedures, such as posters or other devices, to notify participants in the programs and activities listed in section C. of enclosure 1 of their right to be free of discrimination because of handicap in those programs and activities and of their right to file complaints of discrimination with the ASD(MRA&L), or designee.

D. INVESTIGATIONS OF COMPLAINTS

1. The ASD(MRA&L), or designee, shall investigate complaints of discrimination in programs and activities that are conducted by DoD Components and are subject to this Directive.

Document Separator

March 31, 1982
NUMBER 1020.1

Department of Defense Directive

ASD(MRA&L)

SUBJECT: Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of Defense

References:
(a) Section 504 of Public Law 93-112, "Rehabilitation Act of 1973," September 26, 1973 (29 U.S.C. 794) (1976)
(b) Section 111 of Public Law 93-516, "Rehabilitation Act Amendments of 1974," December 7, 1974 (29 U.S.C. 706, 780, 790) (1976)
(c) Section 119 of Public Law 95-602, "Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978," November 6, 1978 (29 U.S.C. 794) (Supp. III 1979)
(d) Department of Justice Regulation, "Implementation of Executive Order 12250, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs," August 11, 1981 (28 CFR 41)
(e) Title 44, United States Code, Chapter 35

A. PURPOSE

This Directive implements references (a) through (d) to prohibit discrimination based on handicap in programs and activities receiving federal financial assistance disbursed by the Department of Defense and in programs and activities conducted by the Department of Defense.

B. APPLICABILITY AND SCOPE

1. This Directive applies to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the National Guard Bureau, and the Defense Agencies (hereafter referred to as "DoD Components") insofar as they:

a. Disburse federal financial assistance to programs and activities that affect handicapped persons in the United States and that are covered by this Directive (See section B., enclosure 1); or

b. Notify the ASD(MRA&L), or designee, of the name, position, location, and telephone number of persons selected by them to be policy-level officials within 15 calendar days of such a selection.

c. Issue guidelines pursuant to enclosure 4 of this Directive.

d. Cooperate fully with the ASD(MRA&L), or designee, in that official's performance of the responsibilities assigned herein, including furnishing to the ASD(MRA&L), or designee, in a timely fashion any requested reports and information.

e. Assign sufficient personnel to implement and to ensure effective enforcement of this Directive.

F. ASSURANCES REQUIRED AND PROCEDURES

See enclosures 3, 4, and 5.

G. INFORMATION REQUIREMENTS

1. Each DoD Component shall maintain a log of all complaints that are filed with it or its recipients under this Directive. The log shall contain the complainant's name (last name, first, and middle initial) and address (street address, city, state, and zip code), the recipient's name (if this refers to a person, last name, first, and middle initial) and address (street address, city, state, and zip code), the nature of the complaint, and the current status of the complaint investigation or resolution. Each DoD Component shall submit a narrative summary report on complaints by memorandum to the ASD(MRA&L), or designee, before July 15 and January 15 of each year. This reporting requirement has been assigned Report Control Symbol DD-M(SA)1596.

2. Each DoD Component shall submit a narrative report by memorandum to the ASD(MRA&L), or designee, whenever, pursuant to enclosure 4 of this Directive, the DoD Component notifies an applicant or recipient that noncompliance with this Directive is indicated. The report shall include the recipient's name (if this refers to a person, last name, first, and middle initial) and address (street address, city, state, and zip code), the date (YYMMDD) and nature of the finding, and the name of the applicable federally assisted program or activity. This reporting requirement has been assigned Report Control Symbol DD-M(AR)1597.

3. The recordkeeping requirements contained in subsection C.2., enclosure 4, have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. Chapter 35 (reference (e)) and have been assigned OMB No. 0704-0102.

PROGRAMS AND ACTIVITIES SUBJECT TO THIS DIRECTIVE

A. This Directive applies to all DoD Components and recipients of federal financial assistance disbursed by a DoD Component insofar as the programs and activities of the DoD Components and recipients affect handicapped persons in the United States. Existing programs and activities that are assisted or conducted by a DoD Component and that are subject to this Directive but do not appear in section B. or C., below, are covered even though not listed. DoD Components must report new programs and activities that are subject to this Directive to the ASD(MRA&L), or designee, within 15 calendar days of their creation or funding.

B. Federal financial assistance programs subject to this Directive include:

1. Title 32, United States Code, Sections 101-716 (1976 and Supp. III 1979): the Army and Air National Guard.

2. Title 40, United States Code, Sections 483, 484, and 512 (1976); Title 49, United States Code, Sections 1101 and 1107 (1976); and Title 10, United States Code, Sections 2541, 2544, 2571, 2576, 2662, 7308, 7541, 7542, 7545, 7546, and 7547 (1976 and Supp. IV 1980): various programs involving the loan or other disposition of surplus, obsolete, or unclaimed property.

3. Title 10, United States Code, Sections 4307-4311 (1976), and the annual Department of Defense Appropriations Act: National Program for the Promotion of Rifle Practice.

4. Secretary of the Navy Instruction 5720.19E, "Navy Science Cruiser Program," February 24, 1977.

5. Title 10, United States Code, Section 9441 (1976 and Supp. IV 1980): Civil Air Patrol.

6. Title 41, United States Code, Sections 501-509 (Supp III 1979): federal grants and cooperative agreements.

7. Title 33, United States Code, Section 426 (1976 and Supp. III 1979): Army Corps of Engineers participation in cooperative investigations and studies concerning the erosi of shores of coastal and lake waters.

8. Title 33, United States Code, Sections 426e-426h (1976): Army Corps of Engineers assistance in the construc tion of works for the restoration and protection of shores.

19. Title 33, United States Code, Section 701g (1976): provision of specialized services by the Army Corps of Engineers to reduce flood damage.

20. Title 24, United States Code, Sections 44c and 47 (1976): United States Soldiers' and Airmen's Home.

21. Title 10, United States Code, Chapter 55, as implemented by DoD 6010.8-R, "Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)," January 10, 1977.

C. All programs and activities conducted by the Department of Defense that affect handicapped persons in the United States are subject to this Directive. They include:

1. Promulgation of rules and regulations for public comment in a manner that grants handicapped persons a reasonable opportunity for such comment (such as by making cassette recordings of proposed rules).

2. Public meetings, conferences, or seminars sponsored or conducted by a DoD Component but held in nongovernment buildings.

3. Public meetings, conferences, or seminars sponsored or conducted by a DoD Component or by a non-DoD organization but held in a DoD building.

4. Open houses, memorial services, tours, or other ceremonies held on or in DoD property.

5. Military museums.

6. Historic vessels.

7. Historic buildings and properties maintained by a DoD Component and properties designated as historic under a statute of the appropriate state or local governmental body.

8. Schools operated by the Department of Defense within the United States pursuant to Section 6 of P.L. 81-874, Title 20, United States Code, Section 241 (1976).

DEFINITIONS

1. Facility. All or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or any interest in such property.

2. Federal Financial Assistance. Any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the federal government provides or otherwise makes available assistance in the form of:

a. Funds.

b. Services performed by federal personnel, including technical assistance, counseling, training, and provision of statistical or expert information.

c. Real and personal property or any interest in or use of such property, including:

(1) Transfers or leases of such property for less than fair market value or for reduced consideration.

(2) 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.

3. Handicapped Person. 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. For purposes of this Directive as it relates to employment programs of recipients, such term does not include any individual who is an alcoholic or drug abuser and whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question, or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or to the safety of others. As used in this paragraph:

a. Physical or Mental Impairment. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal and special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning

GUIDELINES FOR DETERMINING DISCRIMINATORY PRACTICES

A. GENERAL PROHIBITIONS AGAINST DISCRIMINATION

1. No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefit of, or otherwise be subjected to discrimination under any program or activity that is conducted by the Department of Defense or that receives or benefits from federal financial assistance disbursed by the Department of Defense.

2. A recipient or DoD Component may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

a. Provide different or separate aid, benefits, or services to handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are equal to those provided to others;

b. Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

c. 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;

d. Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that afforded to others; or

e. Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity granted to others receiving the aid, benefit, or service.

3. A recipient or DoD Component may not deny a qualified handicappped person the opportunity to participate in programs or activities that are not separate or different from regular programs or activities, even if such separate or different programs and activities are permissible under paragraph A.2.a., above.

4. A recipient or DoD Component may not provide 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 or activity.

11. Recipients and DoD Components shall take appropriate steps to ensure that no handicapped individual is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under any program or activity receiving or benefiting from federal financial assistance disbursed by the Department of Defense or under any program or activity conducted by the Department of Defense because of the absence of auxiliary aids, such as certified sign-language interpreters, telecommunication devices (TDDs), or other telephonic devices for individuals with impaired sensory, manual, or speaking skills.

B. PROHIBITIONS AGAINST EMPLOYMENT DISCRIMINATION BY RECIPIENTS

1. 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 disbursed by the Department of Defense.

2. The prohibition against discrimination in employment applies to the following:

a. Recruitment, advertising, and processing of applications for employment.

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 recipient.

g. Selection and financial support for training, including apprenticeship, professional meetings, conferences and other related activities, and selection for leaves of absence for training.

h. Programs and activities sponsored by the employer, including social and recreational programs.

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

8. 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 if:

a. All entering employees are subjected to such an examination, regardless of handicap.

b. The results of such an examination are used only in accordance with this Directive, which prohibits discrimination against a qualified handicapped person on the basis of handicap.

9. Information obtained under this section concerning the medical condition or history of applicants shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

a. Supervisors and managers may be informed about restrictions on the work or duties of handicapped persons and about necessary accommodations.

b. First aid and safety personnel may be informed, when appropriate, if a handicapping condition might require emergency treatment.

c. Government officials investigating compliance with Section 504 and this Directive shall be provided relevant information upon request.

C. PROGRAM ACCESSIBILITY

1. General Requirements. No qualified handicapped person shall, because a recipient's or DoD Component's facilities are inaccessible to or not usable 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 disbursed by the Department of Defense or under any program or activity conducted by the Department of Defense.

2. Existing Facilities

a. A recipient or DoD Component 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 does not necessarily require a recipient or DoD Component to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons. For guidance in determining the accessibility of facilities, see Chapter 18 of DoD 4270.1-M, "Department of Defense Construction Criteria Manual," June 1, 1978, and Department of the Army, Office of the Chief of

accessible buildings; assignment of aides to beneficiaries, such as readers or certified sign-language interpreters; home visits; delivery of health, welfare, or other services at accessible alternate sites; alteration of existing facilities and construction of new facilities in conformance with this subsection and subsection C.3., below; or any other method that results in making the program or activity of the recipient or DoD Component accessible to handicapped persons.

d. A recipient or DoD Component is not required to make structural changes in existing facilities when other methods are effective in achieving compliance with this section.

e. In choosing among available methods for meeting the requirements of this section, a recipient or DoD Component shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate with nonhandicapped persons.

3. New Construction. New facilities shall be designed and constructed to be readily accessible to and usable by handicapped persons. Alterations to existing facilities shall be designed and constructed, to the maximum extent feasible, to be readily accessible to and usable by handicapped persons. For guidance in determining the accessibility of facilities, see Chapter 18 of DoD 4270.1-M and Department of the Army, Office of the Chief of Engineers, Manual EM 1110-1-103. Inquiries about specific accessibility design problems may be addressed to the ASD(MRA&L), or designee.

4. Historic Properties

a. In the case of historic properties, program accessibility shall mean that, when viewed in their entirety, programs are readily accessible to and usable by handicapped persons. Because the primary benefit of historic properties is the experience of the property itself, DoD Components and recipients shall give priority to those methods of achieving program accessibility that make the historic property, or portions thereof, physically accessible to handicapped persons.

b. Methods of achieving program accessibility include:

(1) Making physical alterations that give handicapped persons access to otherwise inaccessible areas or features of historic properties.

(2) Using audiovisual materials and devices to depict otherwise inaccessible areas or features of historic properties.

5. Military Museums

a. In the case of military museums, program accessibility shall mean that exhibits, displays, tours, lectures, circulating or traveling exhibits, and other programs of military museums are accessible to and usable by handicapped persons. Methods of meeting this requirement include the following:

(1) Museum programs may be made accessible to deaf and hearing-impaired persons by means such as training museum staff, such as docents, in sign language; providing qualified sign-language interpreters to accompany deaf or hearing-impaired visitors; ensuring that clear, concise language is used on all museum signs and display labels; providing amplification devices; or providing printed scripts for films, videotapes, lectures, or tours. DoD Components are encouraged to use "Museums and Handicapped Students: Guidelines for Educators," published by the National Air and Space Museum, Smithsonian Institution, Washington, D.C. 20560.

(2) Museum programs may be made accessible to blind and visually-impaired persons by means such as providing museum catalogues in a large-print edition printed over braille; providing cassette tapes, records, or discs for museum tours or exhibits; providing readers to accompany blind or visually impaired visitors; using large-print and braille display cards at exhibits; providing raised-line maps of the museum building; using raised-line drawings, reproductions, or models of large exhibits to facilitate tactile experiences when touching exhibits is prohibited; placing large-print and braille signs to identify galleries, elevators, restrooms, and other service areas; and permitting guide dogs in all museum facilities.

(3) Museum programs may be made accessible to other physically impaired persons by means such as lowering display cases; spacing exhibits to facilitate movement; using ramps in galleries; increasing lighting in exhibit areas to facilitate viewing from a distance; providing places to sit in exhibit areas; making restrooms accessible; using large-print exhibit display cards to facilitate reading from a distance; and sensitizing museum staff to consider the needs of handicapped visitors when organizing exhibits.

b. DoD Component guidelines developed in accordance with enclosure 4 of this Directive shall identify military museums subject to this subsection and shall contain a plan for making museum programs accessible to handicapped persons. Technical assistance in the preparation and content of these plans may be obtained from the National Access Center, 1419 27th Street, N.W., Washington, D.C. 20007 ((202) 333-1712 or TTY (202) 333-1339). In addition, community organizations that serve handicapped persons and handicapped persons themselves shall be consulted in the preparation of these plans.

ENSURING COMPLIANCE WITH THIS DIRECTIVE IN FEDERAL FINANCIAL ASSISTANCE PROGRAMS AND ACTIVITIES

A. SUPPLEMENTARY GUIDELINES ISSUED BY DOD COMPONENTS

1. Whenever necessary, DoD Components shall publish supplementary guidelines for each type of program or activity to which they disburse federal financial assistance within 120 days of the effective date of this Directive or of the effective date of any subsequent statute authorizing federal financial assistance to a new type of program or activity. DoD Components shall obtain approval of these supplementary guidelines from the ASD(MRA&L), or designee, before issuing them. Prior to their issuance, the ASD (MRA&L), or designee, shall submit supplementary guidelines prepared pursuant to this subsection to the Coordination and Review Section, Civil Rights Division, Department of Justice, for review and approval. To the extent that supplementary guidelines issued by DoD Components deal with the employment of civilians in programs and activities subject to this Directive, the ASD(MRA&L), or designee, shall also obtain the approval of the Equal Employment Opportunity Commission (EEOC) in accordance with Executive Order 12067.

2. The ASD(MRA&L), or designee, and DoD Components shall ensure that their supplementary guidelines conform to the requirements of this Directive and that they provide:

a. A description of the types of programs and activities covered.

b. Examples of prohibited practices likely to arise with respect to those types of programs and activities.

c. A list of the data collection and reporting requirements of the recipients.

d. Procedures for processing and investigating complaints.

e. Procedures for hearings to determine compliance by recipients with this Directive.

f. Requirements or suggestions for affirmative action on behalf of qualified handicapped persons.

g. Requirements for the dissemination of program and complaint information to the public.

conducted in accordance with this Directive and supplementary guidelines promulgated by DoD Components. If a recipient fails to provide an assurance that conforms to the requirements of this section, the DoD Component shall attempt to effect compliance pursuant to sections F. through H., below, provided that if assistance is due and payable to the recipient based on an application approved prior to the effective date of this Directive, the DoD Component shall continue the assistance while any proceedings required by sections N. through V, below, are pending.

2. DoD Components shall advise each recipient of the required elements of the assurance and, with respect to each program or activity, of the extent to which those receiving assistance from recipients shall be required to execute similar assurances.

3. DoD Components shall ensure that each assurance:

a. Obligates the recipient to advise the DoD Component of any complaints received that allege discrimination against handicapped persons.

b. Obligates the recipient to collect and provide the items of information that the DoD Component lists in its supplementary guidelines pursuant to paragraph A.2.c., above.

c. Is made applicable to any federal financial assistance that might be disbursed by a DoD Component without the submission of a new application.

d. Obligates the recipient, when the financial assistance is in the form of property, for the period during which the property is used under a financial assistance agreement or is possessed by the recipient.

e. Includes a provision recognizing that the U.S. Government has the right to seek judicial enforcement of Section 504 and this Directive.

C. <u>SELF-EVALUATION AND CONSULTATION WITH INTERESTED PERSONS AND ORGANIZATIONS</u>

1. DoD Components shall require recipients to conduct, within 6 months of the effective date of this Directive or of first receiving federal financial assistance disbursed by the Department of Defense, a self-evaluation with the assistance of interested persons, including handicapped persons or organizations that represent them. When appropriate, DoD Components also shall require recipients to consult at least annually with such persons. The "Department of Health, Education and Welfare Section 504 Technical Assistance Reserve Directory," April 1980,

of the policy described in subsection D.1., above. This may be accomplished by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

3. Understandable materials developed in accordance with this section shall be provided to ensure that all beneficiaries and employees of the recipient understand the information. In addition, recipients shall disseminate appropriate and comprehensive information about formal and informal complaint and appeal procedures, including directions on how and where to file complaints and to appeal DoD Component decisions.

E. INTIMIDATION AND INTERFERENCE

Recipients and DoD Components shall take reasonable steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of retaliating against, interfering with, or discouraging the filing of a complaint, furnishing of information, or assisting or participating in an investigation, compliance review, hearing, or other activity related to the administration of this Directive.

F. STAFF RESPONSIBILITIES

All DoD Component determinations of recipient compliance with this Directive shall be subject to reviews by the ASD(MRA&L), or designee. When responsibility for approving applications for federal financial assistance disbursed by a DoD Component is assigned to regional or area offices of the DoD Component, personnel in such offices shall be designated to perform the functions described in sections H. and N. through V., below.

G. ACCESS TO RECORDS AND FACILITIES

Each recipient shall permit access to its premises by DoD officials during normal business hours when such access is necessary for conducting onsite compliance reviews or complaint investigations, and shall allow such officials to photograph facilities and to inspect and copy any books, records, accounts, and other material relevant to determining the recipient's compliance with this Directive. Information so obtained shall be used only in connection with the administration of this Directive. If the recipient does not have the information requested, it shall submit to the DoD Component a written report that contains a certification that the information is not available and describes the good-faith efforts made to obtain the information.

4. Postapproval Reviews. DoD Components shall:

a. Establish and maintain effective programs of post-approval reviews.

b. Conduct such reviews of each recipient, the frequency and the nature of which shall be prescribed in the DoD Component supplementary guidelines implementing this Directive.

c. Require recipients periodically to submit compliance reports to them.

d. Record the results of the reviews, including findings of fact and recommendations.

5. A DoD Component shall complete a review within 180 calendar days of initiating it unless an extension of time is granted by the ASD(MRA&L), or designee, for good cause shown, and shall either:

a. Find the recipient to be in compliance and notify the recipient of that finding; or

b. Notify the recipient and the ASD(MRA&L), or designee, of a finding of probable noncompliance, pursuant to section O., below.

I. FILING OF COMPLAINTS AGAINST RECIPIENTS

1. DoD Components shall establish and publish in their supplementary guidelines procedures for the prompt processing and disposition of complaints against recipients, consistent with this section.

2. A DoD Component shall consider all complaints that:

a. Are filed with it within 180 days of the alleged discrimination or within a longer period of time if an extension is granted for good cause by the DoD Component with the approval of the ASD(MRA&L), or designee.

b. Include the name, address, and telephone number, if any, of the complainant; the name and address of the recipient committing the alleged discrimination; a description of the acts or omissions considered to be discriminatory; and other pertinent information.

c. Are signed by the complainant or the complainant's authorized representative (legal counsel or a person with power of attorney granted by the complainant).

a. Ensure that the recipient investigates the complaints in accordance with the standards, procedures, and requirements prescribed in section J., above.

b. Require the recipient to submit a written report of each complaint and investigation to the DoD Component.

c. Retain a review responsibility over the investigation and disposition of each complaint.

d. Ensure that each complaint investigation is completed within 180 calendar days of the receipt of the complaint by the proper DoD Component, unless an extension of time is granted for good cause by the ASD(MRA&L), or designee.

e. Require the recipient to maintain a log of all complaints filed against it, as described in subsection G.1. of this Directive.

2. DoD Components that require or permit complaint investigations to be conducted by recipients shall review recipient complaint investigations pursuant to this section and section L., below.

L. RESULTS OF INVESTIGATIONS

1. Within 180 days of the receipt of a complaint, the DoD Component, recipient, or the ASD(MRA&L), or designee, shall give written notification:

a. Of the disposition of the complaint to the complainant and, as the case may be, to the recipient or DoD Component.

b. To the complainant that within 30 calendar days of receipt of the written notification, the complainant may request that the ASD(MRA&L), or designee, review the findings in the notification pursuant to section M, below.

2. If the complaint investigation results in a determination by the DoD Component that a recipient is not complying with this Directive, the DoD Component shall proceed as prescribed in sections N. through V, below. If the DoD Component determines that the recipient is in compliance, the DoD Component shall submit the complete case file to the ASD(MRA&L), or designee, within 15 calendar days after the notification of the disposition of the investigation to the complainant.

M. REVIEWING COMPLETED INVESTIGATIONS

1. The ASD(MRA&L), or designee, may review all completed investigations.

1. Describes the apparent violation and the corrective actions necessary to achieve compliance.

2. Extends an offer to meet informally with the recipient.

3. Informs the recipient that failure to respond to the notice within 15 calendar days of its receipt shall result in the initiation of enforcement procedures described in sections R. through V., below.

P. ATTEMPTING TO ACHIEVE VOLUNTARY COMPLIANCE BY RECIPIENTS

1. If a DoD Component issues a notice pursuant to section O., above, the DoD Component shall attempt to meet with the recipient and shall attempt to persuade it to take the steps necessary to achieve compliance with this Directive.

2. If a recipient agrees to take remedial steps to achieve compliance, the DoD Component shall require that the agreement be in writing and:

a. Be signed by the head of the DoD Component concerned, or designee, and by the principal official of the recipient.

b. Specify the action necessary to achieve compliance.

c. Be made available to the public upon request.

d. Be subject to the approval of the ASD(MRA&L), or designee.

3. If satisfactory adjustment or a written agreement has not been achieved within 60 calendar days of the recipient's receipt of the notice issued pursuant to section O., above, the DoD Component shall notify the ASD(MRA&L), or designee, and state the reasons therefor.

4. The DoD Component shall initiate the enforcement actions prescribed in sections R. through V., below, if:

a. The recipient does not respond to a notice pursuant to section O., above, within 15 calendar days of its receipt and satisfactory adjustments are not made within 45 calendar days of the date of the recipient's response; or

b. The DoD Component or the ASD(MRA&L) determines at any time within 90 days after the recipient receives a notice pursuant to section O., above, that, despite reasonable efforts, it is not likely that the recipient will comply promptly and voluntarily.

b. The action has been approved by the Secretary of Defense.

c. Ten calendar days have elapsed since the mailing of a notice informing the recipient of its continuing failure to comply with this Directive, the action necessary to achieve compliance, and the sanction to be imposed.

d. During those 10 calendar days the DoD Component has made additional efforts to persuade the recipient to comply.

R. HEARINGS FOR RECIPIENTS

1. General. When, pursuant to paragraph Q.2.b., above, an opportunity for a hearing is given to a recipient, the DoD Component involved shall follow the procedures prescribed in subsections R.2. through R.6., below.

2. Notice. The DoD Component concerned shall notify the recipient of the opportunity for a hearing by registered or certified mail, return receipt requested, when the recipient denies a tentative finding of noncompliance with this Directive.

a. The DoD Component shall ensure that the notice:

(1) Describes the proposed sanctions to be imposed.

(2) Cites the section of this Directive under which the proposed action is to be taken.

(3) States the name and office of the DoD Component official who is responsible for conducting the hearing (hereafter referred to as the "responsible DoD official").

(4) Outlines the issues to be decided at the hearing.

(5) Advises the recipient either of a date, not less than 20 calendar days after the date that the notice is received, by which the recipient may request that the matter be scheduled for a hearing, or of a reasonable time and place of a hearing that is subject to change for good cause shown.

b. When a time and place for a hearing are set, the DoD Component shall give the recipient and the complainant, if any, reasonable notice of such time and place.

3. Waiver of a Hearing. A recipient may waive a hearing and submit to the responsible DoD official, in writing, information or arguments on or before the date stated pursuant to subparagraph R.2.a.(5), above.

by the responsible DoD official pursuant to subsection R.4., above, the hearing examiner shall either:

a. Make an initial decision, if so authorized, that conforms to the requirements of subsection S.4., below; or

b. Certify the entire record and submit to the responsible DoD official recommended findings and a proposed decision.

2. Review of Initial Decisions. Initial decisions made by a hearing examiner pursuant to paragraph S.1.a., above, shall be reviewed as follows:

a. A recipient may file exceptions to an initial decision within 30 calendar days of receiving notice of such initial decision. Reasons shall be stated for each exception.

b. If the recipient does not file exceptions pursuant to paragraph S.2.a., above, the responsible DoD official may notify the recipient within 45 calendar days of the initial decision that the responsible DoD official will review the decision.

c. If exceptions are filed pursuant to paragraph S.2.a., above, or a notice of review is issued pursuant to paragraph S.2.b., above, the responsible DoD official shall review the initial decision and, after giving the recipient reasonable opportunity to file a brief or other written statement of its contentions, issue a final decision that addresses each finding and conclusion in the initial decision and each exception, if any.

d. If the exceptions described in paragraph S.2.a., above, are not filed and the responsible DoD official does not issue the notice of review described in paragraph S.2.b., above, the initial decision of the hearing examiner shall constitute the final decision of the responsible DoD official.

3. Decisions by the Responsible DoD Official Who Conducts a Hearing or Receives a Certified Record. If a hearing examiner who is designated by the responsible DoD official certifies the entire record and submits recommended findings and a proposed decision to the responsible DoD official pursuant to paragraph S.1.b., above, or if the responsible DoD official conducts the hearing, after giving the recipient a reasonable opportunity to file a brief or other written statement of its contentions, the responsible DoD official shall render a final decision that conforms to subsection S.4., below.

4. Contents of Decisions. Each decision of a hearing examiner or responsible DoD official shall state all findings and conclusions and identify each violation of this Directive. The final decision may contain an order pursuant to section Q.,

U. INTERAGENCY COOPERATION AND DELEGATION

1. When several recipients are receiving assistance for the same or similar purposes from a DoD Component and another federal agency, the DoD Component shall notify the ASD(MRA&L), or designee. Such notification shall be in writing and shall contain:

a. A description of the programs and activities involved.

b. A statement of the amount of money expended on the programs and activities in the previous and current fiscal year by the DoD Component and the agency.

c. A list of the known primary recipients.

2. The ASD(MRA&L), or designee, shall attempt to negotiate with the federal agency a written delegation agreement that designates the agency or the DoD Component as the primary agency for purposes of ensuring compliance with Section 504 of P.L. 93-112, as amended, and this Directive, depending upon which of them administers a larger financial assistance program with the common recipients and other relevant factors. If necessary, the agreement shall establish procedures to ensure the enforcement of Section 504 of P.L. 93-112, as amended, and this Directive. The ASD(MRA&L), or designee, shall provide written notification to recipients of an agreement reached under this subsection.

3. When several recipients are receiving assistance for the same or similar purposes from two or more DoD Components, the DoD Components may negotiate a proposed written delegation agreement that:

a. Assigns responsibility for ensuring that the recipient complies with this Directive to one of the DoD Components.

b. Provides for the notification to recipients and the responsible program officials of the DoD Components involved of the assignment of enforcement responsibility.

4. No delegation agreement reached in accordance with subsection U.3., above, shall be effective until it is approved by the ASD(MRA&L), or designee.

5. When possible, existing delegation agreements relating to Title VI of the Civil Rights Act of 1964 shall be amended to provide for the enforcement of this Directive.

6. Any DoD Component conducting a compliance review or investigating a complaint of an alleged violation by a recipient shall notify any other affected agency or DoD Component through the ASD(MRA&L), or designee, upon discovery that the

ENSURING COMPLIANCE WITH THIS DIRECTIVE IN PROGRAMS AND ACTIVITIES CONDUCTED BY THE DEPARTMENT OF DEFENSE

A. SUPPLEMENTARY GUIDELINES

1. Whenever necessary, the ASD(MRA&L), or designee, shall publish supplementary guidelines for programs and activities that are conducted by DoD Components and that are subject to this Directive. Prior to their issuance, the ASD(MRA&L), or designee, shall submit supplementary guidelines prepared pursuant to this subsection to the Coordination and Review Section, Civil Rights Division, Department of Justice, for review.

2. The heads of DoD Components, or designees, shall be responsible for keeping the supplementary guidelines described in this section current and accurate. When a DoD Component head determines that a program or activity should be added to or deleted from the guidelines, that official shall notify the ASD(MRA&L), or designee, in writing.

B. STAFF RESPONSIBILITIES

The ASD(MRA&L), or designee, shall determine DoD Component compliance with this Directive as it pertains to programs and activities that are conducted by DoD Components and are subject to this Directive.

C. FILING OF COMPLAINTS

1. Complaints of discrimination in a program or activity conducted by a DoD Component may be filed directly with the ASD(MRA&L), or designee.

2. DoD Components shall develop procedures, such as posters or other devices, to notify participants in the programs and activities listed in section C. of enclosure 1 of their right to be free of discrimination because of handicap in those programs and activities and of their right to file complaints of discrimination with the ASD(MRA&L), or designee.

D. INVESTIGATIONS OF COMPLAINTS

1. The ASD(MRA&L), or designee, shall investigate complaints of discrimination in programs and activities that are conducted by DoD Components and are subject to this Directive.

Document Separator

Part. If a designated official receives notices based on a support order which, on its face, appears to conform to the laws of the jurisdiction from which it was issued, the designated official shall not be required to ascertain whether the authority that issued the order had obtained personal jurisdiction over the member.

(f) *List of designated officials.*

Army—Commander, U.S. Army Finance and Accounting Center, ATTN: FINCL-G, Indianapolis, IN 46249-0160, (317) 542-2155.

Navy—Director, Navy Family Allowance Activity, Anthony J. Celebrezze Federal Building, Cleveland, OH 44199, (216) 522-5301.

Air Force—Commander, Air Force Accounting and Finance Center, ATTN: JA, Denver, CO 80279, (303) 370-7524.

Marine Corps—Commanding Officer, Marine Corps Finance Center (Code AA), Kansas City, MO 64197, (816) 926-7103.

PART 55—PHYSICAL EXAMINATIONS AND ANNUAL CERTIFICATES OF PHYSICAL CONDITION

Sec.
55.1 Purpose.
55.2 Applicability.
55.3 Policy.

AUTHORITY: 10 U.S.C. 1004(a).

SOURCE: 25 FR 14357, Dec. 31, 1960, unless otherwise noted.

§ 55.1 Purpose.

To establish a uniform policy relating to physical examinations and certificates of physical condition for reservists (other than retired reservists) when not on active duty.

§ 55.2 Applicability.

This part applies to all Military Departments in the administration of members of reserve components.

§ 55.3 Policy.

(a) Each member of the Ready Reserve who is not on active duty shall be examined as to his physical fitness at least once every four years, or more often as the Secretary concerned considers necessary, and shall execute and submit annually a certificate of physical condition.

(b) Each member of the Standby Reserve in an active status, or on an inactive status list, shall execute and submit annually a certificate of physical condition.

(c) Members of the Standby Reserve may be examined as to their physical condition if the Secretary concerned considers such action necessary.

(d) Physical examinations will be reported on Standard Form 88, "Report of Physical Examination" and Standard Form 89, "Report of Medical History." To accomplish physical examinations, the Military Departments are authorized to use jointly all available medical facilities and to award points creditable toward retirement to medical reservists not on active duty for administering physical examinations or to use civilian physicians on a reimbursable basis where governmental medical facilities are not available.

(e) The following action may be taken in regard to those reservists failing to submit such information as may be requested by the appropriate Secretary after every reasonable effort has been made to obtain such information:

(1) Reservists having obligation under the Universal Military Training and Service Act, as amended, may be ordered to active duty or active duty for training, as deemed appropriate under the provisions of section 672(b), Title 10, U.S. Code, for the purpose of securing the necessary information.

(2) All other reservists may be considered for discharge pursuant to section 1162(a) of title 10 U.S. Code.

PART 56—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES ASSISTED OR CONDUCTED BY THE DEPARTMENT OF DEFENSE

Sec.
56.1 Purpose.
56.2 Applicability and scope.
56.3 Definitions.
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56.8 Guidelines for determining discriminatory practices.
56.9 Ensuring compliance with this part in Federal financial assistance programs and activities.

Sec.
56.10 Ensuring compliance with this part in programs and activities conducted by the Department of Defense.

AUTHORITY: Pub. L. 93-112, sec. 504 29 U.S.C. 794, as amended by Pub. L. 95-602, 92 Stat. 2982; Pub. L. 93-112, sec. 7, 29 U.S.C. 706, as amended by Pub. L. 93-516, 88 Stat. 1619; Executive Order 12250; Executive Order 12291; Executive Order 12067.

SOURCE: 47 FR 15124, Apr. 8, 1982, unless otherwise noted.

§ 56.1 Purpose.

This part implements section 504 of Pub. L. 93-112, "Rehabilitation Act of 1973," September 26, 1973 (29 U.S.C. 794) (1976); section 111 of Pub. L. 93-516, "Rehabilitation Act Amendments of 1974," December 7, 1974 (29 U.S.C. 706, 780, 790) (1976); section 119 of Pub. L. 95-602, "Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978," November 6, 1978 (29 U.S.C. 794) (Supp. III 1979); and Department of Justice Regulation, "Implementation of Executive Order 12250, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs," August 11, 1981 (28 CFR Part 41) to prohibit discrimination based on handicap in programs and activities receiving Federal financial assistance disbursed by the Department of Defense and in programs and activities conducted by the Department of Defense.

§ 56.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the National Guard Bureau, and the Defense Agencies (hereafter referred to as "DoD Components") insofar as they:

(1) Extend Federal financial assistance to programs and activities that affect handicapped persons in the United States and that are covered by this part (see § 56.7(b)).

(2) Conduct programs and activities that affect handicapped persons in the United States and that are covered by this part (see § 56.7(c)).

(b) This part also applies to each recipient of Federal financial assistance disbursed by the Department of Defense and to each program and activity that receives or benefits from such assistance, insofar as such recipient, program, or activity affects a handicapped person in the United States.

§ 56.3 Definitions.

(a) *Facility.* All or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or any interest in such property.

(b) *Federal financial assistance.* Any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Federal Government provides or otherwise makes available assistance in the form of:

(1) Funds.

(2) Services performed by Federal personnel, including technical assistance, counseling, training, and provision of statistical or expert information.

(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.

(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.

(c) *Handicapped person.* 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. For purposes of this Directive as it relates to employment programs of recipients, such term does not include any individual who is an alcoholic or drug abuser and whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question, or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or to the safety of others. As used in this paragraph:

(1) *Physical or mental impairment.* Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurologi-

cal; musculoskeletal and special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term includes such diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, and muscular dystrophy; multiple sclerosis; cancer; heart disease; diabetes; drug abuse; and alcoholism.

(2) *Major life activities.* 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.* 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.* Has: (i) A physical or mental impairment that does not substantially limit major life activities but is treated by a recipient or DoD Component as constituting such a limitation;

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

(iii) None of the impairments defined above, but is treated by a recipient or DoD Component as having such an impairment.

(d) *Historic properties.* Those properties listed or eligible for listing in the National Register of Historic Places.

(e) *Include; such as.* Not all the possible items are covered, whether like or unlike the ones named.

(f) *Qualified handicapped person.* A handicapped person who:

(1) With respect to employment, can perform the essential functions of the job in question with reasonable accommodation.

(2) With respect to services, meets the essential eligibility requirements for receiving the services in question.

(g) *Recipient.* Any state or political subdivision or instrumentality thereof, any public or private agency, institution, organization, or other entity, or any person that receives Federal financial assistance directly or through another recipient, including any successor, assignee, or transferee of a recipient, but not the ultimate beneficiary of the assistance. The term includes persons and entities applying to be recipients.

(h) *Substantial impairment.* A significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§ 56.4 Policy.

It is DoD policy that no qualified handicapped person shall be subjected to discrimination on the basis of handicap under any program or activity that receives or benefits from Federal financial assistance disbursed by a DoD Component or under any Federal program or activity that is conducted by a DoD Component. Guidelines for determining actions that discriminate against handicapped persons are prescribed in § 56.8.

§ 56.5 Responsibilities.

(a) The *Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) (ASD(MRA&L))*, or designee, shall monitor compliance with this part. In discharging this responsibility, the ASD(MRA&L), or designee, shall:

(1) Coordinate efforts of DoD Components to enforce this part.

(2) Assist in the development of standards and procedures promulgated pursuant to § 56.9.

(3) Perform the responsibilities assigned to the ASD(MRA&L) in § 56.8, 9, and 10.

(4) Otherwise assist DoD Components in implementing this part.

(b) The *Heads of DoD Components* shall comply with this part. In discharging this responsibility, they shall:

(1) Designate a policy-level official to ensure compliance with this part receive and investigate complaints filed under this part and otherwise manage DoD Component responsibilities under this part.

(2) Notify the ASD(MRA&L), or designee, of the name, position, location, and telephone number of persons selected by them to be policy-level officials within 15 calendar days of such a selection.

(3) Issue guidelines pursuant to § 56.9.

(4) Cooperate fully with the ASD(MRA&L), or designee, in that official's performance of the responsibilities assigned herein, including furnishing to the ASD(MRA&L), or designee, in a timely fashion any requested reports and information.

(5) Assign sufficient personnel to implement and to ensure effective enforcement of this part.

§ 56.6 Information requirements.

(a) Each DoD Component shall maintain a log of all complaints that are filed with it or its recipients under this part. The log shall contain the complainant's name (last name, first, and middle initial) and address (street address, city, state, and zip code), the recipient's name (if this refers to a person, last name, first, and middle initial) and address (street address, city, state, and zip code), the nature of the complaint, and the current status of the complaint investigation or resolution. Each DoD Component shall submit a narrative summary report on complaints by memorandum to the ASD(MRA&L), or designee, before July 15 and January 15 of each year. This reporting requirement has been assigned Report Control Symbol DD-M(SA)1596.

(b) Each DoD Component shall submit a narrative report by memorandum to the ASD(MRA&L), or designee, whenever, pursuant to enclosure 4 of this directive, the DoD Component notifies an applicant or recipient that noncompliance with this part is indicated. The report shall include the recipient's name (if this refers to a person, last name, first, and middle initial) and address (street address, city, state, and zip code), the date (YYMMDD) and nature of the finding, and the name of the applicable federally assisted program or activity. This reporting requirement has been assigned Report Control Symbol DD-M(AR)1597.

(c) The recordkeeping requirements contained in § 56.9(c)(2), have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. Chapter 35 and have been assigned OMB No. 0704-0102.

§ 56.7 Programs and activities subject to this part.

(a) This part applies to all DoD Components and recipients of Federal financial assistance disbursed by a DoD Component insofar as the programs and activities of the DoD Components and recipients affect handicapped persons in the United States. Existing programs and activities that are assisted or conducted by a DoD Component and that are subject to this part but do not appear in paragraph (b) or (c) of this section, are covered even though not listed. DoD Components must report new programs and activities that are subject to this part to the ASD (MRA&L), or designee, within 15 calendar days of their creation or funding.

(b) Federal financial assistance programs subject to this part include: (1) Title 32, United States Code, Sections 101-716 (1976 and Supp. III 1979): the Army and Air National Guard.

(2) Title 40, U.S. Code, sections 483, 484, and 512 (1976); title 49, U.S. Code, sections 1101 and 1107 (1976); and title 10, U.S. Code, sections 2541, 2544, 2571, 2576, 2662, 7308, 7541, 7542, 7545, 7546, and 7547 (1976 and Supp. IV 1980): Various programs involving the loan or other disposition of surplus, obsolete, or unclaimed property.

(3) Title 10 U.S. Code, sections 4307-4311 (1976), and the annual Department of Defense Appropriations Act: National Program for the Promotion of Rifle Practice.

(4) Secretary of the Navy Instruction 5720.19E, "Navy Science Cruiser Program," February 24, 1977.

(5) Title 10 U.S. Code, section 9441 (1976 and Supp. IV 1980): Civil Air Patrol.

(6) Title 41 U.S. Code, sections 501-509 (Supp. III 1979): Federal grants and cooperative agreements.

(7) Title 33 U.S. Code, section 426 (1976 and Supp. III 1979): Army Corps of Engineers participation in cooperative investigations and studies concerning the erosion of shores of coastal and lake waters.

(8) Title 33 U.S. Code, sections 426e-426h (1976): Army Corps of Engineers assistance in the construction of works for the restoration and protection of shores.

(9) Title 16 U.S. Code, section 460d (1976): Construction and operation of public park and recreational facilities in water resource development projects under the administrative jurisdiction of the Department of the Army.

(10) Title 33 U.S. Code, section 701c-3 (1976): Payment to states of lease receipts from lands acquired by the United States for flood control, navigation, and allied purposes.

(11) Title 33 U.S. Code, sections 558c and 702d-1 (1976); title 10, U.S. Code, sections 2668 and 2669 (1976); title 43, U.S. Code, section 961 (1976); and title 40, U.S. Code, section 319 (1976): Grants of easements without consideration, or at a nominal or reduced consideration, on land under the control of the Department of the Army at water resource development projects.

(12) Title 33 U.S. Code, sections 540 and 577 (1976): Army Corps of Engineers assistance in the construction of small boat harbor projects.

(13) Title 33 U.S. Code, section 701s (1976): Emergency bank protection works constructed by the Army Corps of Engineers for protection of highways, bridge approaches, and public works.

(14) Title 33 U.S. Code, section 633 (1976): Army Corps of Engineers contracts for the protection, alteration, reconstruction, relocation, or replacement of structures and facilities.

(15) Title 50 U.S. Code, section 453 (1976): Defense Logistics Agency loans of industrial equipment to educational institutions (Tools for Schools).

(16) Title 33 U.S. Code, section 610 (1976): Provision of specialized services or technical information by the Army Corps of Engineers to state and local governments for the control of aquatic plant growths in rivers, harbors, and allied waters.

(17) Title 42 U.S. Code, section 1962d-16 (1976): Provision of specialized services by the Army Corps of Engineers to any state for the preparation of comprehensive plans for drainage basins located within the boundaries of said state.

(18) Title 33 U.S. Code, section 603a (1976): Provision of specialized services by the Army Corps of Engineers to improve channels for navigation.

(19) Title 33 U.S. Code, section 701g (1976): Provision of specialized services by the Army Corps of Engineers to reduce flood damage.

(20) Title 24 U.S. Code, sections 44c and 47 (1976): United States Soldiers' and Airmen's Home.

(21) Title 10 U.S. Code, Chapter 55, as implemented by DoD 6010.8-R, "Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)," January 10, 1977.

(c) All programs and activities conducted by the Department of Defense that affect handicapped persons in the United States are subject to this part. They include:

(1) Promulgation of rules and regulations for public comment in a manner that grants handicapped persons a reasonable opportunity for such comment (such as by making cassette recordings of proposed rules).

(2) Public meetings, conferences, or seminars sponsored or conducted by a DoD Component but held in nongovernmental buildings.

(3) Public meetings, conferences, or seminars sponsored or conducted by a DoD Component or by a non-DoD organization but held in a DoD building.

(4) Open houses, memorial services, tours, or other ceremonies held on or in DoD property.

(5) Military museums.

(6) Historic vessels.

(7) Historic buildings and properties maintained by a DoD Component and properties designated as historic under a statute of the appropriate state or local governmental body.

(8) Schools operated by the Department of Defense within the United States pursuant to section 6 of Pub. L. 81-874, Title 20, U.S. Code, section 241 (1976).

§ 56.8 Guidelines for determining discriminatory practices.

(a) *General prohibitions against discrimination.* (1) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefit of, or otherwise be subjected to discrimination under any program or activity that is conducted by the Department of Defense or that receives or benefits from Federal financial assistance disbursed by the Department of Defense.

(2) A recipient or DoD Component may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Provide different or separate aid, benefits, or services to handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are equal to those provided to others;

(ii) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(iii) 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;

(iv) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that afforded to others; or

(v) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity granted to others receiving the aid, benefit, or service.

(3) A recipient or DoD Component may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different from regular programs or activities, even if such separate or different programs and activities are permissible under paragraph (a)(2)(i) of this section.

(4) A recipient or DoD Component may not provide 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 or activity.

(5) A recipient of DoD Component may not deny, on the basis of handicap, a qualified handicapped person the opportunity to participate as a member of planning or advisory boards.

(6) A recipient or DoD Component may not use, directly or through contractual or other arrangements, criteria or methods of administration that:

(i) Subject qualified handicapped persons to discrimination on the basis of handicap;

(ii) Defeat or substantially impair accomplishment of the objectives of the recipient's or DoD Component's program or activity with respect to handicapped persons; or

(iii) Perpetuate discrimination by another recipient if both recipients are subject to common administrative control or are agencies of the same state.

(7) In determining the site or location of a facility, a recipient or DoD Component may not make selections that:

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity that receives or benefits from Federal financial assistance; or

(ii) Defeat or substantially impair, with respect to handicapped persons, the accomplishment of the objectives of the program or activity.

(8) Recipients and DoD Components shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

(9) Recipients and DoD Components shall take appropriate steps to make communications with their applicants, employees, and beneficiaries available to persons with impaired vision and hearing.

(10) This section may not be interpreted to prohibit the exclusion of:

(i) Persons who are not handicapped from benefits, programs, and activities limited by Federal statute or Executive order to handicapped persons; or

(ii) One class of handicapped persons from a program or activity limited by Federal statute or Executive order to a different class of handicapped persons.

(11) Recipients and DoD Components shall take appropriate steps to ensure that no handicapped individual is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under any program or activity receiving or benefiting from Federal financial assistance disbursed by the Department of Defense or under any program or activity conducted by the Department of Defense because of the absence of auxiliary aids, such as certified sign-language interpreters, telecommunication devises (TDDs), or other telephonic devices for individuals with impaired sensory, manual, or speaking skills.

(b) *Prohibitions against employment discrimination by recipients.* (1) 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 disbursed by the Department of Defense.

(2) The prohibition against discrimination in employment applies to the following:

(i) Recruitment, advertising, and processing of applications for employment.

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

(iii) Rates of pay or any other form of compensation and changes in compensation.

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

(v) Leaves of absence, sick leave, or any other leave.

(vi) Fringe benefits available by virtue of employment, whether or not administered by the recipient.

(vii) Selection and financial support for training, including apprenticeship, professional meetings, conferences and other related activities, and selection for leaves of absence for training.

(viii) Programs and activities sponsored by the employer, including social and recreational programs.

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

(3) A recipient may not participate in a contractual or other relationship that subjects qualified handicapped applicants or employees to discrimination prohibited by this section, including relationships with employment and referral agencies, labor unions, organizations providing or administering fringe benefits to employees of the recipient, and organizations providing training and apprenticeship programs.

(4) 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. Reasonable accommodation includes providing ramps, accessible restrooms, drinking fountains, interpreters for deaf employees, readers for blind employees, amplified telephones, TDDs such as Teletypewriters or Telephone Writers (TTYs), and tactile signs on elevators.

(5) 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.

(6) A recipient may not conduct a preemployment medical examination or make a preemployment inquiry about whether an applicant is a handicapped person or about the nature or severity of a handicap. A recipient may make, however, a preemployment inquiry into an applicant's ability to perform job-related functions.

(7) When a recipient is taking remedial action to correct the effects of past discrimination or is taking voluntary action to overcome the effects of conditions that have resulted in limited participation by handicapped persons in its federally assisted program or activity, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped if:

(i) The recipient makes clear to the applicants that the information is intended for use solely in connection with its remedial action obligations or its voluntary affirmative action efforts.

(ii) The recipient makes clear to the applicants that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (b)(9) in this section, that refusal to provide it will not subject the applicants to any adverse treatment, and that it will be used only in accordance with this part.

(8) 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 if:

(i) All entering employees are subjected to such an examination, regardless of handicap.

(ii) The results of such an examination are used only in accordance with this part which prohibits discrimination against a qualified handicapped person on the basis of handicap.

(9) Information obtained under this section concerning the medical condition or history of applicants shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(i) Supervisors and managers may be informed about restrictions on the work or duties of handicapped persons and about necessary accommodations.

(ii) First aid and safety personnel may be informed, when appropriate, if a handicapping condition might require emergency treatment.

(iii) Government officials investigating compliance with section 504, Pub. L. 93-112, and this part shall be provided relevant information upon request.

(c) *Program accessibility*—(1) *General requirements.* No qualified handicapped person shall, because a recipient's or DoD Component's facilities are inaccessible to or not usable 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 disbursed by the Department of Defense or under any program or activity conducted by the Department of Defense.

(2) *Existing facilities.* (i) A recipient or DoD Component 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 does not necessarily require a recipient or DoD Component to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons. For guidance in determining the accessibility of facilities, see Chapter 18 of DoD 4270.1-M, "Department of Defense Construction Criteria Manual," June 1, 1978, and Department of the Army, Office of the Chief of Engineers, Manual EM 1110-1-103, "Design for the Physically Handicapped," October 15, 1976. Inquiries on specific accessibility design problems may be addressed to the ASD (MRA&L), or designee.

(ii) When structural changes are necessary to make programs or activities in existing facilities accessible to the exent required by paragraph (c)(1) of this section.

(A) Such changes shall be made as soon as practicable, but not later than 3 years after the effective date of this part however, if the program or activity is a particular mode of transportation (such as a subway station) 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 DoD Component concerned may extend this period of time. This extension shall be for a reasonable and definite period, which shall be determined after consultation with the ASD(MRA&L), or designee.

(B) The recipient or DoD Component shall develop, with the assistance of interested persons or organizations and within a period to be established in each DoD Component's guidelines, a transition plan setting forth the steps necessary to complete such changes.

(C) The recipient or DoD Component shall make a copy of the transition plan available for public inspection. At a minimum, the plan shall:

(*1*) Identify physical obstacles in the recipient's or DoD Component's facili-

ties 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 1 year, identify steps that will be taken during each year of the transition period.

(4) Indicate the person (last name, first, and middle initial) responsible for implementation of the transition plan.

(iii) A recipient or DoD Component may comply with paragraphs (c)(2)(i) and (c)(2)(ii) of this section, through such means as the acquisition or redesign of equipment, such as telecommunication or other telephonic devices; relocation of classes or other services to accessible buildings; assignment of aides to beneficiaries, such as readers or certified sign-language interpreters; home visits; delivery of health, welfare, or other services at accessible alternate sites; alteration of existing facilities and construction of new facilities in conformance with paragraph (c)(3) in this section; or any other method that results in making the program or activity of the recipient or DoD Component accessible to handicapped persons.

(iv) A recipient or DoD Component is not required to make structural changes in existing facilities when other methods are effective in achieving compliance with this section.

(v) In choosing among available methods for meeting the requirements of this section, a recipient or DoD Component shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate with nonhandicapped persons.

(3) *New Construction.* New facilities shall be designed and constructed to be readily accessible to and usable by handicapped persons. Alterations to existing facilities shall be designed and constructed, to the maximum extent feasible, to be readily accessible to and usable by handicapped persons. For guidance in determining the accessibility of facilities, see Chapter 18 of DoD 4270.1-M and Department of the Army, Office of the Chief of Engineers, Manual EM 1110-1-103. Inquiries about specific accessibility design problems may be addressed to the ASD(MRA&L), or designee.

(4) *Historic properties.* (i) In the case of historic properties, program accessibility shall mean that, when viewed in their entirety, programs are readily accessible to and usable by handicapped persons. Because the primary benefit of historic properties is the experience of the property itself, DoD Components and recipients shall give priority to those methods of achieving program accessibility that make the historic property, or portions thereof, physically accessible to handicapped persons.

(ii) Methods of achieving program accessibility include:

(A) Making physical alterations that give handicapped persons access to otherwise inaccessible areas or features of historic properties.

(B) Using audiovisual materials and devices to depict otherwise inaccessible areas or features of historic properties.

(C) Assigning individuals to guide handicapped persons into or through otherwise inaccessible portions of historic properties.

(D) Adopting other innovative methods.

(iii) When program accessibility cannot be achieved without causing a substantial impairment of significant historic features, the DoD Component or recipient may seek a modification or waiver of access standards from the ASD (MRA&L), or designee.

(A) A decision to grant a modification or waiver shall be based on consideration of the following:

(1) Scale of the property, reflecting its ability to absorb alterations.

(2) Use of the property, whether primarily for public or private purposes.

(3) Importance of the historic features of the property to the conduct of the program.

(4) Costs of alterations in comparison to the increase in accessibility.

(B) The ASD(MRA&L), or designee, shall review periodically any waiver granted under this paragraph and may

withdraw it if technological advances or other changes warrant.

(iv) The decision by the ASD(MRA&L), or designee, to grant a modification or waiver of access standards is subject to Section 106 of the National Historic Preservation Act, as amended, and shall be made in accordance with the Advisory Council on Historic Preservation regulation on "Protection of Historic and Cultural Properties" (36 CFR Part 800). When the property is federally owned or when Federal funds may be used for alterations, the ASD(MRA&L), or designee, shall obtain the comments of the Advisory Council on Historic Preservation when required by Section 106 of the National Historic Preservation Act and the Advisory Council on Historic Preservation regulation on "Protection of Historic and Cultural Properties" (36 CFR Part 800) prior to effectuation of structural alterations.

(v) DoD Component guidelines prepared in accordance with § 56.10 shall include a listing of all historic properties, including historic ships, subject to this part and a plan for compliance with paragraph (c)(4) of this section.

(5) *Military museums.* (i) In the case of military museums, program accessibility shall mean that exhibits, displays, tours, lectures, circulating or traveling exhibits, and other programs of military museums are accessible to and usable by handicapped persons. Methods of meeting this requirement include the following:

(A) Museum programs may be made accessible to deaf and hearing-impaired persons by means such as training museum staff, such as docents, in sign language; providing qualified sign-language interpreters to accompany deaf or hearing-impaired visitors; ensuring that clear, concise language is used on all museum signs and display labels; providing amplification devices; or providing printed scripts for films, videotapes, lectures, or tours. DoD Components are encouraged to use "Museums and Handicapped Students: Guidelines for Educators," published by the National Air and Space Museum, Smithsonian Institution, Washington, D.C. 20560.

(B) Museum programs may be made accessible to blind and visually-impaired persons by means such as providing museum catalogues in a large-print edition printed over braille; providing cassette tapes, records, or discs for museum tours or exhibits; providing readers to accompany blind or visually impaired visitors; using large-print and braille display cards at exhibits; providing raised-line maps of the museum building; using raised-line drawings, reproductions, or models of large exhibits to facilitate tactile experiences when touching exhibits is prohibited; placing large-print and braille signs to identify galleries, elevators, restrooms, and other service areas; and permitting guide dogs in all museum facilities.

(C) Museum programs may be made accessible to other physically impaired persons by means such as lowering display cases; spacing exhibits to facilitate movement; using ramps in galleries; increasing lighting in exhibit areas to facilitate viewing from a distance; providing places to sit in exhibit areas; making restrooms accessible; using large-print exhibit display cards to facilitate reading from a distance; and sensitizing museum staff to consider the needs of handicapped visitors when organizing exhibits.

(ii) DoD Component guidelines developed in accordance with paragraph (c)(5) of this section shall identify military museums subject to paragraph (c) of this section and shall contain a plan for making museum programs accessible to handicapped persons. Technical assistance in the preparation and content of these plans may be obtained from the National Access Center, 1419 27th Street, NW., Washington, D.C. 20007 ((202) 333-1712 or TTY (202) 333-1339). In addition, community organizations that serve handicapped persons and handicapped persons themselves shall be consulted in the preparation of these plans.

(d) *Reasonable accommodation.* (1) A recipient or DoD Component shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient or DoD Component demonstrates to the ASD(MRA&L), or designee, that the accommodation

would impose an undue hardship on the operation of its program.

(2) Reasonable accommodation includes the following:

(i) Making facilities used by employees readily accessible to and usable by handicapped persons.

(ii) Job restructuring; part-time or modified work schedules; acquisition or modification of equipment or devices, such as telecommunication or other telephonic instruments; the provision of readers or certified sign-language interpreters; and similar actions.

(3) In determining whether an accommodation would impose an undue hardship on the operation of a recipient's or DoD Component's program, the ASD(MRA&L), or designee, shall consider the following factors, at a minimum:

(i) The overall size of the recipient's or DoD Component's program or activity, such as the number of employees, number and type of facilities, and size of budget.

(ii) The size of the recipient's or DoD Component's operations, including the composition and structure of the recipient's or DoD Component's workforce.

(iii) The nature and cost of the accommodation needed.

(4) A recipient or DoD Component may not deny any employment opportunity to a qualified handicapped employee or applicant for employment if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 56.9 Ensuring compliance with this part in Federal financial assistance programs and activities.

(a) *Supplementary guidelines issued by DoD Components.* (1) Whenever necessary, DoD Components shall publish supplementary guidelines for each type of program or activity to which they disburse Federal financial assistance within 120 days of the effective date of this part or of the effective date of any subsequent statute authorizing Federal financial assistance to a new type of program or activity. DoD Components shall obtain approval of these supplementary guidelines from the ASD(MRA&L), or designee, before issuing them. Prior to their issuance, the ASD(MRA&L), or designee, shall submit supplementary guidelines prepared pursuant to paragraph (a)(1) of this section to the Coordination and Review Section, Civil Rights Division, Department of Justice, for review and approval. To the extent that supplementary guidelines issued by DoD Components deal with the employment of civilians in programs and activities subject to this part the ASD(MRA&L), or designee, shall also obtain the approval of the Equal Employment Opportunity Commission (EEOC) in accordance with Executive Order 12067.

(2) The ASD(MRA&L), or designee, and DoD Components shall ensure that their supplementary guidelines conform to the requirements of this part and that they provide:

(i) A description of the types of programs and activities covered.

(ii) Examples of prohibited practices likely to arise with respect to those types of programs and activities.

(iii) A list of the data collection and reporting requirements of the recipients.

(iv) Procedures for processing and investigating complaints.

(v) Procedures for hearings to determine compliance by recipients with this part.

(vi) Requirements or suggestions for affirmative action on behalf of qualified handicapped persons.

(vii) Requirements for the dissemination of program and complaint information to the public.

(viii) A description of the form of the assurances that must be executed pursuant to paragraph (b) of this section, and sample assurances.

(ix) Requirements concerning the frequency and nature of postapproval reviews conducted pursuant to paragraph (h) of this section.

(x) A period of time, provided for by § 56.8(c)(2)(ii)(B), for the development of a transition plan that sets out the steps necessary to complete structural changes that might be required by § 56.8(c).

(xi) The maximum period of time that may be allowed for extensions that might be granted pursuant to § 56.8(c)(2)(ii).

(xii) An appendix that contains a list of identified programs and activities of the type covered by the supplementary guidelines, including the names of the programs and activities and the authorizing statute, regulation, or directive for each program and activity.

(xiii) Requirements for the recipient to designate a responsible official to coordinate the implementation of supplementary guidelines.

(xiv) Requirements for any other actions or procedures necessary to implement this part.

(3) When the head of a DoD Component determines that it would not be appropriate to include on or more of the provisions described in paragraph (a)(2) of this section, in the supplementary guidelines of that DoD Component or that it is not necessary to issue such guidelines at all, the reasons for such determination shall be stated in writing and submitted to the ASD(MRA&L), or designee, for review and approval. Once that determination is approved, the DoD Component shall make it available to the public upon request.

(4) The heads of DoD Components, or designees, shall be responsible for keeping the supplementary guidelines current and accurate. When a DoD Component determines that a program or activity should be added to or deleted from the guidelines, the DoD Component shall notify the ASD(MRA&L), or designee, in writing.

(b) *Required assurances.* (1) DoD Components shall require all recipients to file written assurances that their programs or activities will be conducted in accordance with this part and supplementary guidelines promulgated by DoD Components. If a recipient fails to provide an assurance that conforms to the requirements of this section, the DoD Component shall attempt to effect compliance pursuant to paragraphs (f) through (h) of this section, provided that if assistance is due and payable to the recipient based on an application approved prior to the effective date of this part the DoD Component shall continue the assistance while any proceedings required by paragraphs (n) through (v) of this section, are pending.

(2) DoD Components shall advise each recipient of the required elements of the assurance and, with respect to each program or activity, of the extent to which those receiving assistance from recipients shall be required to execute similar assurances.

(3) DoD Component shall ensure that each assurance:

(i) Obligates the recipient to advise the DoD Component of any complaints received that allege discrimination against handicapped persons.

(ii) Obligates the recipient to collect and provide the items of information that the DoD Component lists in its supplementary guidelines pursuant to paragraph (a)(2)(iii) of this section.

(iii) Is made applicable to any Federal financial assistance that might be disbursed by a DoD Component without the submission of a new application.

(iv) Obligates the recipient, when the financial assistance is in the form of proprerty, for the period during which the property is used under a financial assistance agreement or is possessed by the recipient.

(v) Includes a provision recognizing that the U.S. Government has the right to seek judicial enforcement of Section 504 and this part.

(c) *Self-evaluation and consultation with interested persons and organizations.* (1) DoD Components shall require recipients to conduct, within 6 months of the effective date of this part or of first receiving Federal financial assistance disbursed by the Department of Defense, a self-evaluation with the assistance of interested persons, including handicapped persons or organizations that represent them. When appropriate, DoD Components also shall require recipients to consult at least annually with such persons. The "Department of Health, Education, and Welfare Section 504 Technical Assistance Reserve Directory," April 1980, shall be consulted to identify likely sources for consultation. In conducting its self-evaluation, each recipient shall:

(i) Evaluate the effects of its policies and practices with respect to its compliance with this part and the applica-

ble DoD Component's supplementary guidelines.

(ii) Modify any policies that do not meet such requirements.

(iii) Take appropriate remedial steps to eliminate the discriminatory effects of any such policies or practices.

(2) For at least 3 years following the completion of a self-evaluation required under paragraph (c)(1) of this section, a recipient shall maintain on file, make available for public inspection, and provide to the ASD(MRA&L), or designee, upon request:

(i) A list of the interested persons (last names, first names, and middle initials) consulted.

(ii) A description of areas examined and problems identified, if any, with respect to those areas.

(iii) A description of any modification made and remedial steps taken.

(d) *Dissemination of information.* (1) Within 90 days of the effective date of this part or of first receiving assistance from the Department of Defense and on a continuing basis thereafter, each recipient shall notify beneficiaries and employees of their rights under this part and shall take appropriate steps to notify participants, beneficiaries, applicants for employment and employees, including those with impaired vision or hearing, and unions or professional organizations involved in collective bargaining or professional agreements with the recipient that the recipient does not discriminate on the basis of handicap in violation of this part. The notification shall state, when appropriate, that the recipient does not discriminate in admitting or providing access to or treating or employing persons in its programs and activities. Such notification may be accomplished by posting notices, publishing announcements in newspapers and magazines, placing notices in its publications, or distributing memoranda or other written communications.

(2) If a recipient publishes or uses and makes available to participants, beneficiaries, applicants for employment, or employees recruitment materials or publications containing general information about the recipient's programs and activities, it shall include in those materials or publications a statement of the policy described in paragraph (d)(1) of this section. This may be accomplished by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

(3) Understandable materials developed in accordance with this section shall be provided to ensure that all beneficiaries and employees of the recipient understand the information. In addition, recipients shall disseminate appropriate and comprehensive information about formal and informal complaint and appeal procedures, including directions on how and where to file complaints and to appeal DoD Component decisions.

(e) *Intimidation and interference.* Recipients and DoD Components shall take reasonable steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of retaliating against, interfering with, or discouraging the filing of a complaint, furnishing of information, or assisting or participating in an investigation, compliance review, hearing, or other activity related to the administration of this part.

(f) *Staff responsibilities.* All DoD Component determinations of recipient compliance with this part shall be subject to reviews by the ASD(MRA&L), or designee. When responsibility for approving applications for Federal financial assistance disbursed by a DoD Component is assigned to regional or area offices of the DoD Component, personnel in such offices shall be designated to perform the functions described in paragraphs (h) and (o) through (w) of this section.

(g) *Access to records and facilities.* Each recipient shall permit access to its premises by DoD officials during normal business hours when such access is necessary for conducting onsite compliance reviews or complaint investigations, and shall allow such officials to photograph facilities and to inspect and copy any books, records, accounts, and other material relevant to determining the recipient's compliance with this part. Information so obtained shall be used only in connection with the administration of this part. If the recipient does not have the information requested, it shall submit to the DoD Component a written report that contains a certification that the information is not available and describes the good-faith efforts made to obtain the information.

(h) *Compliance review.* DoD Components shall determine the compliance of each recipient with this part as follows: (1) *General.* Whenever possible, DoD Components shall perform compliance reviews in conjunction with their review and audit efforts implementing Title VI of the Civil Rights Act of 1964.

(2) *Desk audit application review.* Before approving an application for Federal financial assistance, the DoD Component concerned shall make a written determination as to whether the recipient is in compliance with this part, based on a review of the assurance of compliance executed by a recipient pursuant to paragraph (b) of this section, and other data submitted by the recipient. When a determination cannot be made from the assurance and other data submitted by the recipient, the DoD Component concerned shall require the recipient to submit additional information and shall take other steps as necessary to determine the recipient's compliance with this part. If this additional information demonstrates that the recipient is in compliance with this part, the DoD Component shall notify the recipient promptly that it is in compliance.

(3) *Preapproval onsite review.* (i) When a desk audit application review conducted pursuant to paragraph (h)(2) of this section indicates that the recipient might not be in compliance with this part, the DoD Component concerned may conduct a preapproval onsite review at the recipient's facilities before approving the disbursement of Federal financial assistance to the recipient. The DoD Component shall conduct such a review:

(A) When appropriate, if a desk audit application review reveals that the recipient's compliance posture is questionable because of a history of discrimination complaints, current discrimination complaints, a noncompliance determination by another government agency or DoD Component, or other indications of possible noncompliance; or

(B) If Federal financial assistance is requested for construction, except under extraordinary circumstances, to determine whether the location and design of the project would provide service on a nondiscriminatory basis, in conformity with § 56.8(c).

(ii) Preapproval onsite reviews shall be conducted under DoD Component supplementary guidelines and in accordance with the provisions of paragraph (h)(4) of this section, concerning postapproval reviews.

(4) *Postapproval reviews.* DoD Components shall: (i) Establish and maintain effective programs of postapproval reviews.

(ii) Conduct such reviews of each recipient, the frequency and the nature of which shall be prescribed in the DoD Component supplemetary guidelines implementing this part.

(iii) Require recipients periodically to submit compliance reports to them.

(iv) Record the results of the reviews, including findings of fact and recommendations.

(5) A DoD Component shall complete a review within 180 calendar days of initiating it unless an extension of time is granted by the ASD(MRA&L), or designee, for good cause shown, and shall either:

(i) Find the recipient to be in compliance and notify the recipient of that finding; or

(ii) Notify the recipient and the ASD(MRA&L), or designee, of a finding of probable noncompliance, pursuant to paragraph (o) of this section.

(i) *Filing of complaints against recipients.* (1) DoD Components shall establish and publish in their supplementary guidelines procedures for the prompt processing and disposition of complaints against recipients, consistent with this section.

(2) A DoD Component shall consider all complaints that: (i) Are filed with it within 180 days of the alleged discrimination or within a longer period of time if an extension is granted for good cause by the DoD Component

with the approval of the ASD(MRA&L), or designee.

(ii) Include the name, address, and telephone number, if any, of the complainant; the name and address of the recipient committing the alleged discrimination; a description of the acts or omissions considered to be discriminatory; and other pertinent information.

(iii) Are signed by the complainant or the complainant's authorized representative (legal counsel or a person with power of attorney granted by the complainant).

(3) DoD Components shall transmit a copy of each complaint filed with them to the ASD(MRA&L), or designee, within 10 calendar days after its receipt.

(4) If the information in a complaint is incomplete, the DoD Component shall request the complainant to provide the additional information required. If the DoD Component does not receive this requested information within 30 calendar days of the date of the request, the case may be closed and the complainant so notified in writing.

(5) If a complaint concerning a program or activity is filed with a DoD Component that does not have jurisdiction over it, the DoD Component shall refer the complaint to the ASD(MRA&L), or designee, and advise the complainant in writing of such referral. The ASD(MRA&L), or designee, then shall refer the complaint to the appropriate DoD Component and so notify the complainant in writing.

(j) *Investigation by DoD components.* (1) DoD Components shall investigate complaints that involve recipients and that meet the standards described in paragraph (i) of this section, unless good cause for not investigating is stated in a written notification of the disposition of the complaint provided to the complainant.

(2) If an investigation of a complaint is conducted, the DoD Component concerned shall maintain a case record that contains:

(i) The name (last name, first, and middle initial), address (street address, city, state, and zip code), and telephone number of each person interviewed.

(ii) Copies, transcripts, or summaries of pertinent documents.

(iii) A reference to at least one program or activity conducted by the recipient and receiving Federal financial assistance disbursed by a DoD Component, and a description of the amount and nature of the assistance.

(iv) A narrative report of the results of the investigation that contains references to relevant exhibits and other evidence that relates to the alleged violations.

(k) *Investigations by recipients.* (1) A DoD Component may require or permit recipients to investigate complaints alleging violation of this part. In such cases, the DoD Component shall:

(i) Ensure that the recipient investigates the complaints in accordance with the standards, procedures, and requirements prescribed in paragraph (j) of this section.

(ii) Require the recipient to submit a written report of each complaint and investigation to the DoD Component.

(iii) Retain a review responsibility over the investigation and disposition of each complaint.

(iv) Ensure that each complaint investigation is completed within 180 calendar days of the receipt of the complaint by the proper DoD Component, unless an extension of time is granted for good cause by the ASD(MRA&L), or designee.

(v) Require the recipient to maintain a log of all complaints filed against it, as described in § 56.6(a)(1).

(2) DoD Components that require or permit complaint investigations to be conducted by recipients shall review recipient complaint investigations pursuant to paragraphs (k) and (l) of this section.

(l) *Results of investigations.* (1) Within 180 days of the receipt of a complaint, the DoD Component, recipient, or the ASD(MRA&L), or designee, shall give written notification:

(i) Of the disposition of the complaint to the complainant and, as the case may be, to the recipient or DoD Component.

(ii) To the complainant that within 30 calendar days of receipt of the written notification, the complainant may request that the ASD(MRA&L), or designee, review the findings in the notification pursuant to paragraph (m) of this section.

(2) If the complaint investigation results in a determination by the DoD Component that a recipient is not complying with this part the DoD Component shall proceed as prescribed in paragraph (n) through (v) of this section. If the DoD Component determines that the recipient is in compliance, the DoD Component shall submit the complete case file to the ASD(MRA&L), or designee, within 15 calendar days after the notification of the disposition of the investigation to the complainant.

(m) *Reviewing completed investigations.* (1) The ASD(MRA&L), or designee, may review all completed investigations.

(2) The ASD(MRA&L), or designee, shall review the results of any investigation of a complaint if the complainant requests such a review pursuant to paragraph (l)(1)(ii) of this section.

(3) After reviewing the results of an investigation, the ASD(MRA&L), or designee, may:

(i) Find that no further investigation is necessary and approve the results of the investigation;

(ii) Request further investigation by the DoD Component; or

(iii) Require the DoD Component to take appropriate corrective action.

(n) *Effecting compliance.* (1) When a compliance review or complaint investigation indicates that a recipient has violated this part, the applicable DoD Component's supplementary guidelines, or the assurances executed pursuant to paragraph (b) of this section, the responsible DoD Component or the ASD(MRA&L), or designee, shall attempt to effect compliance in accordance with paragraphs (o) and (p) of this section. The inability of a DoD Component to comply with any time frame prescribed by this part does not relieve a recipient of the responsibility for compliance with this part.

(2) The DoD Component may require, when necessary to overcome the effects of discrimination in violation of this part, a recipient to take remedial action:

(i) With respect to handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program or activity when such discrimination occurred.

(ii) With respect to handicapped persons who would have been participants in the recipient's program or activity had the discrimination not occurred.

(iii) With respect to handicapped persons presently in the recipient's program or activity, but not receiving full benefits or equal and integrated treatment within the program or activity.

(o) *Written notice.* After evaluating the investigative report, the DoD Component shall issue to the recipient and, pursuant to paragraph (n)(2) of this section to the ASD(MRA&L), or designee, a written notice that:

(1) Describes the apparent violation and the corrective actions necessary to achieve compliance.

(2) Extends an offer to meet informally with the recipient.

(3) Informs the recipient that failure to respond to the notice within 15 calendar days of its receipt shall result in the initiation of enforcement procedures described in paragraphs (r) through (v), of this section.

(p) *Attempting to achieve voluntary compliance by recipients.* (1) If a DoD Component issues a notice pursuant to paragraph (o) of this section, the DoD Component shall attempt to meet with the recipient and shall attempt to persuade it to take the steps necessary to achieve compliance with this part.

(2) If a recipient agrees to take remedial steps to achieve compliance, the DoD Component shall require that the agreement be in writing and:

(i) Be signed by the head of the DoD Component concerned, or designee, and by the principal official of the recipient.

(ii) Specify the action necessary to achieve compliance.

(iii) Be made available to the public upon request.

(iv) Be subject to the approval of the ASD(MRA&L), or designee.

(3) If satisfactory adjustment or a written agreement has not been achieved within 60 calendar days of

the recipient's receipt of the notice issued pursuant to paragraph (o) of this section, the DoD Component shall notify the ASD(MRA&L), or designee, and state the reasons therefor.

(4) The DoD Component shall initiate the enforcement actions prescribed in paragraphs (r) through (v) of this section if:

(i) The recipient does not respond to a notice pursuant to paragraph (o) of this section, within 15 calendar days of its receipt and satisfactory adjustments are not made within 45 calendar days of the date of the recipient's response; or

(ii) The DoD Component or the ASD (MRA&L) determines at any time within 90 days after the recipient receives a notice pursuant to paragraph (o) of this section, that, despite reasonable efforts, it is not likely that the recipient will comply promptly and voluntarily.

(5) If, pursuant to paragraph (p)(4) of this section, the DoD Component initiates enforcement action, it also shall continue its attempts to persuade the recipient to comply voluntarily.

(q) *Imposing sanctions*—(1) *Sanctions available.* If a DoD Component has taken action pursuant to paragraphs (o) and (p) of this section, the DoD Component may, by order, subject to paragraph (q)(2) and (q)(3) of this section:

(i) Terminate, suspend, or refuse to grant or continue assistance to such recipient.

(ii) Refer the case to the Department of Justice for the initation of enforcement proceedings at a Federal, State, or local level.

(iii) Pursue any remedies under state or local law.

(iv) Impose other sanctions upon consultation with the ASD (MRASL), or designee.

(2) *Terminating, suspending, or refusing to grant or continue assistance.* A DoD Component may not terminate or refuse to grant or continue Federal financial assistance unless:

(i) Such action has been approved by the Secretary of Defense.

(ii) The DoD Component has given the recipient an opportunity for a hearing pursuant to the procedures set out in paragraph (r) of this section, and a finding of noncompliance has resulted.

(iii) Thirty calendar days have elapsed since the Secretary of Defense has filed a written report describing the violation and action to be taken with the committees of the House of Representatives and Senate that have jurisdiction over the program or activity in which the violation of this part exists.

(iv) Such action is limited to affect only the particular activity or program, or portion thereof, of the recipient where the violation exists.

(3) *Other sanctions.* A DoD Component may not impose the sanctions set out in paragraphs (q)(1) (iii) and (iv) of this section, unless:

(i) The DoD Component has given the recipient an opportunity for a hearing pursuant to paragraph (r) of this section, and a finding of noncompliance has resulted.

(ii) The action has been approved by the Secretary of Defense.

(iii) Ten calendar days have elapsed since the mailing of a notice informing the recipient of its continuing failure to comply with this part the action necessary to achieve compliance, and the sanction to be imposed.

(iv) During those 10 calendar days the DoD Component has made additional efforts to persuade the recipient to comply.

(r) *Hearings for recipients*—(1) *General.* When, pursuant to paragraph (q)(2)(ii) of this section, an opportunity for a hearing is given to a recipient, the DoD Component involved shall follow the procedures prescribed in paragraphs (r)(2) through (r)(6) of this section.

(2) *Notice.* The DoD Component concerned shall notify the recipient of the opportunity for a hearing by registered or certified mail, return receipt requested, when the recipient denies a tentative finding of noncompliance with this part.

(i) The DoD Component shall ensure that the notice:

(A) Describes the proposed sanctions to be imposed.

(B) Cites the section of this part under which the proposed action is to be taken.

(C) States the name and office of the DoD Component official who is responsible for conducting the hearing (hereafter referred to as the "responsible DoD official").

(D) Outlines the issues to be decided at the hearing.

(E) Advises the recipient either of a date, not less than 20 calendar days after the date that the notice is received, by which the recipient may request that the matter be scheduled for a hearing, or of a reasonable time and place of a hearing that is subject to change for good cause shown.

(ii) When a time and place for a hearing are set, the DoD Component shall give the recipient and the complainant, if any, reasonable notice of such time and place.

(3) *Waiver of a hearing.* A recipient may waive a hearing and submit to the responsible DoD official, in writing, information or arguments on or before the date stated pursuant to paragraph (r)(2)(i)(E) of this section.

(i) A recipient waives its right to a hearing if it fails to request a hearing on or before a date stated pursuant to paragraph (r)(2)(i)(E) of this section, or fails to appear at a hearing that has been scheduled pursuant to that paragraph.

(ii) If a recipient waives its right to a hearing under this section, the responsible DoD official shall decide the issues and render a final decision that is based on the information available and that conforms to the requirements of paragraph (s)(4) of this section.

(4) *Hearing examiner.* Hearings shall be conducted by the responsible DoD official or by a hearing examiner designated by the official, provided that the hearing examiner shall be a field grade officer or civilian employee above the grade of GS-12 (or the equivalent) who is admitted to practice law before a Federal court or the highest court of a state, territory, commonwealth, or the District of Columbia.

(5) *Right to counsel.* In all proceedings under this section, the recipient and the DoD Component may be represented by counsel. The representation of the recipient will not be at U.S. Government expense.

(6) *Procedures.* Hearings authorized under this section shall be subject to the following: (i) Hearings shall be open to the public.

(ii) Formal rules of evidence will not apply. The DoD Component concerned and the recipient shall be entitled to introduce all relevant evidence on the issues stated in the notice of hearing issued pursuant to paragraph (r)(2) of this section, and those designated by the responsible DoD official or the hearing examiner at the outset of or during the hearing. The responsible DoD official or hearing examiner, however, may exclude irrelevant, immaterial, or repetitious evidence.

(iii) All witnesses may be examined or cross-examined, as the case may be, by each party.

(iv) All parties shall have the opportunity to examine all evidence offered or admitted for the record.

(v) A transcript of the proceedings shall be maintained in either electronic or typewritten form and made available to all parties.

(s) *Decisions*—(1) *Initial or proposed decisions by a hearing examiner.* If a hearing is conducted by a hearing examiner who is designated by the responsible DoD official pursuant to paragraph (r)(4) of this section, the hearing examiner shall either:

(i) Make an initial decision, if so authorized, that conforms to the requirements of paragraph (s)(4) of this section; or

(ii) Certify the entire record and submit to the responsible DoD official recommended findings and a proposed decision.

(2) *Review of initial decisions.* Initial decisions made by a hearing examiner pursuant to paragraph (s)(1)(i) of this section, shall be reviewed as follows:

(i) A recipient may file exceptions to an initial decision within 30 calendar days of receiving notice of such initial decision. Reasons shall be stated for each exception.

(ii) If the recipient does not file exceptions pursuant to paragraph (s)(2)(i) of this section, the responsible DoD official may notify the recipient within 45 calendar days of the initial decision that the responsible DoD official will review the decisions.

(iii) If exceptions are filed pursuant to paragraph (s)(2)(i) of this section, or a notice of review is issued pursuant to paragraph (s)(2)(ii) of this section, the responsible DoD official shall review the initial decision and, after giving the recipient reasonable opportunity to file a brief or other written statement of its contentions, issue a final decision that addresses each finding and conclusion in the initial decision and each exception, if any.

(iv) If the exceptions described in paragraph (s)(2)(i) of this section are not filed and the responsible DoD official does not issue the notice of review described in paragraph (s)(2)(ii) of this section, the initial decision of the hearing examiner shall constitute the final decision of the responsible DoD official.

(3) *Decisions by the responsible DoD official who conducts a hearing or receives a certified record.* If a hearing examiner who is designated by the responsible DoD official certifies the entire record and submits recommended findings and a proposed decision to the responsible DoD official pursuant to paragraph (s)(1)(ii) of this section, or if the responsible DoD official conducts the hearing, after giving the recipient a reasonable opportunity to file a brief or other written statement of its contentions, the responsible DoD official shall render a final decision that conforms to paragraph (s)(4) of this section.

(4) *Contents of decisions.* Each decision of a hearing examiner or responsible DoD official shall state all findings and conclusions and identify each violation of this part. The final decision may contain an order pursuant to paragraph (q) of this section, providing for the suspension or termination of or refusal to grant or continue all or some of the Federal financial assistance under the program or activity involved and contain terms, conditions, and other provisions that are consistent with and intended to achieve compliance with this Directive.

(5) *Notice of decisions and certifications.* The responsible DoD official shall provide a copy of any certified record of a hearing and any initial or final decision to the recipient and the complainant, if any.

(6) *Review by the Secretary of Defense.* The responsible DoD official shall transmit promptly any final decision that orders a suspension, termination, or denial of Federal financial assistance through the ASD(MRA&L) to the Secretary of Defense. The Secretary may:

(i) Approve the decision;

(ii) Vacate the decision; or

(iii) Remit or mitigate any sanction imposed.

(t) *Restoring eligibility for financial assistance.* (1) A recipient that is affected adversely by a final decision issued under paragraph (s) of this section, may at any time request the responsible DoD official to restore fully its eligibility to receive Federal financial assistance.

(2) If the responsible DoD official determines that the information supplied by the recipient demonstrates that it has satisfied the terms and conditions of the order entered pursuant to paragraph (s) of this section, and that is complying with and has provided reasonable assurance that it will continue to comply with this part the responsible DoD official shall restore such eligibility immediately.

(3) If the responsible DoD official denies a request for restoration of eligibility, the recipient may submit a written request for a hearing that states why it believes the responsible DoD official erred in denying the request. Following such a written request, the recipient shall be given an expeditious hearing under rules of procedure issued by the responsible DoD official to determine whether the requirements described in paragraph (t)(2) of this section, have been met. While any such proceedings are pending, the sanctions imposed by the order issued under paragraph (s) of this section, shall remain in effect.

(u) *Interagency cooperation and delegation.* (1) When several recipients are receiving assistance for the same or similar purposes from a DoD Component and another Federal agency, the DoD Component shall notify the ASD (MRA&L), or designee. Such notification shall be in writing and shall contain:

(i) A description of the programs and activities involved.

(ii) A statement of the amount of money expended on the programs and activities in the previous and current fiscal year by the DoD Component and the agency.

(iii) A list of the known primary recipients.

(2) The ASD(MRA&L), or designee, shall attempt to negotiate with the Federal agency a written delegation agreement that designates the agency or the DoD Component as the primary agency for purposes of ensuring compliance with section 504 of Pub. L. 93-112, as amended, and this part depending upon which of them administers a larger financial assistance program with the common recipients and other relevant factors. If necessary, the agreement shall establish procedures to ensure the enforcement of section 504 of Pub. L. 93-112, as amended, and this part. The ASD(MRA&L), or designee, shall provide written notification to recipients of an agreement reached under this subsection.

(3) When several recipients are receiving assistance for the same or similar purposes from two or more DoD Components, the DoD Components may negotiate a proposed written delegation agreement that:

(i) Assigns responsibility for ensuring that the recipient complies with this part to one of the DoD Components.

(ii) Provides for the notification to recipients and the responsible program officials of the DoD Components involved of the assignment of enforcement responsibility.

(4) No delegation agreement reached in accordance with paragraph (u)(3) to this section shall be effective until it is approved by the ASD(MRA&L), or designee.

(5) When possible, existing delegation agreements relating to Title VI of the Civil Rights Act of 1964 shall be amended to provide for the enforcement of this part.

(6) Any DoD Component conducting a compliance review or investigating a complaint of an alleged violation by a recipient shall notify any other affected agency or DoD Component through the ASD(MRA&L), or designee, upon discovery that the agency or DoD Component has jurisdiction over the program or activity in question and shall subsequently inform it of the finding made. Such reviews or investigations may be conducted on a joint basis.

(7) When a compliance review or complaint investigation under this part reveals a possible violation of Executive Order 11246, Titles VI or VII of the Civil Rights Act of 1964, or any other Federal law, the DoD Component shall notify the appropriate agency, through the ASD(MRA&L), or designee.

(v) *Coordination with Sections 502 and 503.* (1) DoD Components shall use DoD 4270.1-M and Department of the Army, Office of the Chief of Engineers, Manual EM 1110-1-103, in developing requirements for the accessibility of facilities. If DoD Components encounter issues with respect to Section 502 of the Rehabilitation Act of 1973, as amended, that are not covered by these publications, the ASD(MRA&L), or designee, may be consulted. If necessary, the ASD(MRA&L), or designee, shall consult with the Architectural and Transportation Barriers Compliance Board in resolving such problems.

(2) DoD Components may advise recipients to consult directly with the Architectural and Transportation Barriers Compliance Board in developing accessibility criteria.

(3) DoD Components shall coordinate enforcement actions relating to the accessibility of facilities with the Architectural and Transportation Barriers Compliance Board and shall notify the ASD(MRA&L), or designee, of such coordination.

(4) If a recipient is also a Federal contractor subject to Section 503 of the Rehabilitation Act of 1973, as amended, and the regulations thereunder (41 CFR Part 60-741) and if a DoD Component has reason to believe that the recipient is in violation thereof, the DoD Component shall coordinate enforcement actions with the Department of Labor, Office of Federal Contract Compliance Programs. The DoD Component shall notify the ASD(MRA&L), or designee, of such coordination.

§ 56.10 Ensuring compliance with this part in programs and activities conducted by the Department of Defense.

(a) *Supplementary guidelines.* (1) Whenever necessary, the ASD(MRA&L), or designee, shall publish supplementary guidelines for programs and activities that are conducted by DoD Components and that are subject to this Directive. Prior to their issuance, the ASD(MRA&L), or designee, shall submit supplementary guidelines prepared pursuant to this subsection to the Coordination and Review Section, Civil Rights Division, Department of Justice, for review.

(2) The heads of DoD Components, or designees, shall be responsible for keeping the supplementary guidelines described in this section current and accurate. When a DoD Component head determines that a program or activity should be added to or deleted from the guidelines, that official shall notify the ASD(MRA&L), or designee, in writing.

(b) *Staff responsibilities.* The ASD(MRA&L), or designee, shall determine DoD Component compliance with this part as it pertains to programs and activities that are conducted by DoD Components and are subject to this part.

(c) *Filing of complaints.* (1) Complaints of discrimination in a program or activity conducted by a DoD Component may be filed directly with the ASD(MRA&L), or designee.

(2) DoD Components shall develop procedures, such as posters or other devices, to notify participants in the programs and activities listed in § 56.7(c) of their right to be free of discrimination because of handicap in those programs and activities and of their right to file complaints of discrimination with the ASD(MRA&L), or designee.

(d) *Investigations of complaints.* (1) The ASD(MRA&L), or designee, shall investigate complaints of discrimination in programs and activities that are conducted by DoD Components and are subject to this part.

(2) A case record of each investigation shall be compiled in accordance with § 56.9(j)(2).

(e) *Results of investigations.* If the complaint investigation results in a determination by the ASD(MRA&L), or designee, that a DoD Component's program or activity is not complying with § 56.9, the ASD(MRA&L), or designee, shall proceed as prescribed in § 56.9 (n) through (v). Hearings prescribed under § 56.9(r) however, need not be conducted. If the ASD(MRA&L), or designee, determines that the DoD Component is in compliance, the ASD(MRA&L), or designee, shall notify the complainant within 15 calendar days of such determination.

(f) *Written notice.* If an investigative report concludes that there has been a violation of this part in a program or activity conducted by a DoD Component and the ASD(MRA&L), or designee, accepts that conclusion, that official shall issue to the head of the DoD Component a written notice describing the apparent violation, the corrective actions necessary to achieve compliance, and a suspense date for completion of the corrective actions.

(g) *Effecting compliance.* When necessary to overcome the effects of discrimination in violation of this part the ASD(MRA&L), or designee, may require a DoD Component to take remedial action similar to that in § 56.9(n)(2).

(h) *Employment.* DoD Components that conduct Federal programs or activities covered by this part that involve employment of civilian persons to conduct such a program or activity must comply with Section 501 of the Rehabilitation Act of 1973, as amended, and the implementing rules and regulations of the EEOC.

PART 57—EDUCATION OF HANDICAPPED CHILDREN IN THE DoD DEPENDENTS SCHOOLS

Sec.

57.1 Purpose.
57.2 Applicability and scope.
57.3 Policy.
57.4 Responsibilities.
57.5 Definitions.
APPENDIX 1 TO PART 57—PROCEDURES FOR EDUCATIONAL PROGRAMS AND SERVICES FOR HANDICAPPED CHILDREN
APPENDIX 2 TO PART 57—HEARING PROCEDURES

AUTHORITY: Pub. L. 94-142, as amended; Pub. L. 95-561, as amended.

SOURCE: 46 FR 62260, Dec. 23, 1981, unless otherwise noted.

§ 57.1 Purpose.

This part establishes policies and procedures for providing a free appropriate public education to handicapped children receiving or entitled to receive educational instruction from the DoD Dependents Schools (DoDDS) pursuant to Pub. L. 94-142 and Pub. L. 95-561 and in accordance with Part 69 of this title; establishes an Overseas Dependents Schools National Advisory Panel on the Education of Handicapped Dependents (National Advisory Panel) consistent with the provisions of DoD Directive 5105.18,[1] "Department of Defense Committee Management Program," April 25, 1975, and a DoD Coordinating Committee on Special Education and Related Services.

§ 57.2 Applicability and scope.

(a) The provisions of the part apply to the Office of the Secretary of Defense and its field activity, DoDDS and DoDDS constituent elements; the Military Departments; the Organization of the Joint Chiefs of Staff; the Unified and Specified Commands; and the Defense Agencies (collectively DoD Components).

(b) The provisions encompass children receiving or entitled to receive educational instruction from DoDDS, and the parents of those children.

(c) The provisions do not apply to schools operated by the Department of Defense within the United States.

§ 57.3 Policy.

(a) All handicapped children receiving or entitled to receive educational instruction from DoDDS shall be provided a free appropriate public education under the provisions of this part.

(b) DoDDS shall have the responsibility of providing a free appropriate public education to all handicapped children enrolled in its schools.

(c) Handicapped children receiving or entitled to receive educational instruction from DoDDS shall have a free appropriate public education, the same educational opportunities and services offered by DoDDS to nonhandicapped children, and an equal opportunity to participate in school activities.

(d) Physical education services, modified or specially designed if necessary, shall be available to every handicapped child receiving a free appropriate public education from DoDDS.

(e) When appropriate, a qualified military medical authority shall conduct or verify a medical evaluation and participate with DoDDS personnel in determining whether a child has a handicapping condition requiring special education and related services.

§ 57.4 Responsibilities.

(a) The *Director, Department of Defense Dependents Schools, and his subordinate organizational structure,* shall: (1) Ensure that handicapped children receiving educational instruction from DoDDS are provided a free appropriate public education and that the educational needs of handicapped and nonhandicapped children are met comparably, using the procedures established by this part.

(2) Ensure that educational facilities and services operated by DoDDS for handicapped children are comparable to DoDDS educational facilities and services for nonhandicapped children.

(3) Maintain records on special education and related services provided to handicapped children.

(4) Provide any or all special education and related services required by a handicapped child, other than those furnished by the Secretaries of the Military Departments. In fulfilling this responsibility, the Director and his subordinate organizational structure may use interagency, intraagency, and interservice arrangements, or act through contracts with private parties, when funds are authorized and appropriated.

(5) Develop and implement a comprehensive system of personnel development.

[1] Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120, Attention: Code 301.

Part. If a designated official receives notices based on a support order which, on its face, appears to conform to the laws of the jurisdiction from which it was issued, the designated official shall not be required to ascertain whether the authority that issued the order had obtained personal jurisdiction over the member.

(f) *List of designated officials.*

Army—Commander, U.S. Army Finance and Accounting Center, ATTN: FINCL-G, Indianapolis, IN 46249-0160, (317) 542-2155.

Navy—Director, Navy Family Allowance Activity, Anthony J. Celebrezze Federal Building, Cleveland, OH 44199, (216) 522-5301.

Air Force—Commander, Air Force Accounting and Finance Center, ATTN: JA, Denver, CO 80279, (303) 370-7524.

Marine Corps—Commanding Officer, Marine Corps Finance Center (Code AA), Kansas City, MO 64197, (816) 926-7103.

PART 55—PHYSICAL EXAMINATIONS AND ANNUAL CERTIFICATES OF PHYSICAL CONDITION

Sec.
55.1 Purpose.
55.2 Applicability.
55.3 Policy.

AUTHORITY: 10 U.S.C. 1004(a).

SOURCE: 25 FR 14357, Dec. 31, 1960, unless otherwise noted.

§ 55.1 Purpose.

To establish a uniform policy relating to physical examinations and certificates of physical condition for reservists (other than retired reservists) when not on active duty.

§ 55.2 Applicability.

This part applies to all Military Departments in the administration of members of reserve components.

§ 55.3 Policy.

(a) Each member of the Ready Reserve who is not on active duty shall be examined as to his physical fitness at least once every four years, or more often as the Secretary concerned considers necessary, and shall execute and submit annually a certificate of physical condition.

(b) Each member of the Standby Reserve in an active status, or on an inactive status list, shall execute and submit annually a certificate of physical condition.

(c) Members of the Standby Reserve may be examined as to their physical condition if the Secretary concerned considers such action necessary.

(d) Physical examinations will be reported on Standard Form 88, "Report of Physical Examination" and Standard Form 89, "Report of Medical History." To accomplish physical examinations, the Military Departments are authorized to use jointly all available medical facilities and to award points creditable toward retirement to medical reservists not on active duty for administering physical examinations or to use civilian physicians on a reimbursable basis where governmental medical facilities are not available.

(e) The following action may be taken in regard to those reservists failing to submit such information as may be requested by the appropriate Secretary after every reasonable effort has been made to obtain such information:

(1) Reservists having obligation under the Universal Military Training and Service Act, as amended, may be ordered to active duty or active duty for training, as deemed appropriate under the provisions of section 672(b), Title 10, U.S. Code, for the purpose of securing the necessary information.

(2) All other reservists may be considered for discharge pursuant to section 1162(a) of title 10 U.S. Code.

PART 56—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES ASSISTED OR CONDUCTED BY THE DEPARTMENT OF DEFENSE

Sec.
56.1 Purpose.
56.2 Applicability and scope.
56.3 Definitions.
56.4 Policy.
56.5 Responsibilities.
56.6 Information requirements.
56.7 Programs and activities subject to this part.
56.8 Guidelines for determining discriminatory practices.
56.9 Ensuring compliance with this part in Federal financial assistance programs and activities.

Sec.
56.10 Ensuring compliance with this part in programs and activities conducted by the Department of Defense.

AUTHORITY: Pub. L. 93-112, sec. 504 29 U.S.C. 794, as amended by Pub. L. 95-602, 92 Stat. 2982; Pub. L. 93-112, sec. 7, 29 U.S.C. 706, as amended by Pub. L. 93-516, 88 Stat. 1619; Executive Order 12250; Executive Order 12291; Executive Order 12067.

SOURCE: 47 FR 15124, Apr. 8, 1982, unless otherwise noted.

§ 56.1 Purpose.

This part implements section 504 of Pub. L. 93-112, "Rehabilitation Act of 1973," September 26, 1973 (29 U.S.C. 794) (1976); section 111 of Pub. L. 93-516, "Rehabilitation Act Amendments of 1974," December 7, 1974 (29 U.S.C. 706, 780, 790) (1976); section 119 of Pub. L. 95-602, "Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978," November 6, 1978 (29 U.S.C. 794) (Supp. III 1979); and Department of Justice Regulation, "Implementation of Executive Order 12250, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs," August 11, 1981 (28 CFR Part 41) to prohibit discrimination based on handicap in programs and activities receiving Federal financial assistance disbursed by the Department of Defense and in programs and activities conducted by the Department of Defense.

§ 56.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the National Guard Bureau, and the Defense Agencies (hereafter referred to as "DoD Components") insofar as they:

(1) Extend Federal financial assistance to programs and activities that affect handicapped persons in the United States and that are covered by this part (see § 56.7(b)).

(2) Conduct programs and activities that affect handicapped persons in the United States and that are covered by this part (see § 56.7(c)).

(b) This part also applies to each recipient of Federal financial assistance disbursed by the Department of Defense and to each program and activity that receives or benefits from such assistance, insofar as such recipient, program, or activity affects a handicapped person in the United States.

§ 56.3 Definitions.

(a) *Facility.* All or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or any interest in such property.

(b) *Federal financial assistance.* Any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Federal Government provides or otherwise makes available assistance in the form of:

(1) Funds.

(2) Services performed by Federal personnel, including technical assistance, counseling, training, and provision of statistical or expert information.

(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.

(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.

(c) *Handicapped person.* 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. For purposes of this Directive as it relates to employment programs of recipients, such term does not include any individual who is an alcoholic or drug abuser and whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question, or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or to the safety of others. As used in this paragraph:

(1) *Physical or mental impairment.* Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurologi-

cal; musculoskeletal and special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term includes such diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, and muscular dystrophy; multiple sclerosis; cancer; heart disease; diabetes; drug abuse; and alcoholism.

(2) *Major life activities.* 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.* 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.* Has: (i) A physical or mental impairment that does not substantially limit major life activities but is treated by a recipient or DoD Component as constituting such a limitation;

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

(iii) None of the impairments defined above, but is treated by a recipient or DoD Component as having such an impairment.

(d) *Historic properties.* Those properties listed or eligible for listing in the National Register of Historic Places.

(e) *Include; such as.* Not all the possible items are covered, whether like or unlike the ones named.

(f) *Qualified handicapped person.* A handicapped person who:

(1) With respect to employment, can perform the essential functions of the job in question with reasonable accommodation.

(2) With respect to services, meets the essential eligibility requirements for receiving the services in question.

(g) *Recipient.* Any state or political subdivision or instrumentality thereof, any public or private agency, institution, organization, or other entity, or any person that receives Federal financial assistance directly or through another recipient, including any successor, assignee, or transferee of a recipient, but not the ultimate beneficiary of the assistance. The term includes persons and entities applying to be recipients.

(h) *Substantial impairment.* A significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§ 56.4 Policy.

It is DoD policy that no qualified handicapped person shall be subjected to discrimination on the basis of handicap under any program or activity that receives or benefits from Federal financial assistance disbursed by a DoD Component or under any Federal program or activity that is conducted by a DoD Component. Guidelines for determining actions that discriminate against handicapped persons are prescribed in § 56.8.

§ 56.5 Responsibilities.

(a) The *Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) (ASD(MRA&L))*, or designee, shall monitor compliance with this part. In discharging this responsibility, the ASD(MRA&L), or designee, shall:

(1) Coordinate efforts of DoD Components to enforce this part.

(2) Assist in the development of standards and procedures promulgated pursuant to § 56.9.

(3) Perform the responsibilities assigned to the ASD(MRA&L) in § 56.8, 9, and 10.

(4) Otherwise assist DoD Components in implementing this part.

(b) The *Heads of DoD Components* shall comply with this part. In discharging this responsibility, they shall:

(1) Designate a policy-level official to ensure compliance with this part receive and investigate complaints filed under this part and otherwise manage DoD Component responsibilities under this part.

(2) Notify the ASD(MRA&L), or designee, of the name, position, location, and telephone number of persons selected by them to be policy-level officials within 15 calendar days of such a selection.

(3) Issue guidelines pursuant to § 56.9.

(4) Cooperate fully with the ASD(MRA&L), or designee, in that official's performance of the responsibilities assigned herein, including furnishing to the ASD(MRA&L), or designee, in a timely fashion any requested reports and information.

(5) Assign sufficient personnel to implement and to ensure effective enforcement of this part.

§ 56.6 Information requirements.

(a) Each DoD Component shall maintain a log of all complaints that are filed with it or its recipients under this part. The log shall contain the complainant's name (last name, first, and middle initial) and address (street address, city, state, and zip code), the recipient's name (if this refers to a person, last name, first, and middle initial) and address (street address, city, state, and zip code), the nature of the complaint, and the current status of the complaint investigation or resolution. Each DoD Component shall submit a narrative summary report on complaints by memorandum to the ASD(MRA&L), or designee, before July 15 and January 15 of each year. This reporting requirement has been assigned Report Control Symbol DD-M(SA)1596.

(b) Each DoD Component shall submit a narrative report by memorandum to the ASD(MRA&L), or designee, whenever, pursuant to enclosure 4 of this directive, the DoD Component notifies an applicant or recipient that noncompliance with this part is indicated. The report shall include the recipient's name (if this refers to a person, last name, first, and middle initial) and address (street address, city, state, and zip code), the date (YYMMDD) and nature of the finding, and the name of the applicable federally assisted program or activity. This reporting requirement has been assigned Report Control Symbol DD-M(AR)1597.

(c) The recordkeeping requirements contained in § 56.9(c)(2), have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. Chapter 35 and have been assigned OMB No. 0704-0102.

§ 56.7 Programs and activities subject to this part.

(a) This part applies to all DoD Components and recipients of Federal financial assistance disbursed by a DoD Component insofar as the programs and activities of the DoD Components and recipients affect handicapped persons in the United States. Existing programs and activities that are assisted or conducted by a DoD Component and that are subject to this part but do not appear in paragraph (b) or (c) of this section, are covered even though not listed. DoD Components must report new programs and activities that are subject to this part to the ASD (MRA&L), or designee, within 15 calendar days of their creation or funding.

(b) Federal financial assistance programs subject to this part include: (1) Title 32, United States Code, Sections 101-716 (1976 and Supp. III 1979): the Army and Air National Guard.

(2) Title 40, U.S. Code, sections 483, 484, and 512 (1976); title 49, U.S. Code, sections 1101 and 1107 (1976); and title 10, U.S. Code, sections 2541, 2544, 2571, 2576, 2662, 7308, 7541, 7542, 7545, 7546, and 7547 (1976 and Supp. IV 1980): Various programs involving the loan or other disposition of surplus, obsolete, or unclaimed property.

(3) Title 10 U.S. Code, sections 4307-4311 (1976), and the annual Department of Defense Appropriations Act: National Program for the Promotion of Rifle Practice.

(4) Secretary of the Navy Instruction 5720.19E, "Navy Science Cruiser Program," February 24, 1977.

(5) Title 10 U.S. Code, section 9441 (1976 and Supp. IV 1980): Civil Air Patrol.

(6) Title 41 U.S. Code, sections 501-509 (Supp. III 1979): Federal grants and cooperative agreements.

(7) Title 33 U.S. Code, section 426 (1976 and Supp. III 1979): Army Corps of Engineers participation in cooperative investigations and studies concerning the erosion of shores of coastal and lake waters.

(8) Title 33 U.S. Code, sections 426e-426h (1976): Army Corps of Engineers assistance in the construction of works for the restoration and protection of shores.

(9) Title 16 U.S. Code, section 460d (1976): Construction and operation of public park and recreational facilities in water resource development projects under the administrative jurisdiction of the Department of the Army.

(10) Title 33 U.S. Code, section 701c-3 (1976): Payment to states of lease receipts from lands acquired by the United States for flood control, navigation, and allied purposes.

(11) Title 33 U.S. Code, sections 558c and 702d-1 (1976); title 10, U.S. Code, sections 2668 and 2669 (1976); title 43, U.S. Code, section 961 (1976); and title 40, U.S. Code, section 319 (1976): Grants of easements without consideration, or at a nominal or reduced consideration, on land under the control of the Department of the Army at water resource development projects.

(12) Title 33 U.S. Code, sections 540 and 577 (1976): Army Corps of Engineers assistance in the construction of small boat harbor projects.

(13) Title 33 U.S. Code, section 701s (1976): Emergency bank protection works constructed by the Army Corps of Engineers for protection of highways, bridge approaches, and public works.

(14) Title 33 U.S. Code, section 633 (1976): Army Corps of Engineers contracts for the protection, alteration, reconstruction, relocation, or replacement of structures and facilities.

(15) Title 50 U.S. Code, section 453 (1976): Defense Logistics Agency loans of industrial equipment to educational institutions (Tools for Schools).

(16) Title 33 U.S. Code, section 610 (1976): Provision of specialized services or technical information by the Army Corps of Engineers to state and local governments for the control of aquatic plant growths in rivers, harbors, and allied waters.

(17) Title 42 U.S. Code, section 1962d-16 (1976): Provision of specialized services by the Army Corps of Engineers to any state for the preparation of comprehensive plans for drainage basins located within the boundaries of said state.

(18) Title 33 U.S. Code, section 603a (1976): Provision of specialized services by the Army Corps of Engineers to improve channels for navigation.

(19) Title 33 U.S. Code, section 701g (1976): Provision of specialized services by the Army Corps of Engineers to reduce flood damage.

(20) Title 24 U.S. Code, sections 44c and 47 (1976): United States Soldiers' and Airmen's Home.

(21) Title 10 U.S. Code, Chapter 55, as implemented by DoD 6010.8-R, "Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)," January 10, 1977.

(c) All programs and activities conducted by the Department of Defense that affect handicapped persons in the United States are subject to this part. They include:

(1) Promulgation of rules and regulations for public comment in a manner that grants handicapped persons a reasonable opportunity for such comment (such as by making cassette recordings of proposed rules).

(2) Public meetings, conferences, or seminars sponsored or conducted by a DoD Component but held in nongovernmental buildings.

(3) Public meetings, conferences, or seminars sponsored or conducted by a DoD Component or by a non-DoD organization but held in a DoD building.

(4) Open houses, memorial services, tours, or other ceremonies held on or in DoD property.

(5) Military museums.

(6) Historic vessels.

(7) Historic buildings and properties maintained by a DoD Component and properties designated as historic under a statute of the appropriate state or local governmental body.

(8) Schools operated by the Department of Defense within the United States pursuant to section 6 of Pub. L. 81-874, Title 20, U.S. Code, section 241 (1976).

§ 56.8 Guidelines for determining discriminatory practices.

(a) *General prohibitions against discrimination.* (1) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefit of, or otherwise be subjected to discrimination under any program or activity that is conducted by the Department of Defense or that receives or benefits from Federal financial assistance disbursed by the Department of Defense.

(2) A recipient or DoD Component may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Provide different or separate aid, benefits, or services to handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are equal to those provided to others;

(ii) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(iii) 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;

(iv) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that afforded to others; or

(v) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity granted to others receiving the aid, benefit, or service.

(3) A recipient or DoD Component may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different from regular programs or activities, even if such separate or different programs and activities are permissible under paragraph (a)(2)(i) of this section.

(4) A recipient or DoD Component may not provide 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 or activity.

(5) A recipient of DoD Component may not deny, on the basis of handicap, a qualified handicapped person the opportunity to participate as a member of planning or advisory boards.

(6) A recipient or DoD Component may not use, directly or through contractual or other arrangements, criteria or methods of administration that:

(i) Subject qualified handicapped persons to discrimination on the basis of handicap;

(ii) Defeat or substantially impair accomplishment of the objectives of the recipient's or DoD Component's program or activity with respect to handicapped persons; or

(iii) Perpetuate discrimination by another recipient if both recipients are subject to common administrative control or are agencies of the same state.

(7) In determining the site or location of a facility, a recipient or DoD Component may not make selections that:

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity that receives or benefits from Federal financial assistance; or

(ii) Defeat or substantially impair, with respect to handicapped persons, the accomplishment of the objectives of the program or activity.

(8) Recipients and DoD Components shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

(9) Recipients and DoD Components shall take appropriate steps to make communications with their applicants, employees, and beneficiaries available to persons with impaired vision and hearing.

(10) This section may not be interpreted to prohibit the exclusion of:

(i) Persons who are not handicapped from benefits, programs, and activities limited by Federal statute or Executive order to handicapped persons; or

(ii) One class of handicapped persons from a program or activity limited by Federal statute or Executive order to a different class of handicapped persons.

(11) Recipients and DoD Components shall take appropriate steps to ensure that no handicapped individual is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under any program or activity receiving or benefiting from Federal financial assistance disbursed by the Department of Defense or under any program or activity conducted by the Department of Defense because of the absence of auxiliary aids, such as certified sign-language interpreters, telecommunication devises (TDDs), or other telephonic devices for individuals with impaired sensory, manual, or speaking skills.

(b) *Prohibitions against employment discrimination by recipients.* (1) 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 disbursed by the Department of Defense.

(2) The prohibition against discrimination in employment applies to the following:

(i) Recruitment, advertising, and processing of applications for employment.

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

(iii) Rates of pay or any other form of compensation and changes in compensation.

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

(v) Leaves of absence, sick leave, or any other leave.

(vi) Fringe benefits available by virtue of employment, whether or not administered by the recipient.

(vii) Selection and financial support for training, including apprenticeship, professional meetings, conferences and other related activities, and selection for leaves of absence for training.

(viii) Programs and activities sponsored by the employer, including social and recreational programs.

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

(3) A recipient may not participate in a contractual or other relationship that subjects qualified handicapped applicants or employees to discrimination prohibited by this section, including relationships with employment and referral agencies, labor unions, organizations providing or administering fringe benefits to employees of the recipient, and organizations providing training and apprenticeship programs.

(4) 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. Reasonable accommodation includes providing ramps, accessible restrooms, drinking fountains, interpreters for deaf employees, readers for blind employees, amplified telephones, TDDs such as Teletypewriters or Telephone Writers (TTYs), and tactile signs on elevators.

(5) 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.

(6) A recipient may not conduct a preemployment medical examination or make a preemployment inquiry about whether an applicant is a handicapped person or about the nature or severity of a handicap. A recipient may make, however, a preemployment inquiry into an applicant's ability to perform job-related functions.

(7) When a recipient is taking remedial action to correct the effects of past discrimination or is taking voluntary action to overcome the effects of conditions that have resulted in limited participation by handicapped persons in its federally assisted program or activity, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped if:

(i) The recipient makes clear to the applicants that the information is intended for use solely in connection with its remedial action obligations or its voluntary affirmative action efforts.

(ii) The recipient makes clear to the applicants that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (b)(9) in this section, that refusal to provide it will not subject the applicants to any adverse treatment, and that it will be used only in accordance with this part.

(8) 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 if:

(i) All entering employees are subjected to such an examination, regardless of handicap.

(ii) The results of such an examination are used only in accordance with this part which prohibits discrimination against a qualified handicapped person on the basis of handicap.

(9) Information obtained under this section concerning the medical condition or history of applicants shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(i) Supervisors and managers may be informed about restrictions on the work or duties of handicapped persons and about necessary accommodations.

(ii) First aid and safety personnel may be informed, when appropriate, if a handicapping condition might require emergency treatment.

(iii) Government officials investigating compliance with section 504, Pub. L. 93-112, and this part shall be provided relevant information upon request.

(c) *Program accessibility*—(1) *General requirements.* No qualified handicapped person shall, because a recipient's or DoD Component's facilities are inaccessible to or not usable 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 disbursed by the Department of Defense or under any program or activity conducted by the Department of Defense.

(2) *Existing facilities.* (i) A recipient or DoD Component 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 does not necessarily require a recipient or DoD Component to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons. For guidance in determining the accessibility of facilities, see Chapter 18 of DoD 4270.1-M, "Department of Defense Construction Criteria Manual," June 1, 1978, and Department of the Army, Office of the Chief of Engineers, Manual EM 1110-1-103, "Design for the Physically Handicapped," October 15, 1976. Inquiries on specific accessibility design problems may be addressed to the ASD (MRA&L), or designee.

(ii) When structural changes are necessary to make programs or activities in existing facilities accessible to the exent required by paragraph (c)(1) of this section.

(A) Such changes shall be made as soon as practicable, but not later than 3 years after the effective date of this part however, if the program or activity is a particular mode of transportation (such as a subway station) 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 DoD Component concerned may extend this period of time. This extension shall be for a reasonable and definite period, which shall be determined after consultation with the ASD(MRA&L), or designee.

(B) The recipient or DoD Component shall develop, with the assistance of interested persons or organizations and within a period to be established in each DoD Component's guidelines, a transition plan setting forth the steps necessary to complete such changes.

(C) The recipient or DoD Component shall make a copy of the transition plan available for public inspection. At a minimum, the plan shall:

(*1*) Identify physical obstacles in the recipient's or DoD Component's facili-

ties 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 1 year, identify steps that will be taken during each year of the transition period.

(4) Indicate the person (last name, first, and middle initial) responsible for implementation of the transition plan.

(iii) A recipient or DoD Component may comply with paragraphs (c)(2)(i) and (c)(2)(ii) of this section, through such means as the acquisition or redesign of equipment, such as telecommunication or other telephonic devices; relocation of classes or other services to accessible buildings; assignment of aides to beneficiaries, such as readers or certified sign-language interpreters; home visits; delivery of health, welfare, or other services at accessible alternate sites; alteration of existing facilities and construction of new facilities in conformance with paragraph (c)(3) in this section; or any other method that results in making the program or activity of the recipient or DoD Component accessible to handicapped persons.

(iv) A recipient or DoD Component is not required to make structural changes in existing facilities when other methods are effective in achieving compliance with this section.

(v) In choosing among available methods for meeting the requirements of this section, a recipient or DoD Component shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate with nonhandicapped persons.

(3) *New Construction.* New facilities shall be designed and constructed to be readily accessible to and usable by handicapped persons. Alterations to existing facilities shall be designed and constructed, to the maximum extent feasible, to be readily accessible to and usable by handicapped persons. For guidance in determining the accessibility of facilities, see Chapter 18 of DoD 4270.1-M and Department of the Army, Office of the Chief of Engineers, Manual EM 1110-1-103. Inquiries about specific accessibility design problems may be addressed to the ASD(MRA&L), or designee.

(4) *Historic properties.* (i) In the case of historic properties, program accessibility shall mean that, when viewed in their entirety, programs are readily accessible to and usable by handicapped persons. Because the primary benefit of historic properties is the experience of the property itself, DoD Components and recipients shall give priority to those methods of achieving program accessibility that make the historic property, or portions thereof, physically accessible to handicapped persons.

(ii) Methods of achieving program accessibility include:

(A) Making physical alterations that give handicapped persons access to otherwise inaccessible areas or features of historic properties.

(B) Using audiovisual materials and devices to depict otherwise inaccessible areas or features of historic properties.

(C) Assigning individuals to guide handicapped persons into or through otherwise inaccessible portions of historic properties.

(D) Adopting other innovative methods.

(iii) When program accessibility cannot be achieved without causing a substantial impairment of significant historic features, the DoD Component or recipient may seek a modification or waiver of access standards from the ASD (MRA&L), or designee.

(A) A decision to grant a modification or waiver shall be based on consideration of the following:

(1) Scale of the property, reflecting its ability to absorb alterations.

(2) Use of the property, whether primarily for public or private purposes.

(3) Importance of the historic features of the property to the conduct of the program.

(4) Costs of alterations in comparison to the increase in accessibility.

(B) The ASD(MRA&L), or designee, shall review periodically any waiver granted under this paragraph and may

withdraw it if technological advances or other changes warrant.

(iv) The decision by the ASD(MRA&L), or designee, to grant a modification or waiver of access standards is subject to Section 106 of the National Historic Preservation Act, as amended, and shall be made in accordance with the Advisory Council on Historic Preservation regulation on "Protection of Historic and Cultural Properties" (36 CFR Part 800). When the property is federally owned or when Federal funds may be used for alterations, the ASD(MRA&L), or designee, shall obtain the comments of the Advisory Council on Historic Preservation when required by Section 106 of the National Historic Preservation Act and the Advisory Council on Historic Preservation regulation on "Protection of Historic and Cultural Properties" (36 CFR Part 800) prior to effectuation of structural alterations.

(v) DoD Component guidelines prepared in accordance with § 56.10 shall include a listing of all historic properties, including historic ships, subject to this part and a plan for compliance with paragraph (c)(4) of this section.

(5) *Military museums.* (i) In the case of military museums, program accessibility shall mean that exhibits, displays, tours, lectures, circulating or traveling exhibits, and other programs of military museums are accessible to and usable by handicapped persons. Methods of meeting this requirement include the following:

(A) Museum programs may be made accessible to deaf and hearing-impaired persons by means such as training museum staff, such as docents, in sign language; providing qualified sign-language interpreters to accompany deaf or hearing-impaired visitors; ensuring that clear, concise language is used on all museum signs and display labels; providing amplification devices; or providing printed scripts for films, videotapes, lectures, or tours. DoD Components are encouraged to use "Museums and Handicapped Students: Guidelines for Educators," published by the National Air and Space Museum, Smithsonian Institution, Washington, D.C. 20560.

(B) Museum programs may be made accessible to blind and visually-impaired persons by means such as providing museum catalogues in a large-print edition printed over braille; providing cassette tapes, records, or discs for museum tours or exhibits; providing readers to accompany blind or visually impaired visitors; using large-print and braille display cards at exhibits; providing raised-line maps of the museum building; using raised-line drawings, reproductions, or models of large exhibits to facilitate tactile experiences when touching exhibits is prohibited; placing large-print and braille signs to identify galleries, elevators, restrooms, and other service areas; and permitting guide dogs in all museum facilities.

(C) Museum programs may be made accessible to other physically impaired persons by means such as lowering display cases; spacing exhibits to facilitate movement; using ramps in galleries; increasing lighting in exhibit areas to facilitate viewing from a distance; providing places to sit in exhibit areas; making restrooms accessible; using large-print exhibit display cards to facilitate reading from a distance; and sensitizing museum staff to consider the needs of handicapped visitors when organizing exhibits.

(ii) DoD Component guidelines developed in accordance with paragraph (c)(5) of this section shall identify military museums subject to paragraph (c) of this section and shall contain a plan for making museum programs accessible to handicapped persons. Technical assistance in the preparation and content of these plans may be obtained from the National Access Center, 1419 27th Street, NW., Washington, D.C. 20007 ((202) 333-1712 or TTY (202) 333-1339). In addition, community organizations that serve handicapped persons and handicapped persons themselves shall be consulted in the preparation of these plans.

(d) *Reasonable accommodation.* (1) A recipient or DoD Component shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient or DoD Component demonstrates to the ASD(MRA&L), or designee, that the accommodation

would impose an undue hardship on the operation of its program.

(2) Reasonable accommodation includes the following:

(i) Making facilities used by employees readily accessible to and usable by handicapped persons.

(ii) Job restructuring; part-time or modified work schedules; acquisition or modification of equipment or devices, such as telecommunication or other telephonic instruments; the provision of readers or certified sign-language interpreters; and similar actions.

(3) In determining whether an accommodation would impose an undue hardship on the operation of a recipient's or DoD Component's program, the ASD(MRA&L), or designee, shall consider the following factors, at a minimum:

(i) The overall size of the recipient's or DoD Component's program or activity, such as the number of employees, number and type of facilities, and size of budget.

(ii) The size of the recipient's or DoD Component's operations, including the composition and structure of the recipient's or DoD Component's workforce.

(iii) The nature and cost of the accommodation needed.

(4) A recipient or DoD Component may not deny any employment opportunity to a qualified handicapped employee or applicant for employment if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 56.9 Ensuring compliance with this part in Federal financial assistance programs and activities.

(a) *Supplementary guidelines issued by DoD Components.* (1) Whenever necessary, DoD Components shall publish supplementary guidelines for each type of program or activity to which they disburse Federal financial assistance within 120 days of the effective date of this part or of the effective date of any subsequent statute authorizing Federal financial assistance to a new type of program or activity. DoD Components shall obtain approval of these supplementary guidelines from the ASD(MRA&L), or designee, before issuing them. Prior to their issuance, the ASD(MRA&L), or designee, shall submit supplementary guidelines prepared pursuant to paragraph (a)(1) of this section to the Coordination and Review Section, Civil Rights Division, Department of Justice, for review and approval. To the extent that supplementary guidelines issued by DoD Components deal with the employment of civilians in programs and activities subject to this part the ASD(MRA&L), or designee, shall also obtain the approval of the Equal Employment Opportunity Commission (EEOC) in accordance with Executive Order 12067.

(2) The ASD(MRA&L), or designee, and DoD Components shall ensure that their supplementary guidelines conform to the requirements of this part and that they provide:

(i) A description of the types of programs and activities covered.

(ii) Examples of prohibited practices likely to arise with respect to those types of programs and activities.

(iii) A list of the data collection and reporting requirements of the recipients.

(iv) Procedures for processing and investigating complaints.

(v) Procedures for hearings to determine compliance by recipients with this part.

(vi) Requirements or suggestions for affirmative action on behalf of qualified handicapped persons.

(vii) Requirements for the dissemination of program and complaint information to the public.

(viii) A description of the form of the assurances that must be executed pursuant to paragraph (b) of this section, and sample assurances.

(ix) Requirements concerning the frequency and nature of postapproval reviews conducted pursuant to paragraph (h) of this section.

(x) A period of time, provided for by § 56.8(c)(2)(ii)(B), for the development of a transition plan that sets out the steps necessary to complete structural changes that might be required by § 56.8(c).

(xi) The maximum period of time that may be allowed for extensions that might be granted pursuant to § 56.8(c)(2)(ii).

(xii) An appendix that contains a list of identified programs and activities of the type covered by the supplementary guidelines, including the names of the programs and activities and the authorizing statute, regulation, or directive for each program and activity.

(xiii) Requirements for the recipient to designate a responsible official to coordinate the implementation of supplementary guidelines.

(xiv) Requirements for any other actions or procedures necessary to implement this part.

(3) When the head of a DoD Component determines that it would not be appropriate to include on or more of the provisions described in paragraph (a)(2) of this section, in the supplementary guidelines of that DoD Component or that it is not necessary to issue such guidelines at all, the reasons for such determination shall be stated in writing and submitted to the ASD(MRA&L), or designee, for review and approval. Once that determination is approved, the DoD Component shall make it available to the public upon request.

(4) The heads of DoD Components, or designees, shall be responsible for keeping the supplementary guidelines current and accurate. When a DoD Component determines that a program or activity should be added to or deleted from the guidelines, the DoD Component shall notify the ASD(MRA&L), or designee, in writing.

(b) *Required assurances.* (1) DoD Components shall require all recipients to file written assurances that their programs or activities will be conducted in accordance with this part and supplementary guidelines promulgated by DoD Components. If a recipient fails to provide an assurance that conforms to the requirements of this section, the DoD Component shall attempt to effect compliance pursuant to paragraphs (f) through (h) of this section, provided that if assistance is due and payable to the recipient based on an application approved prior to the effective date of this part the DoD Component shall continue the assistance while any proceedings required by paragraphs (n) through (v) of this section, are pending.

(2) DoD Components shall advise each recipient of the required elements of the assurance and, with respect to each program or activity, of the extent to which those receiving assistance from recipients shall be required to execute similar assurances.

(3) DoD Component shall ensure that each assurance:

(i) Obligates the recipient to advise the DoD Component of any complaints received that allege discrimination against handicapped persons.

(ii) Obligates the recipient to collect and provide the items of information that the DoD Component lists in its supplementary guidelines pursuant to paragraph (a)(2)(iii) of this section.

(iii) Is made applicable to any Federal financial assistance that might be disbursed by a DoD Component without the submission of a new application.

(iv) Obligates the recipient, when the financial assistance is in the form of proprerty, for the period during which the property is used under a financial assistance agreement or is possessed by the recipient.

(v) Includes a provision recognizing that the U.S. Government has the right to seek judicial enforcement of Section 504 and this part.

(c) *Self-evaluation and consultation with interested persons and organizations.* (1) DoD Components shall require recipients to conduct, within 6 months of the effective date of this part or of first receiving Federal financial assistance disbursed by the Department of Defense, a self-evaluation with the assistance of interested persons, including handicapped persons or organizations that represent them. When appropriate, DoD Components also shall require recipients to consult at least annually with such persons. The "Department of Health, Education, and Welfare Section 504 Technical Assistance Reserve Directory," April 1980, shall be consulted to identify likely sources for consultation. In conducting its self-evaluation, each recipient shall:

(i) Evaluate the effects of its policies and practices with respect to its compliance with this part and the applica-

ble DoD Component's supplementary guidelines.

(ii) Modify any policies that do not meet such requirements.

(iii) Take appropriate remedial steps to eliminate the discriminatory effects of any such policies or practices.

(2) For at least 3 years following the completion of a self-evaluation required under paragraph (c)(1) of this section, a recipient shall maintain on file, make available for public inspection, and provide to the ASD(MRA&L), or designee, upon request:

(i) A list of the interested persons (last names, first names, and middle initials) consulted.

(ii) A description of areas examined and problems identified, if any, with respect to those areas.

(iii) A description of any modification made and remedial steps taken.

(d) *Dissemination of information.* (1) Within 90 days of the effective date of this part or of first receiving assistance from the Department of Defense and on a continuing basis thereafter, each recipient shall notify beneficiaries and employees of their rights under this part and shall take appropriate steps to notify participants, beneficiaries, applicants for employment and employees, including those with impaired vision or hearing, and unions or professional organizations involved in collective bargaining or professional agreements with the recipient that the recipient does not discriminate on the basis of handicap in violation of this part. The notification shall state, when appropriate, that the recipient does not discriminate in admitting or providing access to or treating or employing persons in its programs and activities. Such notification may be accomplished by posting notices, publishing announcements in newspapers and magazines, placing notices in its publications, or distributing memoranda or other written communications.

(2) If a recipient publishes or uses and makes available to participants, beneficiaries, applicants for employment, or employees recruitment materials or publications containing general information about the recipient's programs and activities, it shall include in those materials or publications a statement of the policy described in paragraph (d)(1) of this section. This may be accomplished by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

(3) Understandable materials developed in accordance with this section shall be provided to ensure that all beneficiaries and employees of the recipient understand the information. In addition, recipients shall disseminate appropriate and comprehensive information about formal and informal complaint and appeal procedures, including directions on how and where to file complaints and to appeal DoD Component decisions.

(e) *Intimidation and interference.* Recipients and DoD Components shall take reasonable steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of retaliating against, interfering with, or discouraging the filing of a complaint, furnishing of information, or assisting or participating in an investigation, compliance review, hearing, or other activity related to the administration of this part.

(f) *Staff responsibilities.* All DoD Component determinations of recipient compliance with this part shall be subject to reviews by the ASD(MRA&L), or designee. When responsibility for approving applications for Federal financial assistance disbursed by a DoD Component is assigned to regional or area offices of the DoD Component, personnel in such offices shall be designated to perform the functions described in paragraphs (h) and (o) through (w) of this section.

(g) *Access to records and facilities.* Each recipient shall permit access to its premises by DoD officials during normal business hours when such access is necessary for conducting onsite compliance reviews or complaint investigations, and shall allow such officials to photograph facilities and to inspect and copy any books, records, accounts, and other material relevant to determining the recipient's compliance with this part. Information so obtained shall be used only in connection with the administration of this part. If the recipient does not have the information requested, it shall submit to the DoD Component a written report that contains a certification that the information is not available and describes the good-faith efforts made to obtain the information.

(h) *Compliance review.* DoD Components shall determine the compliance of each recipient with this part as follows: (1) *General.* Whenever possible, DoD Components shall perform compliance reviews in conjunction with their review and audit efforts implementing Title VI of the Civil Rights Act of 1964.

(2) *Desk audit application review.* Before approving an application for Federal financial assistance, the DoD Component concerned shall make a written determination as to whether the recipient is in compliance with this part, based on a review of the assurance of compliance executed by a recipient pursuant to paragraph (b) of this section, and other data submitted by the recipient. When a determination cannot be made from the assurance and other data submitted by the recipient, the DoD Component concerned shall require the recipient to submit additional information and shall take other steps as necessary to determine the recipient's compliance with this part. If this additional information demonstrates that the recipient is in compliance with this part, the DoD Component shall notify the recipient promptly that it is in compliance.

(3) *Preapproval onsite review.* (i) When a desk audit application review conducted pursuant to paragraph (h)(2) of this section indicates that the recipient might not be in compliance with this part, the DoD Component concerned may conduct a preapproval onsite review at the recipient's facilities before approving the disbursement of Federal financial assistance to the recipient. The DoD Component shall conduct such a review:

(A) When appropriate, if a desk audit application review reveals that the recipient's compliance posture is questionable because of a history of discrimination complaints, current discrimination complaints, a noncompliance determination by another government agency or DoD Component, or other indications of possible noncompliance; or

(B) If Federal financial assistance is requested for construction, except under extraordinary circumstances, to determine whether the location and design of the project would provide service on a nondiscriminatory basis, in conformity with § 56.8(c).

(ii) Preapproval onsite reviews shall be conducted under DoD Component supplementary guidelines and in accordance with the provisions of paragraph (h)(4) of this section, concerning postapproval reviews.

(4) *Postapproval reviews.* DoD Components shall: (i) Establish and maintain effective programs of postapproval reviews.

(ii) Conduct such reviews of each recipient, the frequency and the nature of which shall be prescribed in the DoD Component supplemetary guidelines implementing this part.

(iii) Require recipients periodically to submit compliance reports to them.

(iv) Record the results of the reviews, including findings of fact and recommendations.

(5) A DoD Component shall complete a review within 180 calendar days of initiating it unless an extension of time is granted by the ASD(MRA&L), or designee, for good cause shown, and shall either:

(i) Find the recipient to be in compliance and notify the recipient of that finding; or

(ii) Notify the recipient and the ASD(MRA&L), or designee, of a finding of probable noncompliance, pursuant to paragraph (o) of this section.

(i) *Filing of complaints against recipients.* (1) DoD Components shall establish and publish in their supplementary guidelines procedures for the prompt processing and disposition of complaints against recipients, consistent with this section.

(2) A DoD Component shall consider all complaints that: (i) Are filed with it within 180 days of the alleged discrimination or within a longer period of time if an extension is granted for good cause by the DoD Component

with the approval of the ASD(MRA&L), or designee.

(ii) Include the name, address, and telephone number, if any, of the complainant; the name and address of the recipient committing the alleged discrimination; a description of the acts or omissions considered to be discriminatory; and other pertinent information.

(iii) Are signed by the complainant or the complainant's authorized representative (legal counsel or a person with power of attorney granted by the complainant).

(3) DoD Components shall transmit a copy of each complaint filed with them to the ASD(MRA&L), or designee, within 10 calendar days after its receipt.

(4) If the information in a complaint is incomplete, the DoD Component shall request the complainant to provide the additional information required. If the DoD Component does not receive this requested information within 30 calendar days of the date of the request, the case may be closed and the complainant so notified in writing.

(5) If a complaint concerning a program or activity is filed with a DoD Component that does not have jurisdiction over it, the DoD Component shall refer the complaint to the ASD(MRA&L), or designee, and advise the complainant in writing of such referral. The ASD(MRA&L), or designee, then shall refer the complaint to the appropriate DoD Component and so notify the complainant in writing.

(j) *Investigation by DoD components.* (1) DoD Components shall investigate complaints that involve recipients and that meet the standards described in paragraph (i) of this section, unless good cause for not investigating is stated in a written notification of the disposition of the complaint provided to the complainant.

(2) If an investigation of a complaint is conducted, the DoD Component concerned shall maintain a case record that contains:

(i) The name (last name, first, and middle initial), address (street address, city, state, and zip code), and telephone number of each person interviewed.

(ii) Copies, transcripts, or summaries of pertinent documents.

(iii) A reference to at least one program or activity conducted by the recipient and receiving Federal financial assistance disbursed by a DoD Component, and a description of the amount and nature of the assistance.

(iv) A narrative report of the results of the investigation that contains references to relevant exhibits and other evidence that relates to the alleged violations.

(k) *Investigations by recipients.* (1) A DoD Component may require or permit recipients to investigate complaints alleging violation of this part. In such cases, the DoD Component shall:

(i) Ensure that the recipient investigates the complaints in accordance with the standards, procedures, and requirements prescribed in paragraph (j) of this section.

(ii) Require the recipient to submit a written report of each complaint and investigation to the DoD Component.

(iii) Retain a review responsibility over the investigation and disposition of each complaint.

(iv) Ensure that each complaint investigation is completed within 180 calendar days of the receipt of the complaint by the proper DoD Component, unless an extension of time is granted for good cause by the ASD(MRA&L), or designee.

(v) Require the recipient to maintain a log of all complaints filed against it, as described in § 56.6(a)(1).

(2) DoD Components that require or permit complaint investigations to be conducted by recipients shall review recipient complaint investigations pursuant to paragraphs (k) and (l) of this section.

(l) *Results of investigations.* (1) Within 180 days of the receipt of a complaint, the DoD Component, recipient, or the ASD(MRA&L), or designee, shall give written notification:

(i) Of the disposition of the complaint to the complainant and, as the case may be, to the recipient or DoD Component.

(ii) To the complainant that within 30 calendar days of receipt of the written notification, the complainant may request that the ASD(MRA&L), or

designee, review the findings in the notification pursuant to paragraph (m) of this section.

(2) If the complaint investigation results in a determination by the DoD Component that a recipient is not complying with this part the DoD Component shall proceed as prescribed in paragraph (n) through (v) of this section. If the DoD Component determines that the recipient is in compliance, the DoD Component shall submit the complete case file to the ASD(MRA&L), or designee, within 15 calendar days after the notification of the disposition of the investigation to the complainant.

(m) *Reviewing completed investigations.* (1) The ASD(MRA&L), or designee, may review all completed investigations.

(2) The ASD(MRA&L), or designee, shall review the results of any investigation of a complaint if the complainant requests such a review pursuant to paragraph (l)(1)(ii) of this section.

(3) After reviewing the results of an investigation, the ASD(MRA&L), or designee, may:

(i) Find that no further investigation is necessary and approve the results of the investigation;

(ii) Request further investigation by the DoD Component; or

(iii) Require the DoD Component to take appropriate corrective action.

(n) *Effecting compliance.* (1) When a compliance review or complaint investigation indicates that a recipient has violated this part, the applicable DoD Component's supplementary guidelines, or the assurances executed pursuant to paragraph (b) of this section, the responsible DoD Component or the ASD(MRA&L), or designee, shall attempt to effect compliance in accordance with paragraphs (o) and (p) of this section. The inability of a DoD Component to comply with any time frame prescribed by this part does not relieve a recipient of the responsibility for compliance with this part.

(2) The DoD Component may require, when necessary to overcome the effects of discrimination in violation of this part, a recipient to take remedial action:

(i) With respect to handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program or activity when such discrimination occurred.

(ii) With respect to handicapped persons who would have been participants in the recipient's program or activity had the discrimination not occurred.

(iii) With respect to handicapped persons presently in the recipient's program or activity, but not receiving full benefits or equal and integrated treatment within the program or activity.

(o) *Written notice.* After evaluating the investigative report, the DoD Component shall issue to the recipient and, pursuant to paragraph (n)(2) of this section to the ASD(MRA&L), or designee, a written notice that:

(1) Describes the apparent violation and the corrective actions necessary to achieve compliance.

(2) Extends an offer to meet informally with the recipient.

(3) Informs the recipient that failure to respond to the notice within 15 calendar days of its receipt shall result in the initiation of enforcement procedures described in paragraphs (r) through (v), of this section.

(p) *Attempting to achieve voluntary compliance by recipients.* (1) If a DoD Component issues a notice pursuant to paragraph (o) of this section, the DoD Component shall attempt to meet with the recipient and shall attempt to persuade it to take the steps necessary to achieve compliance with this part.

(2) If a recipient agrees to take remedial steps to achieve compliance, the DoD Component shall require that the agreement be in writing and:

(i) Be signed by the head of the DoD Component concerned, or designee, and by the principal official of the recipient.

(ii) Specify the action necessary to achieve compliance.

(iii) Be made available to the public upon request.

(iv) Be subject to the approval of the ASD(MRA&L), or designee.

(3) If satisfactory adjustment or a written agreement has not been achieved within 60 calendar days of

the recipient's receipt of the notice issued pursuant to paragraph (o) of this section, the DoD Component shall notify the ASD(MRA&L), or designee, and state the reasons therefor.

(4) The DoD Component shall initiate the enforcement actions prescribed in paragraphs (r) through (v) of this section if:

(i) The recipient does not respond to a notice pursuant to paragraph (o) of this section, within 15 calendar days of its receipt and satisfactory adjustments are not made within 45 calendar days of the date of the recipient's response; or

(ii) The DoD Component or the ASD (MRA&L) determines at any time within 90 days after the recipient receives a notice pursuant to paragraph (o) of this section, that, despite reasonable efforts, it is not likely that the recipient will comply promptly and voluntarily.

(5) If, pursuant to paragraph (p)(4) of this section, the DoD Component initiates enforcement action, it also shall continue its attempts to persuade the recipient to comply voluntarily.

(q) *Imposing sanctions*—(1) *Sanctions available.* If a DoD Component has taken action pursuant to paragraphs (o) and (p) of this section, the DoD Component may, by order, subject to paragraph (q)(2) and (q)(3) of this section:

(i) Terminate, suspend, or refuse to grant or continue assistance to such recipient.

(ii) Refer the case to the Department of Justice for the initation of enforcement proceedings at a Federal, State, or local level.

(iii) Pursue any remedies under state or local law.

(iv) Impose other sanctions upon consultation with the ASD (MRASL), or designee.

(2) *Terminating, suspending, or refusing to grant or continue assistance.* A DoD Component may not terminate or refuse to grant or continue Federal financial assistance unless:

(i) Such action has been approved by the Secretary of Defense.

(ii) The DoD Component has given the recipient an opportunity for a hearing pursuant to the procedures set out in paragraph (r) of this section, and a finding of noncompliance has resulted.

(iii) Thirty calendar days have elapsed since the Secretary of Defense has filed a written report describing the violation and action to be taken with the committees of the House of Representatives and Senate that have jurisdiction over the program or activity in which the violation of this part exists.

(iv) Such action is limited to affect only the particular activity or program, or portion thereof, of the recipient where the violation exists.

(3) *Other sanctions.* A DoD Component may not impose the sanctions set out in paragraphs (q)(1) (iii) and (iv) of this section, unless:

(i) The DoD Component has given the recipient an opportunity for a hearing pursuant to paragraph (r) of this section, and a finding of noncompliance has resulted.

(ii) The action has been approved by the Secretary of Defense.

(iii) Ten calendar days have elapsed since the mailing of a notice informing the recipient of its continuing failure to comply with this part the action necessary to achieve compliance, and the sanction to be imposed.

(iv) During those 10 calendar days the DoD Component has made additional efforts to persuade the recipient to comply.

(r) *Hearings for recipients*—(1) *General.* When, pursuant to paragraph (q)(2)(ii) of this section, an opportunity for a hearing is given to a recipient, the DoD Component involved shall follow the procedures prescribed in paragraphs (r)(2) through (r)(6) of this section.

(2) *Notice.* The DoD Component concerned shall notify the recipient of the opportunity for a hearing by registered or certified mail, return receipt requested, when the recipient denies a tentative finding of noncompliance with this part.

(i) The DoD Component shall ensure that the notice:

(A) Describes the proposed sanctions to be imposed.

(B) Cites the section of this part under which the proposed action is to be taken.

(C) States the name and office of the DoD Component official who is responsible for conducting the hearing (hereafter referred to as the "responsible DoD official").

(D) Outlines the issues to be decided at the hearing.

(E) Advises the recipient either of a date, not less than 20 calendar days after the date that the notice is received, by which the recipient may request that the matter be scheduled for a hearing, or of a reasonable time and place of a hearing that is subject to change for good cause shown.

(ii) When a time and place for a hearing are set, the DoD Component shall give the recipient and the complainant, if any, reasonable notice of such time and place.

(3) *Waiver of a hearing.* A recipient may waive a hearing and submit to the responsible DoD official, in writing, information or arguments on or before the date stated pursuant to paragraph (r)(2)(i)(E) of this section.

(i) A recipient waives its right to a hearing if it fails to request a hearing on or before a date stated pursuant to paragraph (r)(2)(i)(E) of this section, or fails to appear at a hearing that has been scheduled pursuant to that paragraph.

(ii) If a recipient waives its right to a hearing under this section, the responsible DoD official shall decide the issues and render a final decision that is based on the information available and that conforms to the requirements of paragraph (s)(4) of this section.

(4) *Hearing examiner.* Hearings shall be conducted by the responsible DoD official or by a hearing examiner designated by the official, provided that the hearing examiner shall be a field grade officer or civilian employee above the grade of GS-12 (or the equivalent) who is admitted to practice law before a Federal court or the highest court of a state, territory, commonwealth, or the District of Columbia.

(5) *Right to counsel.* In all proceedings under this section, the recipient and the DoD Component may be represented by counsel. The representation of the recipient will not be at U.S. Government expense.

(6) *Procedures.* Hearings authorized under this section shall be subject to the following: (i) Hearings shall be open to the public.

(ii) Formal rules of evidence will not apply. The DoD Component concerned and the recipient shall be entitled to introduce all relevant evidence on the issues stated in the notice of hearing issued pursuant to paragraph (r)(2) of this section, and those designated by the responsible DoD official or the hearing examiner at the outset of or during the hearing. The responsible DoD official or hearing examiner, however, may exclude irrelevant, immaterial, or repetitious evidence.

(iii) All witnesses may be examined or cross-examined, as the case may be, by each party.

(iv) All parties shall have the opportunity to examine all evidence offered or admitted for the record.

(v) A transcript of the proceedings shall be maintained in either electronic or typewritten form and made available to all parties.

(s) *Decisions*—(1) *Initial or proposed decisions by a hearing examiner.* If a hearing is conducted by a hearing examiner who is designated by the responsible DoD official pursuant to paragraph (r)(4) of this section, the hearing examiner shall either:

(i) Make an initial decision, if so authorized, that conforms to the requirements of paragraph (s)(4) of this section; or

(ii) Certify the entire record and submit to the responsible DoD official recommended findings and a proposed decision.

(2) *Review of initial decisions.* Initial decisions made by a hearing examiner pursuant to paragraph (s)(1)(i) of this section, shall be reviewed as follows:

(i) A recipient may file exceptions to an initial decision within 30 calendar days of receiving notice of such initial decision. Reasons shall be stated for each exception.

(ii) If the recipient does not file exceptions pursuant to paragraph (s)(2)(i) of this section, the responsible DoD official may notify the recipient within 45 calendar days of the initial decision that the responsible DoD official will review the decisions.

(iii) If exceptions are filed pursuant to paragraph (s)(2)(i) of this section, or a notice of review is issued pursuant to paragraph (s)(2)(ii) of this section, the responsible DoD official shall review the initial decision and, after giving the recipient reasonable opportunity to file a brief or other written statement of its contentions, issue a final decision that addresses each finding and conclusion in the initial decision and each exception, if any.

(iv) If the exceptions described in paragraph (s)(2)(i) of this section are not filed and the responsible DoD official does not issue the notice of review described in paragraph (s)(2)(ii) of this section, the initial decision of the hearing examiner shall constitute the final decision of the responsible DoD official.

(3) *Decisions by the responsible DoD official who conducts a hearing or receives a certified record.* If a hearing examiner who is designated by the responsible DoD official certifies the entire record and submits recommended findings and a proposed decision to the responsible DoD official pursuant to paragraph (s)(1)(ii) of this section, or if the responsible DoD official conducts the hearing, after giving the recipient a reasonable opportunity to file a brief or other written statement of its contentions, the responsible DoD official shall render a final decision that conforms to paragraph (s)(4) of this section.

(4) *Contents of decisions.* Each decision of a hearing examiner or responsible DoD official shall state all findings and conclusions and identify each violation of this part. The final decision may contain an order pursuant to paragraph (q) of this section, providing for the suspension or termination of or refusal to grant or continue all or some of the Federal financial assistance under the program or activity involved and contain terms, conditions, and other provisions that are consistent with and intended to achieve compliance with this Directive.

(5) *Notice of decisions and certifications.* The responsible DoD official shall provide a copy of any certified record of a hearing and any initial or final decision to the recipient and the complainant, if any.

(6) *Review by the Secretary of Defense.* The responsible DoD official shall transmit promptly any final decision that orders a suspension, termination, or denial of Federal financial assistance through the ASD(MRA&L) to the Secretary of Defense. The Secretary may:

(i) Approve the decision;

(ii) Vacate the decision; or

(iii) Remit or mitigate any sanction imposed.

(t) *Restoring eligibility for financial assistance.* (1) A recipient that is affected adversely by a final decision issued under paragraph (s) of this section, may at any time request the responsible DoD official to restore fully its eligibility to receive Federal financial assistance.

(2) If the responsible DoD official determines that the information supplied by the recipient demonstrates that it has satisfied the terms and conditions of the order entered pursuant to paragraph (s) of this section, and that is complying with and has provided reasonable assurance that it will continue to comply with this part the responsible DoD official shall restore such eligibility immediately.

(3) If the responsible DoD official denies a request for restoration of eligibility, the recipient may submit a written request for a hearing that states why it believes the responsible DoD official erred in denying the request. Following such a written request, the recipient shall be given an expeditious hearing under rules of procedure issued by the responsible DoD official to determine whether the requirements described in paragraph (t)(2) of this section, have been met. While any such proceedings are pending, the sanctions imposed by the order issued under paragraph (s) of this section, shall remain in effect.

(u) *Interagency cooperation and delegation.* (1) When several recipients are receiving assistance for the same or similar purposes from a DoD Component and another Federal agency, the DoD Component shall notify the ASD (MRA&L), or designee. Such notification shall be in writing and shall contain:

(i) A description of the programs and activities involved.

(ii) A statement of the amount of money expended on the programs and activities in the previous and current fiscal year by the DoD Component and the agency.

(iii) A list of the known primary recipients.

(2) The ASD(MRA&L), or designee, shall attempt to negotiate with the Federal agency a written delegation agreement that designates the agency or the DoD Component as the primary agency for purposes of ensuring compliance with section 504 of Pub. L. 93-112, as amended, and this part depending upon which of them administers a larger financial assistance program with the common recipients and other relevant factors. If necessary, the agreement shall establish procedures to ensure the enforcement of section 504 of Pub. L. 93-112, as amended, and this part. The ASD(MRA&L), or designee, shall provide written notification to recipients of an agreement reached under this subsection.

(3) When several recipients are receiving assistance for the same or similar purposes from two or more DoD Components, the DoD Components may negotiate a proposed written delegation agreement that:

(i) Assigns responsibility for ensuring that the recipient complies with this part to one of the DoD Components.

(ii) Provides for the notification to recipients and the responsible program officials of the DoD Components involved of the assignment of enforcement responsibility.

(4) No delegation agreement reached in accordance with paragraph (u)(3) to this section shall be effective until it is approved by the ASD(MRA&L), or designee.

(5) When possible, existing delegation agreements relating to Title VI of the Civil Rights Act of 1964 shall be amended to provide for the enforcement of this part.

(6) Any DoD Component conducting a compliance review or investigating a complaint of an alleged violation by a recipient shall notify any other affected agency or DoD Component through the ASD(MRA&L), or designee, upon discovery that the agency or DoD Component has jurisdiction over the program or activity in question and shall subsequently inform it of the finding made. Such reviews or investigations may be conducted on a joint basis.

(7) When a compliance review or complaint investigation under this part reveals a possible violation of Executive Order 11246, Titles VI or VII of the Civil Rights Act of 1964, or any other Federal law, the DoD Component shall notify the appropriate agency, through the ASD(MRA&L), or designee.

(v) *Coordination with Sections 502 and 503.* (1) DoD Components shall use DoD 4270.1-M and Department of the Army, Office of the Chief of Engineers, Manual EM 1110-1-103, in developing requirements for the accessibility of facilities. If DoD Components encounter issues with respect to Section 502 of the Rehabilitation Act of 1973, as amended, that are not covered by these publications, the ASD(MRA&L), or designee, may be consulted. If necessary, the ASD(MRA&L), or designee, shall consult with the Architectural and Transportation Barriers Compliance Board in resolving such problems.

(2) DoD Components may advise recipients to consult directly with the Architectural and Transportation Barriers Compliance Board in developing accessibility criteria.

(3) DoD Components shall coordinate enforcement actions relating to the accessibility of facilities with the Architectural and Transportation Barriers Compliance Board and shall notify the ASD(MRA&L), or designee, of such coordination.

(4) If a recipient is also a Federal contractor subject to Section 503 of the Rehabilitation Act of 1973, as amended, and the regulations thereunder (41 CFR Part 60-741) and if a DoD Component has reason to believe that the recipient is in violation thereof, the DoD Component shall coordinate enforcement actions with the Department of Labor, Office of Federal Contract Compliance Programs. The DoD Component shall notify the ASD(MRA&L), or designee, of such coordination.

§ 56.10 Ensuring compliance with this part in programs and activities conducted by the Department of Defense.

(a) *Supplementary guidelines.* (1) Whenever necessary, the ASD(MRA&L), or designee, shall publish supplementary guidelines for programs and activities that are conducted by DoD Components and that are subject to this Directive. Prior to their issuance, the ASD(MRA&L), or designee, shall submit supplementary guidelines prepared pursuant to this subsection to the Coordination and Review Section, Civil Rights Division, Department of Justice, for review.

(2) The heads of DoD Components, or designees, shall be responsible for keeping the supplementary guidelines described in this section current and accurate. When a DoD Component head determines that a program or activity should be added to or deleted from the guidelines, that official shall notify the ASD(MRA&L), or designee, in writing.

(b) *Staff responsibilities.* The ASD(MRA&L), or designee, shall determine DoD Component compliance with this part as it pertains to programs and activities that are conducted by DoD Components and are subject to this part.

(c) *Filing of complaints.* (1) Complaints of discrimination in a program or activity conducted by a DoD Component may be filed directly with the ASD(MRA&L), or designee.

(2) DoD Components shall develop procedures, such as posters or other devices, to notify participants in the programs and activities listed in § 56.7(c) of their right to be free of discrimination because of handicap in those programs and activities and of their right to file complaints of discrimination with the ASD(MRA&L), or designee.

(d) *Investigations of complaints.* (1) The ASD(MRA&L), or designee, shall investigate complaints of discrimination in programs and activities that are conducted by DoD Components and are subject to this part.

(2) A case record of each investigation shall be compiled in accordance with § 56.9(j)(2).

(e) *Results of investigations.* If the complaint investigation results in a determination by the ASD(MRA&L), or designee, that a DoD Component's program or activity is not complying with § 56.9, the ASD(MRA&L), or designee, shall proceed as prescribed in § 56.9 (n) through (v). Hearings prescribed under § 56.9(r) however, need not be conducted. If the ASD(MRA&L), or designee, determines that the DoD Component is in compliance, the ASD(MRA&L), or designee, shall notify the complainant within 15 calendar days of such determination.

(f) *Written notice.* If an investigative report concludes that there has been a violation of this part in a program or activity conducted by a DoD Component and the ASD(MRA&L), or designee, accepts that conclusion, that official shall issue to the head of the DoD Component a written notice describing the apparent violation, the corrective actions necessary to achieve compliance, and a suspense date for completion of the corrective actions.

(g) *Effecting compliance.* When necessary to overcome the effects of discrimination in violation of this part the ASD(MRA&L), or designee, may require a DoD Component to take remedial action similar to that in § 56.9(n)(2).

(h) *Employment.* DoD Components that conduct Federal programs or activities covered by this part that involve employment of civilian persons to conduct such a program or activity must comply with Section 501 of the Rehabilitation Act of 1973, as amended, and the implementing rules and regulations of the EEOC.

PART 57—EDUCATION OF HANDICAPPED CHILDREN IN THE DoD DEPENDENTS SCHOOLS

Sec.
57.1 Purpose.
57.2 Applicability and scope.
57.3 Policy.
57.4 Responsibilities.
57.5 Definitions.
APPENDIX 1 TO PART 57—PROCEDURES FOR EDUCATIONAL PROGRAMS AND SERVICES FOR HANDICAPPED CHILDREN
APPENDIX 2 TO PART 57—HEARING PROCEDURES

AUTHORITY: Pub. L. 94-142, as amended; Pub. L. 95-561, as amended.

SOURCE: 46 FR 62260, Dec. 23, 1981, unless otherwise noted.

§ 57.1 Purpose.

This part establishes policies and procedures for providing a free appropriate public education to handicapped children receiving or entitled to receive educational instruction from the DoD Dependents Schools (DoDDS) pursuant to Pub. L. 94-142 and Pub. L. 95-561 and in accordance with Part 69 of this title; establishes an Overseas Dependents Schools National Advisory Panel on the Education of Handicapped Dependents (National Advisory Panel) consistent with the provisions of DoD Directive 5105.18,[1] "Department of Defense Committee Management Program," April 25, 1975, and a DoD Coordinating Committee on Special Education and Related Services.

§ 57.2 Applicability and scope.

(a) The provisions of the part apply to the Office of the Secretary of Defense and its field activity, DoDDS and DoDDS constituent elements; the Military Departments; the Organization of the Joint Chiefs of Staff; the Unified and Specified Commands; and the Defense Agencies (collectively DoD Components).

(b) The provisions encompass children receiving or entitled to receive educational instruction from DoDDS, and the parents of those children.

(c) The provisions do not apply to schools operated by the Department of Defense within the United States.

§ 57.3 Policy.

(a) All handicapped children receiving or entitled to receive educational instruction from DoDDS shall be provided a free appropriate public education under the provisions of this part.

(b) DoDDS shall have the responsibility of providing a free appropriate public education to all handicapped children enrolled in its schools.

(c) Handicapped children receiving or entitled to receive educational instruction from DoDDS shall have a free appropriate public education, the same educational opportunities and services offered by DoDDS to nonhandicapped children, and an equal opportunity to participate in school activities.

(d) Physical education services, modified or specially designed if necessary, shall be available to every handicapped child receiving a free appropriate public education from DoDDS.

(e) When appropriate, a qualified military medical authority shall conduct or verify a medical evaluation and participate with DoDDS personnel in determining whether a child has a handicapping condition requiring special education and related services.

§ 57.4 Responsibilities.

(a) The *Director, Department of Defense Dependents Schools, and his subordinate organizational structure,* shall: (1) Ensure that handicapped children receiving educational instruction from DoDDS are provided a free appropriate public education and that the educational needs of handicapped and nonhandicapped children are met comparably, using the procedures established by this part.

(2) Ensure that educational facilities and services operated by DoDDS for handicapped children are comparable to DoDDS educational facilities and services for nonhandicapped children.

(3) Maintain records on special education and related services provided to handicapped children.

(4) Provide any or all special education and related services required by a handicapped child, other than those furnished by the Secretaries of the Military Departments. In fulfilling this responsibility, the Director and his subordinate organizational structure may use interagency, intraagency, and interservice arrangements, or act through contracts with private parties, when funds are authorized and appropriated.

(5) Develop and implement a comprehensive system of personnel development.

[1] Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120, Attention: Code 301.

CITE CHECK

✓ SCIARROTTO	715 F SUPP 222
✓ WILLIAMS	926 F2d 994
✓ JOHNSTON	875 F2d 1415
✓ BOYD	752 F2d 410
SAN FRAN	need cite
✓ ARLINE	772 F2d 759
✓ DEVARGAS	911 F2d 1377
✓ DOT	477 US 597
✓ GLANZ	756 F SUPP 632
✓ BAYLOR	736 F2d 103

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BLUE CROSS	545 FSUPP 576
DOE	454 FSUPP 621

§ 102. Military departments

The military departments are:

The Department of the Army.

The Department of the Navy.

The Department of the Air Force.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 378.

Historical and Revision Notes

The section is supplied to avoid the necessity for defining "military departments" each time it is used in this title. See section 101(7) of title 10.

Cross References

Attorney General to advise Secretaries of military departments, see section 513 of Title 28, Judiciary and Judicial Procedure.

Organization—

Air Force, see section 8010 et seq. of Title 10, Armed Forces.

Army, see section 3010 et seq. of Title 10.

Navy, see section 5011 et seq. of Title 10.

Library References

Armed Services ⚷1. C.J.S. Armed Services §§ 2 to 4, 11, 12.

§ 103. Government corporation

For the purpose of this title—

(1) "Government corporation" means a corporation owned or controlled by the Government of the United States; and

(2) "Government controlled corporation" does not include a corporation owned by the Government of the United States.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 378.

Historical and Revision Notes

The section is supplied to avoid the necessity for defining "Government corporation" and "Government controlled corporation" each time it is used in this title.

Cross References

Federal Crop Insurance Corporation, see section 1501 et seq. of Title 7, Agriculture.

Government Corporation Control Act, see section 841 et seq. of Title 31, Money and Finance.

National Trust for Historic Preservation in United States, see section 468 et seq. of Title 16, Conservation.

Saint Lawrence Seaway Development Corporation, see section 981 et seq. of Title 33, Navigation and Navigable Waters.

Tennessee Valley Authority, see section 831 et seq. of Title 16, Conservation.

Library References

United States ⚷53(1). C.J.S. United States § 65.

§ 104. Independent establishment

For the purpose of this title, "independent establishment" means—

(1) an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and

(2) the General Accounting Office.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 379; Pub.L. 91–375, § 6(c)(2), Aug. 12, 1970, 84 Stat. 775.

Historical and Revision Notes

The section is supplied to avoid the necessity for defining "independent establishment" each time it is used in this title.

Certain agencies are not independent establishments under the definition since they are constituent agencies or parts of an independent establishment. However, these agencies would continue to be subject to the provisions of this title applicable to the independent establishment of which they are a constituent or part. Also, the definition does not expand or abridge any rights or authority possessed by these agencies as no substantive changes are intended, see section 7(a) of the bill.

1970 Amendment. Par. (1). Pub.L. 91–375 inserted "(other than the United States Postal Service or the Postal Rate Commission)" following "executive branch".

Effective Date of 1970 Amendment. Amendment by Pub.L. 91–375 effective within 1 year after Aug. 2, 1970, on date established therefor by the Board of Governors of the United States Postal Service and published by it in the Federal Register, see section 15(a) of Pub.L. 91–735, set out as a note preceding section 101 of Title 39, Postal Service.

Legislative History. For legislative history and purpose of Pub.L. 91–375, see 1970 U.S.Code Cong. and Adm.News, p. 3649.

Cross References

Board of Veterans' Appeals, see section 4001 et seq. of Title 38, Veterans' Benefits.

Department of Medicine and Surgery, see section 4101 et seq. of Title 38.

General Accounting Office, see section 41 et seq. of Title 31, Money and Finance.

Veterans' Administration, see section 201 et seq. of Title 38, Veterans' Benefits.

Veterans' Canteen Service, see section 4201 et seq. of Title 38.

Library References

United States ⚷31. C.J.S. United States § 31.

§ 105. Executive agency

For the purpose of this title, "Executive agency" means an Executive department, a Government corporation, and an independent establishment.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 379.

Historical and Revision Notes

Reviser's Note. The section is supplied to avoid the necessity for defining "Executive agency" each time it is used in this title.

Library References

United States ⚷31. C.J.S. United States § 31.

Handicap discrimination in employment: The employer defense of future safety risk. Richard A. Perras and Walter C. Hunter, 6 U.Pitt.L. & Comm.J. 377 (1986).

Handicap discrimination in employment: The Rehabilitation Act of 1973. Richard F. Richards, 39 Ark.L.Rev. 1 (1985).

Legal rights of nonsmokers in the workplace. Raymond L. Paolella, 10 Puget Sound L.Rev. 591 (1987).

Medical examinations and inquires under the Americans with Disabilities Act: A view from the inside. Chai Feldblum, 64 Temp.L.Rev. 521 (1991).

1988 Missouri AIDS and HIV infection laws: The employer's perspective. David L. Wing, 53 Mo.L.Rev. 671 (1988).

Survey of the law on employee drug testing. Stephen M. Fogel, Gerri L. Kornblut, and Newton P. Porter, 42 U.Miami L.Rev. 553 (1988).

The developing law on AIDS in the workplace. Jana Howard Carey and Megan M. Arthur, 46 Md.L.Rev. 284 (1987).

The modern at-will employment doctrine: Myths and misperceptions. Andrew S. Brignone 551, No. 2 Inter Alia 5 (1986).

What disabilities are protected under the Rehabilitation Act of 1973? David D. Larson, 16 Memphis St.U.L.Rev. 229 (1986).

NOTES OF DECISIONS

Employees within section 17
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3. State regulation or control

Employer's unrebutted evidence regarding its contract with federal agency established that employer had contract for amount in excess of $2,500 during period of alleged discriminatory conduct toward employee, with result that employer was covered by Rehabilitation Act and was not amenable to suit under Virginia Rights of Persons With Disabilities Act. Sneed v. American Bank Stationary Co., Div. of ABS Corp., W.D.Va.1991, 764 F.Supp. 65.

Rehabilitation Act preempts state tort action and administrative remedies described in Act are exclusive remedy for violation of Act; thus, discharged employee cannot maintain state law wrongful discharge action based on violation of Rehabilitation Act. Fergerstrom v. Datapoint Corp., D.Hawaii 1988, 680 F.Supp. 1456.

Federal Rehabilitation Act does not preempt West Virginia Human Rights Act, and thus former railroad employee was not barred from bringing action against railroad for discrimination on basis of physical handicap under West Virginia Human Rights Act, as Congress has indicated intent in field of employment discrimination to permit overlapping and parallel remedies, and where employer failed to show that actual conflict exists between West Virginia Human Rights Act and Rehabilitation Act. Muncy v. Norfolk and Western Ry. Co., S.D.W.Va.1986, 650 F.Supp. 641.

Workers' Compensation Act section prohibiting retaliatory discharge for filing workers' compensation claim is not preempted by federal Vocational Rehabilitation Act, prohibiting discrimination because of handicap. Proctor v. Caudill, Okl.App. 1991, 820 P.2d 1353.

4. Persons on whom duty imposed

Moon v. Secretary, U.S. Dept. of Labor, 747 F.2d 599 [main volume] certiorari denied 105 S.Ct. 2117, 471 U.S. 1055, 85 L.Ed.2d 481.

6. —— Basis for rejection of

An employee unable to refrain from doing physical violence to supervisor was not "otherwise qualified" for employment and thus was not entitled to reasonable accommodation under the Rehabilitation Act, even assuming that employee's mental condition could be deemed a handicap. Adams v. Alderson, D.D.C.1989, 723 F.Supp. 1531.

7. Agency action—Generally

Moon v. Secretary, U.S. Dept. of Labor, 747 F.2d 599 [main volume] certiorari denied 105 S.Ct. 2117, 471 U.S. 1055, 85 L.Ed.2d 481.

9. Private right of action

Hodges v. Atchison, Topeka and Santa Fe Ry. Co. 728 F.2d 414 [main volume] certiorari denied 105 S.Ct. 97, 469 U.S. 822, 83 L.Ed.2d 43.

California Paralyzed Veterans Ass'n. v. F.C.C. 496 F.Supp. 125 [main volume] certiorari denied 105 S.Ct. 121, 469 U.S. 832, 83 L.Ed.2d 63.

Worker, who suffered from acrophobia and was rehired by government contractor after he had initiated an administrative complaint with the Office of Federal Contract Compliance Programs, could not maintain action in federal district court against contractor for wrongful discharge arising out of contractor's firing him two days prior to expiration of 60-day probationary period for position for which he was rehired; worker's sole remedy was the administrative proceeding provided by the Rehabilitation Act. D'Amato v. Wisconsin Gas Co., C.A.7 (Wis.) 1985, 760 F.2d 1474.

Former employee had no private cause of action against employer for wrongful discharge in violation of Vocational Rehabilitation Act; the Act provided for administrative remedy through Department of Labor. Day v. Alcan Aluminum Corp., W.D.Ky.1987, 675 F.Supp. 1508.

Vocational Rehabilitation Act provision, § 503, requiring any contract in excess of $2,500 entered into by federal government to contain affirmative action provision for handicapped individuals and authorizing any handicapped individual who believes that any contractor has failed or refused to comply to file complaint with Department of Labor did not create private right of action by such handicapped individual against employer for alleged discrimination in employment on basis of physical handicap. Healy v. Bergman, D.C.Mass. 1985, 609 F.Supp. 1448.

10. Exhaustion of administrative remedies

California Paralyzed Veterans Ass'n. v. F.C.C., 496 F.Supp. 125 [main volume] certiorari denied 105 S.Ct. 121, 469 U.S. 832, 83 L.Ed.2d 63.

11. Persons entitled to maintain action

Contractor's employee did not have Article III standing to seek order directing Department of Labor (DOL) to conduct prompt investigation of future complaints that government contractors violated Rehabilitation Act; contractor's employee was unable to show that he had suffered injury that was likely to be redressed by favorable decision and, thus, Article III constitutional requirement of live case or controversy could not be met, where DOL actually conducted investigation and determined that no enforcement action was appropriate in employee's case. Giacobbi v. Biermann, D.D.C.1992, 780 F.Supp. 33.

14. Questions for court

District court had statutory duty to determine whether Department of Labor unreasonably delayed resolution of employment discrimination complaint asserted by employee of alleged public contractor and, if so, to determine appropriate remedy, even though administrative complaint had finally been filed seven years after employee initiated complaint with Department. Thompson v. U.S. Dept. of Labor, C.A.3 (Pa.) 1987, 813 F.2d 48.

14a. Moot questions

Requests for declaratory and injunctive relief under Administrative Procedure Act and for mandamus, seeking relief from hold which Office of Federal Contract Compliance Programs placed on administrative complaint, pending resolution of appeal in similar case, were rendered moot by Office's reactivation of administrative complaint. Thompson v. U.S. Dept. of Labor, C.A.3 (Pa.) 1987, 813 F.2d 48.

15. Third-party beneficiary action

Terminated worker, who suffered from acrophobia, could not maintain third-party beneficiary action against government contractor on basis of affirmative action clauses in contract between government and contractor, which clauses were required by section of Rehabilitation Act of 1973 governing employment under federal contracts; Congress intended that administrative scheme be sole avenue of redress for the handicapped. D'Amato v. Wisconsin Gas Co., C.A.7 (Wis.) 1985, 760 F.2d 1474.

16. Jurisdiction

Provision of Rehabilitation Act providing for enforcement by Department of Labor set no substantive priorities or otherwise limited Department of Labor's discretion in choosing which claims to prosecute and instead committed decision of whether to prosecute handicapped discrimination claim solely to Department, and thus Department of Labor's decision whether to prosecute handicapped discrimination claim was not subject to judicial review. Andrews v. Consolidated Rail Corp., C.A.7 (Ind.) 1987, 831 F.2d 678.

Advertisements placed in newspaper by United States Air Force Reserve did not make newspaper a "government contractor" within meaning of Rehabilitation Act so as to provide Office of Federal Contract Compliance Programs with jurisdiction to prosecute claim of handicap employment discrimination by newspaper's former employee, where none of the advertisements included date on which employee was terminated, and no master contract or subcontract existed between government and newspaper. Burnett v. Brock, C.A.11 (Ga.) 1986, 806 F.2d 265.

17. Employees within section

Rehabilitation Act, as originally enacted, did not apply to Library of Congress employees, and thus, Library of Congress employee asserting that discharge from Library of Congress violated Rehabilitation Act because employee was alcoholic failed to state claim. Judd v. Billington, 1988, 863 F.2d 103, 274 U.S.App.D.C. 197.

18. No remedy for statutory violation by DOL

No remedy existed for failure by Department of Labor (DOL) to meet its obligation to commence and complete prompt investigation of employee's claim that government contractor violated Rehabilitation Act, where investigation was ultimately performed and DOL, within its discretion, decided that no violation had occurred and that no enforcement action was appropriate. Giacobbi v. Biermann, D.D.C.1992, 780 F.Supp. 33.

§ 794. Nondiscrimination under federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

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

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

(B) a local educational agency (as defined in section 2891(12) of Title 20) system of vocational education, or other school system;

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

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

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

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

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

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers; exception

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

(d) Standards used in determining violation of section

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

(As amended Pub.L. 99–506, Title I, § 103(d)(2)(B), Title X, § 1002(e)(4), Oct. 21, 1986, 100 Stat. 1810, 1844; Pub.L. 100–259, § 4, Mar. 22, 1988, 102 Stat. 29; Pub.L. 100–630, Title II, § 206(d), Nov. 7, 1988, 102 Stat. 3312; Pub.L. 102–569, Title I, § 102(p)(32), Title V, § 506, Oct. 29, 1992, 106 Stat. 4360, 4428.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Americans with Disabilities Act of 1990, referred to in subsec. (d), is Pub.L. 101–336, July 26, 1990, 104 Stat. 327, which is classified principally to chapter 126 (section 12101 et seq.) of Title 42, The Public Health and Welfare. Title I of this Act is classified generally to subchapter I (section 12111 et seq) of chapter 126 of Title 42. Sections 501 through 504, and 510, of this Act are classified to sections 12201 through 12204, and 12210, of Title 42. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of Title 42 and Tables.

1988 Amendments

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

Subsec. (a). Pub.L. 100–259, § 4(1), designated existing provision as subsec. (a).

Subsecs. (b), (c). Pub.L. 100–259, § 4(2), added subsecs. (b) and (c).

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

1986 Amendment

Pub.L. 99–506, § 103(d)(2)(B), substituted "individual with handicaps" for "handicapped individual" wherever appearing.

Pub.L. 99–506, § 1002(e)(4), substituted "section 706(8) of this title" for "section 706(7) of this title".

Effective Date of 1992 Amendment

Amendment by Title I of Pub.L. 102–569 effective Oct. 29, 1992, see section 138(a) of Pub.L. 102–569, set out as a note under section 701 of this title.

Effective Date of 1986 Amendment

Amendment to this section by Pub.L. 99–506 to take effect Oct. 21, 1986, unless otherwise provided, see section 1006 of Pub.L. 99–506, set out as a note under section 701 of this title.

Exclusion From Coverage

Amendment of this section and enactment of section 706(8)(C) of this title by Pub.L. 100–259 not to be construed to extend the application of the Rehabilitation Act of 1973 [this chapter] to ultimate beneficiaries of Federal financial assistance excluded from coverage before Mar. 22, 1988, see section 7 of Pub.L. 100–259, set out as a note under section 1687 of Title 20, Education.

Abortion Neutrality

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

Legislative History

For legislative history and purpose of Pub.L. 99–506, see 1986 U.S. Code Cong. and Adm. News, p. 3471. See, also, Pub.L. 100–259, 1988 U.S. Code Cong. and Adm. News, p. 3; Pub.L. 102–569, 1992 U.S. Code Cong. and Adm. News, p. 3712.

CROSS REFERENCES

Family violence prevention and services program, handicap nondiscrimination provisions relating to, see section 10406(a) of Title 42, The Public Health and Welfare.

States not immune under Eleventh Amendment for violation of this section, see section 2000d–7 of Title 42, The Public Health and Welfare.

WEST'S FEDERAL PRACTICE MANUAL

Discrimination against handicapped and veterans, see § 15711 et seq.

CODE OF FEDERAL REGULATIONS

Application to agencies—

Federal Maritime Commission, see 46 CFR 507.101 et seq.

Interstate Commerce Commission, see 49 CFR 1014.101 et seq.

Mine Safety and Health Review Commission, see 29 CFR 2706.101 et seq.

National Credit Union Administration, see 12 CFR 794.101 et seq.

Pension Benefit Guaranty Corporation, see 29 CFR 2608.101 et seq.

LAW REVIEW COMMENTARIES

Admission of AIDS patients to long-term care facility: Protections under federal and Washington State law. Robert J. Roche, 24 Gonzaga L.Rev. 85 (1988/1989).

AIDS and employment discrimination: Should AIDS be considered a handicap? 33 Wayne L.Rev. 1095 (1987).

AIDS and employment law revisited. Arthur S. Leonard, 14 Hofstra L.Rev. 11 (1985).

AIDS and the health care provider: Burgeoning legal issues. Salwa G. Spong, 67 Mich.B.J. 610 (1988).

AIDS, astrology, and *Arline*: Towards a casual interpretation of section 504. Gary Lawson, 17 Hofstra L.Rev. 237 (1989).

AIDS, employment and unemployment. Arthur S. Leonard, 49 Ohio St.L.J. 929 (1989).

AIDS in the classroom. Frederick A.O. Schwarz, Jr. and Frederick P. Schaffer, 14 Hofstra L.Rev. 163 (1985).

AIDS: Does it qualify as a "handicap" under the Rehabilitation Act of 1973? 61 Notre Dame L.Rev. 572 (1986).

AIDS: Handicap or not? 17 Col.Law. 1 (1988).

AIDS project: Creating a public health policy—rights and obligations of health care workers. Comment, 48 Md.L.Rev. 106 (1989).

Americans with Disabilities Act: An overview. Bonnie P. Tucker, U.Ill.L.Rev. 923 (1989).

An employer's duty to accommodate religion, handicap, and, to some degree, pregnancy. Mary Greenwood, 61 Fla.B.J. 105 (June 1987).

Application of handicap discrimination laws to AIDS patients. 22 U.S.F.L.Rev. 317 (1988).

Application of Section 504 of the Rehabilitation Act to the segregation of HIV–Positive inmates. Ayesha Khan, 65 Wash.L.Rev. 839 (1990).

Asymptomatic infection with the AIDS virus as a handicap under the Rehabilitation Act of 1973. Note, 88 Columbia L.Rev. 563 (1988).

At work while "under the influence": The employer's response to a hazardous condition. 70 Marquette L.Rev. 88 (1986).

Attorney fees for representing persons with disabilities. Stewart R. Hakola, 66 Mich.B.J. 36 (1987).

Attorneys' fees for administrative proceedings under the Education of the Handicapped Act: Of *Carey*, *Crest Street* and congressional intent. Myron Schreck, 60 Temple L.Q. 599 (1987).

Baby Doe's new guardians: Federal policy brings nontreatment decisions out of hiding. 75 Ky.L.J. 659 (1986–87).

Beyond *Tarasoff*: AIDS and the obligation to breach confidentiality. Kenneth E. Labowitz, 9 St. Louis U.Pub.L.Rev. 495 (1990).

Burdens of proving handicap discrimination using federal employment discrimination law: Rational basis or undue burden? Kenneth Allen Greene, Det.C.L.Rev. 1053 (1989).

TITLE 5 -- ADMINISTRATIVE PERSONNEL;
REVISED AS OF JANUARY 1, 1992

CHAPTER XVI -- OFFICE OF GOVERNMENT ETHICS
SUBCHAPTER B -- GOVERNMENT ETHICS

PART 2641 -- POST-EMPLOYMENT CONFLICT OF INTEREST RESTRICTIONS
SUBPART A -- GENERAL PROVISIONS

@ 2641.101 Definitions.

5 CFR 2641.101

The following terms are defined for purposes of this part:

Agency includes any department, independent establishment, commission, administration, authority, board, or bureau of the United States, and includes a Government corporation. 18 U.S.C. 202(e)(1); 5 U.S.C. 105.

Department means one of the executive departments enumerated in 5 U.S.C. 101.

Designated agency ethics official means an officer or employee who is designated by the head of an agency to coordinate and manage an agency's ethics program in accordance with @ 2638.203 of this subchapter. 5 CFR 2638.202.

Employee means any officer or employee of the executive branch as that term is defined in this section. Unless otherwise indicated, the term does not include the President or the Vice President. 18 U.S.C. 202(c). It does not include an individual performing services for the United States as an independent contractor under a personal services contract or an enlisted member of the armed forces as defined in 5 U.S.C. 2101(2). 18 U.S.C. 202(a). Unless otherwise indicated, the term encompasses senior employees, very senior employees, and special Government employees as defined in this section.

Executive branch includes each executive agency as defined in 5 U.S.C. 105, other than the General Accounting Office, and also includes any other entity or administrative unit in the executive branch. 18 U.S.C. 202(e)(1).

Former employee, former senior employee, or former very senior employee means one who was, and is no longer, an employee, senior employee, or very senior employee.

Senior employee means an employee, other than a very senior employee, who is:

(1) Employed in a position for which the rate of pay is specified in or fixed

according to 5 U.S.C. 5311-5318 (the Executive Schedule);

(2) Employed in a position for which the basic rate of pay, exclusive of any locality-based pay adjustment under 5 U.S.C. 5302 (or any comparable adjustment pursuant to interim authority of the President) is equal to or greater than the rate of basic pay payable for Level V of the Executive Schedule (including any such position in the Senior Executive Service or other SES-type systems, e.g., the Senior Foreign Service);

(3) Appointed by the President to a position under 3 U.S.C. 105(a)(2)(B);

(4) Appointed by the Vice President to a position under 3 U.S.C. 106(a)(1)(B);

(5) Employed in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade (as specified in 37 U.S.C. 201) is pay grade O-7 or above; or

(6) Detailed to any such position.

Special Government employee includes an officer or employee of an agency who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed 130 days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis. See 18 U.S.C. 202(a).

Very senior employee means an employee who is:

(1) Serving in the position of Vice President of the United States;

(2) Employed in a position at a rate of pay payable for Level I of the Executive Schedule;

(3) Employed in a position in the Executive Office of the President at a rate of pay payable for Level II of the Executive Schedule;

(4) Appointed by the President to a position under 3 U.S.C. 105(a)(2)(A);

(5) Appointed by the Vice President to a position under 3 U.S.C. 106(a)(1)(A); or

(6) Detailed to any such position.

SOURCE: 56 FR 3963, Feb. 1, 1991.
AUTHORITY: 5 U.S.C. appendixes; 18 U.S.C. 207; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547.

REGULATORY INFORMATION SERVICE CENTER
DEPARTMENT OF JUSTICE
Civil Rights Division

Coordination of Enforcement of Nondiscrimination in Federally Assisted Programs (28 CFR 42.401 et seq.)

45 FR 77904

November 24, 1980

CALENDAR OF FEDERAL REGULATIONS
CHAPTER 5 -- HUMAN RESOURCES

TEXT: Legal Authority

E.O. 12250 (45 FR 72995, November 4, 1980).

Reason for Including This Entry

The Department of Justice (DOJ) includes this entry because if concerns a matter of great public interest.

Statement of Problem

The changes DOJ proposes are the result of responsibilities placed on the Attorney General by the President when he issued Executive Order 12250 on November 2, 1980. That Order charged the Attorney General with responsibility for coordinating the implementation and enforcement of Title VI of the 1964 Civil Rights Act, 42 U.S.C. @ 2000d et seq.; @ 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. @ 794; and all other provisions of Federal statutory law which prohibit discrimination on the basis of race, color, national origin, handicap, religion, or sex in federally assisted programs.

Title VI prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving Federal financial assistance.

Title IX prohibits discrimination on the basis of sex in education programs receiving Federal financial assistance.

Section 504 prohibits discrimination on the basis of handicap in federally assisted and federally conducted programs.

Each Federal agency empowered to extend such assistance is primarily responsible for enforcing Title VI, Title IX, @ 504, and other statutes prohibiting discrimination on the basis of race, color, national origin, religion, handicap, or sex as they relate to their activities.

Under Executive Order 12250, issued November 2, 1980, the Attorney General is charged with the responsibility for:

(1) developing standards and procedures for taking enforcement actions and for conducting investigations and compliance reviews;

(2) issuing 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; and

(3) establishing guidelines and standards for the development of consistent and effective recordkeeping and reporting requirements and for datasharing among agencies.

These specific responsibilities as they relate to the statutes covered by the Order are new and were not specifically set out in any previous Executive Order applicable to the Attorney General.

The proposed regulations implement the directives of the President as set forth in Executive Order 12250.

Alternatives Under Consideration

The principal alternative of taking no action would not be responsive to the Executive Order.

Summary of Benefits

Sectors Affected: The Federal Government; minorities; handicapped individuals; women; and the general public.

We expect that these proposed rules will result in a more efficient use of Federal executive agency civil rights personnel. The rules place time limits on how long investigation of alleged civil rights noncompliance may last and how long voluntary negotiations between an agency and recipient may continue before the agency determines whether voluntary compliance is possible or formal enforcement action is necessary. As a result civil rights investigations should be resolved more quickly. In addition, because they provide that civil rights compliance decisions are subject to the approval of agency civil rights offices, who staffs are trained in civil rights requirements, decisions should be more consistent and made more promptly.

As a result, recipients, minorities, women, handicapped individuals, and the public can expect that civil rights problems will be dealth with in a more predictable and efficient manner.

Summary of Costs

Sectors Affected: None.

This proposal allows for the more efficient use of existing staff and, therefore, no additional personnel costs are expected in the immediate time period after its adoption. Additional costs may be incurred by agencies as they use these procedures to enforce Title IX, @ 504, and other statutes covered by the Order,. However, it is impossible to say that, if any, additional costs may be incurred.

Related Regulations and Actions

Internal: These proposed rules will require the amendment of regulations entitled "DOJ Nondiscrimination in Federally Assisted Programs -- Implementation of Title VI of the Civil Rights Act of 1964," 29 CFR 42.101 et seq.

External: These proposed rules will require the amendment or issuance of regulations implementing Title VI, Title IX, @ 504, and other statutes which prohibit discrimination on the basis of race, color, national origin, handicap, religion, or sex by the following agencies: ACTION: Agency for International Development (AID); Department of Agriculture (DOA); Civil Aeronautics Board (CAB); Department of Defense (DOD); Department of Commerce (DOC); Department of Education (ED); Equal Employment Opportunity Commission (EEOC); Environmental Protection Agency (EPA); Federal Home Loan Bank Board (FHLBB); General Services Administration (GSA); Department of Health and Human Services (HHS); Department of Labor (DOL); Department of Housing and Urban Development (HUD); Department of the Interior (DIO); Department of the Treasury (Treasury); National Aeronautics and Space Administration (NASA); National Endowment for the Arts (NEA); Nuclear Regulatory Commission (NRC); National Science Foundation (NSF); Office of Personnel Management (OPM); Small Business Administration (SBA); Department of

State (DOS); Department of Transportation (DOT); Tennessee Valley Authority (TVA); Water Resources Council (WRC); and Veterans Administration (VA).

Active Government Collaboration

In 1979, we proposed the concepts set forth in the proposed rules, as they relate to ttitle VI, by letter or in meetings, or both, with ACTION, Agency for International Development, Department of Agriculture, Civil Aeronautics Board, Department of Defense, Department of Commerce, Department of Education, Department of Energy, Environmental Protection Agency, Federal Home Loan Bank Board, General Services Administration, Department of Health and Human Services, Department of Housing and Urban Development, Department of the Interior, Department of Labor, National Aeronautics and Space Administration, National Endowment for the Arts, Nuclear Regulatory Commission, National Science Foundation, Office of Personnel Management, Small Business Administration, Department of State, Department of Transportation, Tennessee Valley Authority, Water Resources Council, Veterans Administration, Equal Employment Opportunity Commission, International Communications Agency, National Endowment for the Humanities, Community Services Administration, and Office of Management and Budget.

Additional consultation with affected agencies will take place prior to final issuance of the proposed rules as required by Executive Order 12250.

Timetable

NPRM -- December 1980/January 1981.
Regulatory Analysis -- Not required.
Public Hearing -- None.
Public Comment Period -- Minimum of 90 days following publication of NPRM.
Final Rule -- May/June 1981.
Final Rule Effective -- Upon publication.

Available Documents

E.O. 12250, 45 FR 72995, November 4, 1980.
28 CFR 42.401-415.
42 U.S.C. @ 2000d et seq.
20 U.S.C. @ 1681 et seq.
29 U.S.C. @ 794.

"Agencies When Providing Federal Financial Assistance Should Ensure Compliance With Title VI," General Accounting Office (GAO), April 15, 1980. Available from GAO, publication number HRD-80-22.

Agency Contact

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Document Separator

TITLE 28 -- JUDICIAL ADMINISTRATION;
REVISED AS OF JULY 1, 1992

CHAPTER I -- DEPARTMENT OF JUSTICE

PART 39 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF JUSTICE

[NO SECTION IN ORIGINAL]

28 CFR PART 39 EDITORIAL NOTE

EDITORIAL NOTE: For the convenience of the user, the "Supplementary Information" portion of the document published at 49 FR 35724, Sept. 11, 1984, is set forth below:

SUPPLEMENTARY INFORMATION: On December 16, 1983, the Department of Justice published a Notice of Proposed Rulemaking (NPRM) for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap, as it applies to programs and activities conducted by the Department of Justice. 48 FR 55996. Shortly after the NPRM was published, the Department received a number of preliminary comments from handicapped individuals and from organizations representing handicapped individuals. The tone and nature of these comments indicated to the Department that some of the regulatory provisions of the NPRM were being misunderstood. As a result, the Department, on March 1, 1984, published a Supplementary Notice further explaining the NPRM and requesting comments on possible revisions to the original NPRM. 49 FR 7792.

By April 16, 1984, close of the comment period, the Department received 1,194 comments. Two hundred and six of these comments also addressed the supplemental notice. Over 90% of the comments that the Department received came from individuals (908), most frequently handicapped persons, and from organizations representing the interests of handicapped persons (180). The Department received comments from all fifty states, the District of Columbia, Puerto Rico, Canada, and Denmark. Most of the comments that the Department received were general in nature. The Department received 721 comments based on a form letter. This form letter, written before issuance of the Supplemental Notice, expressed dismay at the inclusion of the regulation's "undue financial and administrative burdens" language, asserted that the Department was imposing a lesser requirement on the Federal government than on recipients of Federal assistance, and requested that the regulation be withdrawn. This form letter did not contain any substantive or detailed analysis. In fact, only 55 of the 1,194 comments contained specific, detailed analysis of the Department's proposal.

The Department read and analyzed each comment. Each comment was then subdivided according to one or more of over 90 issue categories. Because comments often addressed, even in general terms, more than one issue, the 1,194 comments were translated into 4,256 issue-specific comments. The decisions that the Department made in response to these comments, however, were not made on the basis of the number of commenters addressing any one point but on a thorough consideration of the merits of the points of view expressed in the comments. Copies of the written comments will remain available for public inspection in Room 854 of the HOLC Building, 320 First Street, NW., Washington, DC from 9:00 a.m. to 5:30 p.m., Monday through Friday, except for legal holidays, until November 13, 1984.

Section 504 requires that regulations that apply to the programs and activities of Federal executive agencies shall be submitted to the appropriate authorizing committees of Congress and that such regulations may take effect no earlier than the thirtieth day after they have been so submitted. The Department has today submitted this regulation to the Senate Committee on Labor and Human Resources and its Subcommittee on the Handicapped and the House Committee on Education and Labor and its Subcommittee on Select Education pursuant to the

terms of section 504. The regulation will become effective on October 11, 1984.

This rule applies to all programs and activities conducted by the Department of Justice. Thus, this rule regulates the activities of over 30 separate subunits in the Department, including, for example, the Federal Bureau of Investigation, the Drug Enforcement Administration, the Immigration and Naturalization Service, the Bureau of Prisons, Federal Prison Industries, and the United States Attorneys.

Background

The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), as it applies to programs and activities conducted by the Department of Justice (DOJ). As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Sec. 119, Pub. L. 95-602, 92 Stat. 2982), section 504 of the Rehabilitation Act of 1973 states 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

The substantive nondiscrimination obligations of the agency, as set forth in this rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. See 28 CFR part 41 (section 504 coordination regulation for federally assisted programs). This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1984) id., 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); id. at 38,552 (remarks of Rep. Sarasin).

Nine hundred and two comments that the Department received agreed that the obligations of section 504 for federally conducted programs should be identical to those developed by the Federal agencies over the past seven years for federally assisted programs. These commenters, however, objected to any language differences between the Department's proposed rule for federally conducted programs and the Department's section 504 coordination regulation for federally assisted programs (28 CFR part 41). The commenters asserted that a number of language differences that the Department had proposed created less stringent standards for the Federal government than those applied to recipients of Federal assistance under section 504. They wrote that such a result could not be justified by Executive Order 12250, by the wording of the statute itself, nor by the legislative history of the 1978 amendments.

The commenters appear to have misunderstood the basis for inclusion of the new language in the DOJ regulation. The changes in this regulation are based on the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting Davis and section 504. See Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981) (APTA); see also Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F.2d 490 (1st Cir. 1983).

Some commenters questioned the use of Davis as justification for the inclusion of the new provisions in the federally conducted regulation. They noted that the Department had not included these changes when, subsequent to the Davis decision, it issued a regulation implementing section 504 in programs receiving Federal financial assistance from this Department. The Department's section 504 federally assisted regulation, however, was issued prior to the D.C. circuit's decision in APTA. In APTA, the Department had argued a position similar to that advocated by the commenters. Judge Abner Mikva's decision in APTA clearly rejected the Department's position in that case. Other circuit court decisions followed the APTA interpretation of Davis. Since these decisions, the Department has interpreted its section 504 regulation for federally assisted programs in a manner consistent with the language of this final rule. The Department believes that judicial interpretation of section 504 compels it to incorporate the new language in the federally conducted regulation.

Incorporation of these changes, therefore, makes this section 504 federally conducted regulation consistent with the Federal government's section 504 federally assisted regulations. Because many of these federally assisted regulations were issued prior to the judicial interpretations of Davis and its progeny, their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence the Department believes that there are no significant differences between this final rule for federally conducted programs and the Federal government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp. , p. 206). It is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared. This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601-612).

Section-by-Section Analysis and Response To Comments

Section 39.101 Purpose

Section 39.101 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

The Department received no comments on this section and it remains unchanged from the Department's proposed rule.

Section 39.102 Application

The regulation applies to all programs or activities conducted by the Department of Justice. Under this section, a federally conducted program or activity is, in simple terms, anything a Federal agency does. Aside from employment, there are two major categories of federally conducted programs or activities covered by this regulation: those involving general public contact as part of ongoing agency operations and those directly administered by the Department for program beneficiaries and participants. Activities in the first part include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the Department's facilities (cafeteria, library). Activities in the second category include programs that provide Federal services or benefits (immigration activities, operation of the Federal prison system). No comments were received on this section.

Section 39.103 Definitions

The Department received 469 comments on the definitions section. Most of the comment, however, concentrated on the definition of "qualified handicapped person."

"Agency" is defined as the Department of Justice.

"Assistant Attorney General." "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Auxiliary aids are addressed in @ 39.160(a)(1). Comments on the definition of "auxiliary aids" are discussed in connection with that section.

"Complete complaint." "Complete complaint" is defined to include all the information necessary to enable the agency to investigate the complaint. The definition is necessary, because the 180 day period for the agency's investigation (see @ 39.170(g)) begins when it receives a complete complaint.

"Facility." The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs, 28 CFR 41.3(f), except that the term "rolling stock or other conveyances" has been added and the phrase "or interest in such property" has been deleted.

Twenty commenters on the NPRM objected to the omission of the phrase "or interest in such property" from the definition of "facility." As explained in the Supplemental Notice, the term "facility," as used in this regulation, refers to structures, and does not include intangible property rights. The definition, therefore, has no effect on the scope of coverage of programs, including those conducted in facilities not included in the definition. The phrase has been omitted because the requirement that facilities be accessible would be a logical absurdity if applied to a lease, life estate, mortgage, or other intangible property interest. The regulation applies to all programs and activities conducted by the agency regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the agency. Sixty commenters supported the clarification of this issue in the Supplemental Notice.

"Handicapped person." The definition of "handicapped person" has been revised to make it identical to the definition appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). In its NPRM, the Department omitted the list of physical or mental impairments included in the definition of "handicapped persons." The Department received 19 negative comments on this omission, and, in the Supplemental Notice, requested comments on whether it should be re-inserted. On the basis of the comments received, we have included the list in the final rule.

"Qualified handicapped person" The definition of "qualified handicapped person" is a revised version of the definition appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

Subparagraph (1) of the definition states that a "qualified handicapped person" with regard to any program under which a person is required to perform services or to achieve a level of accomplishment is a handicapped person who can achieve the purpose of the program without modifications in the program that the agency can demonstrate would result in a fundamental alteration in its nature. This definition is based on the Supreme Court's Davis decision.

In Davis, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." 442 U.S. at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," id. at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." Id. at 410.

The Department incorporated the Court's language in the definition of "qualified handicapped person" in order to make clear that such a person must be able to participate in the program offered by the agency. The agency is required to make modifications in order to enable a handicapped applicant to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered; not whether the applicant could benefit or obtain results from some other program that the agency does not offer. Although the revised definition allows exclusion of some handicapped people from some programs, it requires that a handicapped person who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

Two hundred and forty-four commenters objected to this revised definition for a variety of reasons. Several commenters stated that the Department incorrectly used Davis as the justification for explaining the differences between the federally assisted and the federally conducted regulations because the Supreme Court upheld the validity of the existing regulations in Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984). This view misunderstands the Court's actions in Darrone. In that case the Court ruled on a series of issues, the most important of which was under what circumstances section 504 applied to employment discrimination by recipients. The Court did not concern itself either directly or indirectly with the definition of "qualified handicapped person" or whether section 504 included limitations based on "undue financial and administrative burdens."

Many commenters stated that the proposal would change the definition of qualified handicapped person for employment. "Qualified handicapped person" is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by @ 39.140. Nothing in this part changes existing regulations applicable to employment.

Many commenters assumed that the definition would have the effect of placing on the handicapped person the burden of proving that he or she is qualified. The definition has been revised to make it clear that the agency has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alteration, the agency must follow the procedures established in @@ 39.150(a)(2) and 39.160(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the agency head or his or her designee in writing after consideration of all resources available for the program or activity and must be accompanie by an explanation of the reasons for the decision. If the agency head determines that an action would result in a fundamental alteration, the agency must consider options that would enable the handicapped person to achieve the purpose of the program but would not result in such an alteration.

Some commenters said that the definition of "qualified handicapped person" places handicapped persons in a "Catch-22" situation: because only qualified

handicapped persons are protected by the statute, a determination that a person is not qualified would make enforcement remedies unavailable to that person. This concern is misplaced. If the Department determined that a handicapped person was not "qualified," the person could use the procedures established by @
39.170 to challenge that determination, just as he or she could challenge any other decision by the agency that he or she believed to be discriminatory.

Many commenters argued that the definition of "qualified handicapped person" confused what should be two separate inquiries: whether a person meets essential eligibility requirements and, if so, whether accommodation is required. They argued that the reference to "fundamental alteration" in the definition focuses attention on accommodations rather than on a handicapped person's abilities. As another commenter noted, however, the Supreme Court in Davis developed the "fundamental alteration" language in a decision that was determining the nature and scope of what constitutes a qualified handicapped person. The Department continues to believe that the concept of "qualified handicapped person" properly encompasses both the notion of "essential eligibility requirements" and the notion of program modifications that might fundamentally alter a program.

Some commenters argued that our analysis of Davis was inappropriate because Davis was decided on the basis of individual facts unique to that case or because Davis involved federally assisted and not federally conducted programs. While cases are decided on the basis of specific factual situations, courts, especially the Supreme Court, develop general principles of law for use in analyzing facts. The Davis decision was the Supreme Court's first comprehensive view of section 504, a major new civil rights statute. The Davis holding, that a person who cannot achieve the purpose of a program without fundamental changes in its nature is not a "qualified handicapped person," is a general principle, a statement by the Court on how it views section 504. It is therefore necessary to reflect it in the Department's regulation.

Subparagraph (2) of the definition adopts the existing definition in the coordination regulation of "qualified handicapped person" with respect to services for programs receiving Federal financial assistance (28 CFR 41.32(b)). Under this part of the definition, a qualified handicapped person is a handicapped person who meets the essential eligibility requirements for participation in the program or activity.

"Section 504." This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the agency and not to programs or activities to which it provides Federal financial assistance.

Section 39.110 Self-evaluation

This section requires that the agency conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with handicapped persons that promotes both effective and efficient implementation of section 504.

In response to preliminary comments that the proposed rule had no specific criteria for conducting a self-evaluation, we requested comment on a proposed alternative in our Supplemental Notice (49 FR 7792). We received 64 comments, 57 of which were positive. The comments generally favored adoption of the alternative section, instead of the proposed section. We agree.

With respect to the applicability of the Federal Advisory Committee Act (5 U.S.C. App. 1 et seq.) (FACA), several comments were received. They argued that the FACA is not intended to apply to meetings with a self-evaluation group comprised of private individuals because they are rather unstructured, ad hoc meetings.

Authority for interpreting FACA was delegated to the General Services Administration (GSA) by Executive Order 12024 in 1977. Regulations issued by GSA place specific limitations on the scope of the Act by delineating examples of meetings or groups not covered. 41 CFR part 101-6. GSA identified a major issue in the promulgation of the regulations to be the extent of applicability of the Act.

Some commenters believe, as a matter of general policy, that advisory groups which have a continuing existence, which meet to deal with specific issues, and whose meetings do not constitute an established pattern of conduct should not be covered under the Act. * * * This rule reflects our judgement that the exclusion of certain non-recurring meetings from the Act's coverage is fully consistent with the statute, its legislative history, and judicial interpretation. * * * The interim rule provides guidance for those meetings between Federal officials and non-Federal individuals which do not fall within the scope of the Act, and for which a charter and consultation with GSA is not required.

48 FR 19324 (Preamble to interim rules).

The regulations define "advisory committee" in pertinent part as:

Any committee, board, commission, council, conference, panel, task force or other similar group * * * established by * * * or utilized by * * * any agency official for the purpose of obtaining advice or recommendations on issues or policy which are within the scope of his or her responsibilities.

41 CFR 101-6. 1003 (emphasis added).

In turn, "utilized" is defined in pertinent part as a

group * * * which * * * agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.

41 CFR 101-6.1003 (emphasis added).

The GSA regulation further provides that the Act does not apply to

(g) Any meeting initiated by the President or one or more Federal official [sic] for the purpose of obtaining advice or recommendations from one individual;

(h) Except with respect to established advisory committees:

(1) Any meeting with a group initiated by the President or one or more Federal official(s) for the purpose of exchanging facts or information; or

(2) Any meeting initiated by a group with the President or one or more Federal official(s) for the purpose of expressing the group's view, provided that the President or Federal official(s) does not use the group as a preferred source of advice or recommendation;

* * * * * *

(j) Any meeting initiated by a Federal official(s) with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations.

41 CFR 101-6.1004 (g), (h), and (j).

This final rule provides that the agency shall provide an opportunity for interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process and development of transition plans by submitting comments (both oral and written).

Section 39.111 Notice

The Department received negative comments on its omission of a paragraph routinely used in section 504 regulations for federally assisted programs requiring recipients to inform interested persons of their rights under section 504. In the Department's Supplemental Notice, we requested comments on inclusion of specific regulatory language. Fifty-four positive comments were received. As a result, the Department has incorporated that new provision on notice into the final rule. It appears as @ 39.111.

Section 39.111 requires the agency to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504 of this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

Section 39.111 is, in fact, a broader and more detailed version of the proposed rule's requirement (at @ 39.160(d)) that the agency provide handicapped persons with information concerning their rights. Because @ 39.111 encompasses the requirements of proposed @ 39.160(d), that latter paragraph has been deleted as duplicative.

Section 39.130 General prohibitions against discrimination

Section 39.130 is an adaptation of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51). This regulatory provision attracted relatively few public comments and has not been changed from the proposed rule.

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in @ 39.130 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. If the agency violates a provision in any of the subsequent sections, it will also violate one of the general prohibitions found in @ 39.130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of handicapped persons. The agency may not refuse to provide a handicapped person with an equal opportunity to participate in or benefit from its program simply because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (e.g., epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligiblity requirements for participation in the activity in question. It would be permissible,

therefore, to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce; but it may not be permissible to disqualify automatically all those who are blind in just one eye.

In addition, section 504 prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Subparagraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to a handicapped person be as effective as that afforded to others. The later sections on program accessibility (@@ 39.149-39.151) and communications (@ 39.160) are specific applications of this principle.

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons, subparagraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids, benefits, or services when necessary to provide handicapped persons with an equal opportunity to participate in or benefit from the agency's programs or activities. Subparagraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, subparagraph (b)(2) provides that a qualified handicapped person still has the right to choose to participate in the program that is not designed to accommodate handicapped persons.

Subparagraph (b)(1)(v) prohibits the agency from denying a qualified handicapped person the opportunity to participate as a member of a planning or advisory board.

Subparagraph (b)(1)(vi) prohibits the agency from limiting a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Subparagraph (b)(3) prohibits the agency from utilizing criteria or methods of administration that deny handicapped persons access to the agency's programs or activities. The phrase "criteria or methods of administration" refers to official written agency policies and to the actual practices of the agency. This subparagraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny handicapped persons an effective opportunity to participate.

Subparagraph (b)(4) specifically applies the prohibition enunciated in @ 39.130(b)(3) to the process of selecting sites for construction of new facilities or existing facilities to be used by the agency. Subparagraph (b)(4) does not apply to construction of additional buildings at an existing site.

Subparagraph (b)(5) prohibits the agency, in the selection of procurement contractors, from using criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

Subparagraph (b)(6) prohibits the agency from discriminating against qualified handicapped persons on the basis of handicap in the granting of licenses or certification. A person is a "qualified handicapped person" with respect to licensing or certification, if he or she can meet the essential eligibility requirements for receiving the license or certification (see @ 39.103).

In addition, the agency may not establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap. For example, the agency must comply with this requirement when establishing safety standards for the

operations of licensees. In that case the agency must ensure that standards that it promulgates do not discriminate in an impermissible manner against the employment of qualified handicapped persons.

Subparagraph (b)(6) does not extend section 504 directly to the programs or activities of licensees or certified entities themselves. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities nor are they programs or activities receiving Federal financial assistance merely by virtue of the Federal license or certificate. However, as noted above, section 504 may affect the content of the rules established by the agency for the operation of the program or activity of the licensee or certified entity, and thereby indirectly affect limited aspects of its operations.

Twenty-three commenters argued that the regulation should extend to the activities of licensees or certified entities, citing Community Television of Southern California v. Gottfried, 103 S. Ct. 885 (1983). In that case, the Court held that section 504 as applied to federally assisted programs did not require the Federal Communications Commission to prohibit discrimination on the basis of handicap by licensed broadcasters, but that "the policies underlying the Communications Act" might authorize the Commission to issue a regulation governing such discrimination. The Court did not, however, indicate that section 504 itself could serve as the source of such regulatory authority.

The Court has held that "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather the words take meaning from the purposes of the regulatory legislation." National Association for the Advancement of Colored People v. Federal Power Commission, 425 U.S. 662, 669 (1976). In our view, section 504 does not of itself extend an agency's regulatory authority to the activities of licensees or certified entities. Where an agency has existing regulatory authority that is broad enough to enable it to establish a nondiscrimination requirement for its licensees or certified entities, section 504 may support the exercise of that authority. Because the Department of Justice has no such underlying authority, it cannot prohibit discrimination by licensees.

Twenty-two commenters objected to the omission of a paragraph from the regulations for federally assisted programs that prohibits a recipient from providing significant assistance to an organization that discriminates. To the extent that assistance from the agency would provide significant support to an organization, it would constitute Federal financial assistance and the organization, as a recipient of such assistance, would be covered by the agency's section 504 regulation for federally assisted programs. The regulatory "significant assistance" provision, however, would be inappropriate in a regulation applying only to federally conducted programs or activities.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only handicapped persons or a given class of handicapped persons may be limited to those handicapped persons.

Paragraph (d), discussed above, provides that the agency must administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

Section 39.140 Employment

Section 39.140 prohibits discrimination on the basis of handicap in employment by the agency. Comments on proposed @ 39.140 identified two types of problems. First, several commenters felt that the rule's treatment of employment was not sufficiently comprehensive. They pointed out that the rule does not enumerate the employment practices covered (e.g., hiring, promotion, assignment); it does not say what must be done to avoid or correct possible discrimination (e.g., reasonable accommodation, review of preemployment tests, limitations on preemployment inquiries and the use of medical examinations); nor

does it define a "qualified handicapped person" with respect to employment.

Second, one commenter objected to the rule's adoption of "the definitions, requirements and procedures of section 501 of the Rehabilitation Act" as established in rules of the Equal Employment Opportunity Commission (EEOC) at 29 CFR part 1613. This commenter argued that EEOC's rules on physical examinations were too restrictive and claimed that the proposed rule did not limit employment coverage to the program conducted by the Federal government in a manner similar to the "program or activity" limitation on coverage of programs receiving Federal financial assistance. Finally, the commenter asserted that reliance on section 501 was misplaced because that section of the Rehabilitation Act requires affirmative action whereas section 504, which the rule implements, contains only a nondiscrimination requirement.

The original notice of proposed rulemaking explained that the regulation is in accord with Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981), which held that Congress intended section 504 to cover the employment practices of Executive agencies. In Prewitt, the court also held that, in order to give effect to sections 501 and 504, both of which cover Federal employment, the administrative procedures of section 501 must be followed. Accordingly, the proposed rule adopted the definitions, requirements and procedures of section 501 as established in EEOC's rules.

The final rule has not been changed. The Department intends to avoid duplicative, competing or conflicting standards under the Rehabilitation Act with respect to Federal employment. While the rule could define terms with respect to employment and enumerate what practices are covered and what requirements apply, reference to the Government-wide rules of the Equal Employment Opportunity Commission is sufficient and avoids duplication. The class of Federal employees and applicants for employment covered by section 504 is identical to or subsumed within that covered by section 501. To apply different or lesser standards to persons alleging violations of section 504 could lead unnecessarily to confusion in the enforcement of the Rehabilitation Act with respect to Federal employment.

Section 39.149 Program accessibility: Discrimination prohibited

The proposed regulation did not contain a general statement of the program accessibility requirement similar to that appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.56). The decision not to include this language in the proposed regulation created the misperception that a change in substance was intended. In order to remedy this misunderstanding, the Supplemental Notice requested comments on explicitly including it. Sixty-two commenters favored inclusion of the specific regulatory language that was published in the Supplemental Notice. Consequently, the final rule has been revised to include the language of the Supplemental Notice. The language appears at @ 39.149.

Section 39.150 Program accessibility: Existing facilities

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.57), with certain modifications. Thus, @ 39.150 requires that the agency's program or activity, when viewed in its entirety, be readily accessible to and usable by handicapped persons. The regulation also makes clear that the agency is not required to make each of its existing facilities accessible (@ 39.150(a)(1)). However, @ 39.150, unlike 28 CFR 41.56-41.57, places explicit limits on the agency's obligation to ensure program accessibility (@ 39.150(a)(2)). This provision provoked 959 comments, the largest number received on any single issue. Most commenters sought the deletion of the "undue financial and administrative burdens" language from the regulation. On the basis of preliminary comments on this paragraph, the Department published clarifying language in its Supplemental Notice. The final version includes that clarification.

The "undue financial and administrative burdens" language (found at @@ 39.150(a)(2) and 39.160(d)) is based on the Supreme Court's Davis holding that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since Davis, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. See, e.g., Dopico v. Goldschmidt, supra; American Public Transit Association v. Lewis, supra (APTA). In APTA the United States Court of Appeals for the District of Columbia Circuit applied the Davis language and invalidated the section 504 regulations of the Department of Transportation (DOT). The court in APTA noted "that at some point a transit system's refusal to take modest, affirmative steps to accommodate handicapped persons might well violate section 504. But DOT's rules do not mandate only modest expenditures. The regulations require extensive modifications of existing systems and impose extremely heavy financial burdens on local transit authorities." 655 F.2d at 1278.

The inclusion of subparagraph (a)(2) is an effort to conform the agency's regulation implementing section 504 to the Supreme Court's interpretation of the statute in Davis as well as to the decisions of lower courts following the Davis opinion. This subparagraph acknowledges, in light of recent case law, that, in some situations, certain accommodations for a handicapped person may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. The failure to include such a provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

Many commenters argued that the Supreme Court's decision in Davis did not require inclusion of an undue burdens defense in this regulation. These commenters asserted that the holding in Davis was that the plaintiff was not a qualified handicapped person and that the subsequent reference to "undue financial and administrative burdens" was mere dicta. These commenters overlook the interpretations of Davis provided by the Federal circuit court cases mentioned above. The APTA and Dopico decisions make it clear that financial burdens can limit the obligation to comply with section 504. See also New Mexico Association for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982).

Many commenters argued that inclusion of the undue burdens defense was inconsistent with the position taken by Vice President Bush in his letter of March 21, 1983, in which he announced the Administration's decision not to revise the coordination regulation for federally assisted programs. The decision to include the undue burdens defense represents no contradiction with the position taken by Vice President Bush on the guidelines for federally assisted programs. In his letter the Vice President stated that "extensive change of the existing 504 coordination regulations was not required, and that with respect to those few areas where clarification might be desirable, the courts are currently providing useful guidance and can be expected to continue to do so in the future." One element of that "useful guidance" obviously comes from interpretations of the Davis decision by the lower Federal courts.

The Department has carefully considered the comments on the process that the Department should follow in determining whether a program modification would result in undue financial and administrative burdens. The Department intends to be guided by six principles in its application of the "fundamental alteration" and "undue financial and administrative burdens" language.

First, because of the extensive resources and capabilities that could properly be drawn upon for section 504 purposes by a large Federal agency like the Department of Justice, the Department explicitly acknowledges that, in most cases, making a Department program accessible will likely not result in undue burdens. Second, the burden of proving that the accommodation request will result in a fundamental alteration or undue burdens has been placed squarely on

the Department of Justice, not on the handicapped person. Third, in determining whether financial and administrative burdens are undue, the Department is to consider all Department resources available for use in the funding and operation of the conducted program. Fourth, the "fundamental alteration"/"undue burdens" decision is to be made by the Attorney General or his designee and must be accompanied by a written statement of reasons for reaching such a conclusion. Fifth, if a disabled person disagrees with the Attorney General's finding, he or she can file a complaint under the complaint procedures established by the final regulation. A significant feature of this complaint adjudication procedure is the availability of a hearing before an independent administrative law judge under the due process protections of the Administrative Procedure Act. Sixth and finally, even if there is a determination that making a program accessible will fundamentally alter the nature of the program, or will result in undue financial and administrative burdens, the Department must still take action, short of that outer limit, that will open participation in the Department's program to disabled persons to the fullest extent possible.

One hundred and eighty-one commenters on the Supplemental Notice objected to the provision that the "undue burdens" decision would be based on consideration of "all agency resources available for use in the funding and operation of the conducted program," arguing that it should be based on the resources of the agency as a whole. Some argued that this formulation was required because all agency resources come from taxpayer monies and should not be used to support discrimination.

The Department's entire budget is an inappropriate touchstone for making determinations as to undue financial and administrative burdens. Many parts of the Department's budget are earmarked for specific purposes and are simply not available for use in making the Department's programs accessible to disabled persons. For example, funds for the operation of the Bureau of Prisons are unavailable for defraying the cost of a sign language interpreter at a deportation hearing conducted by the Immigration and Naturalization Service. There are extensive resources available to the Department and it is expected that the Department will, only on very rare occasions, be faced with "undue burdens" in meeting the program accessibility or communications sections of the regulation.

One commenter said that the term "undue hardship" used in regulations for federally assisted programs is more specific and less discriminatory than the term "undue burdens." The term "undue hardship" is a term of art used in connection with employment. The term "undue burdens" is taken from the Supreme Court's opinion in Davis and is appropriately included in this regulation.

Some commenters argued that section 504 creates an absolute right to access, and that cost cannot limit this right, although it may be a factor in determining timeframes for compliance. Section 504 does not create an absolute right to access. The Supreme Court stated in Davis that recipients need not undertake modifications to their programs to meet the requirements of section 504 that would result in "undue financial and administrative burdens." This understanding of section 504 and its implementing regulations for federally assisted programs is shared by the lower Federal courts, which have routinely applied the "undue burdens" limitation to accessibility issues. Congress suggested no different interpretation of section 504 when applying it to federally conducted programs. Spreading the cost of compliance over a period of time is, however, one way of avoiding undue financial and administrative burdens, and the Department will consider that as an option whenever it considers asserting that defense.

Paragraph (b) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of handicapped persons. Structural changes in existing facilities are required

only when there is no other feasible way to make the agency's program accessible. The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the agency must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section 39.151 Program accessibility: New construction and alterations

Overlapping coverage exists with respect to new construction under section 504, section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C 792), and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). Section 39.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by handicapped persons in accordance with 41 CFR 101-19.600 to 101-19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). It is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required to meet the new construction standard. They are subject, however, to the requirements of @ 39.150.

A commenter has recommended that the regulation should require that buildings leased after the effective date of the regulation should meet the new construction standards of @ 39.151, rather than the program accessibility standard for existing facilities in @ 39.150. Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the Department believes the same program accessibility standard should apply to both owned and leased existing buildings.

Section 39.160 Communications

Section 39.160 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps include procedures for determining when auxiliary aids are necessary under @ 39.160(a)(1) to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They also include an opportunity for handicapped persons to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the agency (@ 39.160(a)(1)(i)). The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under @ 39.160(d). That paragraph limits the obligation of the agency to ensure effective communication in accordance with Davis and the circuit court opinions interpreting it (see supra preamble @ 39.150(a)(2)). Unless not required by @ 39.160(d), the agency shall provide auxiliary aids at no cost to the handicapped person.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (e.g., a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. In these cases, a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to inform the public of (1) the communications services it offers to afford handicapped persons an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preferences regarding auxiliary aids when several different modes are effective.

The agency shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the agency, e.g., INS deportation proceedings. Auxiliary aids in these proceedings must be afforded where they are necesssary to ensure effective communication at the proceedings. When sign language interpreters are necessary, the agency may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (@ 39.160(a)(1)(ii)). For example, the agency need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

Some commenters suggested that the Department's language in @ 39.160(a)(1)(ii) that states that the agency need not provide individually prescribed devices or readers for personal use or study be modified to state that such devices are not required for "nonprogram material." This suggestion has not been adopted because it is less clear than the existing formulation, which is intended to distinguish between communications that are necessary to obtain the benefits of the federal programs and those that are not and which parallels the requirements of the Federal government's section 504 regulations for federally assisted programs. For example, a federally operated library would have to ensure effective communication between its librarian and a patron, but not between the patron and a friend who had accompanied him or her to the library.

Several comments suggested that the definition of auxiliary aids should include attendant services that may be needed to aid disabled persons to travel to meetings. Other comments recommended that in some cases attendant services may be an appropriate auxiliary aid to achieve program accessiblity.

The Department has not adopted the approach recommended by these comments.To the extent that the services of an attendant are not directly related to a federally conducted program or activity, it would be inappropriate to require them at Federal expense. For example, the services of a sign language interpreter make a workshop as available to any deaf participant as it is to other participants. The need for services of interpreters arises directly out of the presentation of information in a form that can be understood by hearing persons. However, the Department views the services of an attendant for a disabled person as generally personal in nature and not directly related to the federally conducted program.

A different conclusion, however, might be reached for Federal employees or other persons traveling for the agency. Where a disabled person who is unable to travel without an attendant is required to perform official travel, the travel expenses of an attendant, including per diem and transportation expenses, may be paid by the Department. See 5 U.S.C. 3102(d) (1982).

Paragraph (b) requires the agency to provide information to handicapped persons concerning accessible services, activities, and facilities. Paragraph (c) requires the agency to provide signage at inaccessible facilities that directs users to locations with information about accessible facilities.

Section 39.170 Compliance procedures

Section 39.170 establishes a detailed complaint processing and review procedure for resolving allegations of discrimination in violation of section 504 in the Department of Justice's programs and activities. The 1978 amendments to section 504 failed to provide a specific statutory remedy for violations of section 504 in federally conducted programs. The amendment's legislative history suggesting parallelism between section 504 for federally conducted and federally assisted programs is unhelpful in this area because the fund termination mechanism used in section 504 federally assisted regulations depends on the legal relationship between a Federal funding agency and the recipients to which the Federal funding is extended. The Department has decided that the most effective and appropriate manner in which to enforce section 504 in the federally conducted area is through an equitable complaint resolution process. Section 39.170 establishes this process.

The complaint process in the final rule is substantially the same as the one that the Department proposed. The Department received 57 comments on this section. These comments did not question the use of a complaint-responsive enforcement scheme as appropriate for section 504 for federally conducted programs. The Department continues to view its specific proposal as satisfactory.

Paragraph (a) specifies that paragraphs (c) through (l) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the agency will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

Paragraph (c) vests in the Responsible Official the responsibility for the overall management of the 504 compliance program. "Responsible Official" or "Official," as defined in @ 39.103, refers to the Director of Equal Employment Opportunity, who is designated as the official responsible for coordinating implementation of compliance procedures set forth in @ 39.170. The definition of "Official" includes other Department Officials to whom authority has been delegated by the Official. The Assistant Attorney General for Administration has been designated as the Director of Equal Employment Opportunity for the Department. See 28 CFR 42.2(a).

Although one person has responsibility both for administering the Equal Employment Opportunity Program for the Department and for coordinating implementation of the compliance procedures under this part, the procedures for carrying out these two responsibilities are different. The Official would follow the procedures for enforcing equal employment opportunity, as set forth in 29 CFR part 1613, only for complaints alleging employment discrimination (see @ 39.170(b)). Other complaints would be processed under the procedures in @ 39.170. Authority for processing complaints of employment discrimination has been delegated to Equal Employment Opportunity Officers in some Department components, and it is expected that authority for enforcing this part will be similarly delegated.

Subparagraphs (d) (1) and (3) provide that any person who believes that he or she has been discriminated against may file a complaint within 180 days from the date of the alleged discrimination. The Official may extend the time limit when the complainant shows good cause. Good cause could be found if, for example, (1) the complainant mistakenly filed with the wrong agency and was not informed of the mistake within the 180 days; or (2) the complainant could not reasonably be expected to know of the act or event said to be discriminatory.

Several commenters argued that the proposed rule unnecessarily restricted the right to file a complaint by not allowing an individual victim of discrimination to authorize a representative to file on his or her behalf. The final rule permits filing by the authorized representative of an individual victim, or, in the case of class discrimination, of a member of the class, as well as by an individual victim or class member. The final rule has been revised to make it clear that complaints alleging that a specific class of persons has been discriminated against may only be filed by a member of that specific class or by a representative authorized to file the complaint by a member of that class (@ 39.170(d)(1)).

The Federal Bureau of Prisons has established an Administrative Remedy Procedure for handling grievances of inmates of Federal penal institutions (28 CFR part 542). This procedure allows an inmate to file a formal written complaint with the Warden of the Institution or with the Regional Director. While these remedies are not a substitute for the right to an independent investigation by a civil rights office and appeal to the Complaint Adjudication Officer, the final rule requires inmates to exhaust these procedural remedies before filing a complaint with the Official. The time period for filing a complaint with the Official would be extended by the time spent exhausting these remedies. This requirement applies only to inmates and does not extend to visitors and employees.

The Department received several comments on how prisoners' complaints should be handled. Some of them suggested that both the discrimination procedure and the prison grievance procedures should be invoked simultaneously. The Department believes that this proposal would require the unnecessary duplication of efforts without materially enhancing results. The Bureau of Prisons reported that thousands of inmate complaints were filed in 1983 alone and that several court decisions have held that the inmate administrative remedy procedure must be exhausted before suit can be filed. Although the volume of complaints by prison inmates might be burdensome, it is not possible now to forecast the number that will be filed. The Department believes, however, that handicapped prisoners must be afforded the right to have their complaints investigated by an office that specializes in discrimination complaints, including section 504 complaints, as well as the right to appeal to the Complaint Adjudication Officer. It is expected that the requirement that inmates first exhaust prison administrative remedies will be effective in resolving most meritorious complaints. It may be necessary, of course, for the Department to provide additional resources to handle complaints filed under the new regulation.

Subparagraph (d)(2) requires that the name and identity of a complainant be held in confidence unless he or she waives that right in writing and except to the extent necessary for compliance purposes.

Complaints may be mailed or delivered to the Attorney General, the Responsible Official, or other agency officials. Complaints received by any agency official other than the Responsible Official must be forwarded immediately to the Responsible Official (subparagraph (d)(4)).

Paragraph (e) requires the agency to send to the Architectural and Transportation Barriers Compliance Board a copy of any complaint alleging that a building or facility subject to the Architectural Barriers Act or section 502 was designed, constructed, or altered in a manner that does not provide ready access to and use by handicapped persons.

The Official is required to accept all complete complaints over which the agency has jurisdiction (@ 39.170(f)(1)). If the Official determines that the agency does not have jurisdiction over a complaint, the Official shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal government (@ 39.170(f)(3)).

If a complaint is not complete when it is filed, the Official must notify the complainant within 30 days that additional information is needed. The complainant must furnish the necessary information within 30 days of receipt of the notice, or the complaint will be dismissed without prejudice. Filing an incomplete complaint within 180 days from the date of the alleged discrimination satisfies the requirement of subparagraph (d)(3), but the timeframes governing the Official's other obligations to process the complaint (see, e.g., @ 39.170(g)(1), @ 39.170(h)) do not begin to operate until the Official receives a complete complaint.

Within 180 days of receipt of the complete complaint, the Official is to investigate the complaint, attempt an informal resolution, and, if informal resolution is not achieved, issue a letter of findings (@ 39.170(h)). Within the time limit, the Official should make every effort to achieve informal resolution whenever possible.

In response to a suggestion from a commenter, the Department no longer refers to the letter of findings as "preliminary." The word "preliminary" has been deleted because, if there is no appeal, the determination made in the letter of findings will constitute the final agency decision.

Paragraph (h) requires that the Official's letter be sent to the complainant and respondent, and that it contain findings of fact and conclusions of law, the relief granted if discrimination is found, and notice of the right to appeal. The regulation provides that a party may appeal the Official's letter or findings to the Complaint Adjudication Officer (CAO). If neither party files an appeal from the letter of findings within 30 days after receipt of the letter, the letter will constitute the final decision of the agency (@ 39.170(i)(4)).

The Department's final rule provides an opportunity for a hearing before an administrative law judge (ALJ). The ALJ would make a recommended decision to the CAO, who would make the final agency decision. The purpose of the hearing is to provide a forum in which the complainant or respondent can have an opportunity to be heard, confront witnesses, and present evidence so that an administrative law judge can issue a recommended decision that is well-reasoned and justified on the basis of the evidence presented.

The opportunity for a hearing before an ALJ assures more impartiality and the appearance of more impartiality than a decision made by one agency official concerning other officials of the same agency. The Department expects that agency decisions based on a hearing record would more likely survive later judicial review.

Under the regulation, another person or organization would be allowed to participate as a third party or amicus curiae if the ALJ determines that the petitioner has a legitimate interest in the proceedings, that participation will not duly delay the outcome, and that petitioner's participation may contribute materially to the disposition of the proceedings.

The Department received comments on the proposed opportunity for a hearing before an administrative law judge. Some commenters were primarily concerned that by invoking a hearing before the ALJ with the procedural safeguards adopted from the Administrative Procedure Act (APA) (5 U.S.C. 554-557), the complainant would lose the right to a de novo review of the agency's final decision, because the APA allows a Federal court only to determine if the agency's final decisions are "arbitrary and capricious" (5 U.S.C. 706(2)(A)). It is beyond our jurisdiction to specify that a de novo review is available to complaints seeking judicial review of final agency decisions. This issue is for the courts to decide. That is also true for the issue of the availability of a private right of action, either without invoking our compliance procedures or after the issuance of letters of findings.

Given the inherent conflicts of interest in situations where complaints allege discrimination on the part of the Department, it is critically important to ensure that a complaint be reviewed in a fair, independent process. The availability of a hearing before an independent ALJ would provide the appearance as well as the actuality of an impartial compliance mechanism. The Department has therefore included the provision for a hearing in the final regulation.

One comment requested the addition of a provision whereby the Department would award attorneys fees to complainants. Another comment suggested that the Equal Access to Justice Act (5 U.S.C. 504) might provide for the award of fees. Nothing contained in title V of the Rehabilitation Act provides for the agency award of attorneys fees in administrative proceedings other than those involving Federal employment. Nor does the EAJA and the Department's implementing regulations at 28 CFR part 24 provide for such awards in hearings conducted under @ 39.170(k). We have therefore included no attorneys fee provision in the current regulations.

Under paragraph (1), the CAO renders a final agency decision after appeal without a hearing or after a hearing. The CAO directs appropriate remedial action if discrimination is found. The CAO's decision will involve reviewing the entire file, including the investigation report, letter of findings, and, if a hearing was held, the hearing record and recommended decision of the administrative law judge. The decision shall be made within 60 days of receipt of the complaint file or the hearing record.

One commenter objected to the requirement in subparagraph (1)(1) that the CAO explain specifically a decision to reject or modify the ALJ's proposed findings, arguing that it would inappropriately limit the CAO's consideration of the issues. We have adopted the suggestion and eliminated the requirement.

In response to recommendations from the Department's CAO and the Drug Enforcement Administration's ALJ, some changes have been made in the compliance procedures. Among the changes are a new requirement that the ALJ provide findings to all parties, not just the CAO, an added provision for filing exceptions to an ALJ's recommended decision, a delineation of the authorities of the ALJ, and a clarification of the responsibility for supervising compliance with the final agency decision between the Responsible Official and the CAO.

The Department also received some comments on the appropriateness of providing for an appeal by either the complainant or respondent. Some commenters objected to allowing a respondent to obtain an administrative appeal because it could delay remedying discrimination. On the other hand, an impartial adjudicatory mechanism would require that opportunity is provided for both sides to appeal. For this reason, the Department finds it necessary and appropriate for both complainant and respondent to have the right to an administrative appeal.

CROSS REFERENCES: Customs Service, Department of the Treasury: See Customs Duties, 19 CFR chapter I.
Internal Revenue Service, Department of the Treasury: See Internal Revenue, 26 CFR chapter I.
Employees' Benefits: See title 20.
Federal Trade Commission: See Commercial Practices, 16 CFR chapter I.

NOTE: Other regulations issued by the Department of Justice appear in title 4; title 8; title 21; title 45; title 48.

SUPPLEMENTAL PUBLICATIONS: The official opinions of the Attorneys General of the United States. (Op. A.G.) Irregular, 1789 --; Washington, v. 1 --, 1852 --.

SOURCE: Order No. 1065-84, 49 FR 35734, Sept. 11, 1984.
AUTHORITY: 29 U.S.C. 794

Document Separator

ACTION
AGENCY: ACTION.

45 CFR Part 1214
Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by ACTION

55 FR 47755

November 15, 1990

ACTION: Final rule.

SUMMARY: This regulation requires that ACTION operate all of its programs and activities so that qualified handicapped persons are not subjected to discrimination by ACTION. It sets forth standards for what constitutes discrimination on the basis of mental or physical handicap, provides a definition for handicapped person and qualified handicapped person, and establishes a detailed complaint mechanism for resolving allegations of discrimination against ACTION. This regulation implements section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in programs or activities conducted by Federal executive agencies.

EFFECTIVE DATE: January 14, 1991.

FOR FURTHER INFORMATION CONTACT: Nancy Voss, Director, Equal Opportunity Staff, ACTION at (202) 634-9312 (Voice) or (202) 634-9256 (TDD). These are not toll-free numbers. Copies of this regulation are available on tape for persons with visual impairments.

TEXT: SUPPLEMENTARY INFORMATION:

Background

The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) , as it applies to programs and activities conducted by ACTION. As amended by the Rehabilitation, Comprehensive Services, and Development Disabilities Amendments of 1978 (Sec. 199, Pub. L. 95-602, 92 Stat. 2982), section 504 of the Rehabilitation Act of 1973 states that:

No otherwise qualified individual with handicaps 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

On September 18, 1989, ACTION published a notice of proposed Rulemaking (NPRM) for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap, as it applies to programs and activities conducted by ACTION. 54 FR 38401. ACTION received one response with comments on the NPRM. After analysis of the comments received and the final section 504 regulation that the Department of Justice issued for its own programs and activities, ACTION decided to adopt this final rule.

The substantive nondiscrimination obligations of the agency, as set forth in this rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. (See 28 CFR part 41 (section 504 coordination regulation for federally assisted programs)). This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) id.; 124 Cong. Rec. 13897 (remarks of Rep. Brademas); id. at 38552 (remarks of Rep. Sarasin).

There are, however, some language differences between this rule and the Federal government's section 504 regulations for federally assisted programs. These changes are based on the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting Davis and section 504. See Dopico v. Goldschmidt, 687 F.2d 1272 (D.C. Cir. 1981) (APTA); see also Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F.2d 490 (1st Cir. 1983).

These language differences are also supported by the decision of the Supreme Court in Alexander v. Choate, 469 U.S. 287 (1985), where the Court held that the regulations for federally assisted programs did not require a recipient to modify its durational limitation on Medicaid coverage of inpatient hospital care for handicapped persons. Clarifying its Davis decision, the Court explained that section 504 requires only "reasonable" modifications, id. at 300, and explicitly noted that "[the regulations implementing 504 [for federally assisted programs] are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access.]" Id. at 301 n.21 (emphasis added).

Incorporation of these changes, therefore, makes this regulation implementing section 504 Federally conducted programs consistent with the Federal government's regulations implementing section 504 for federally assisted programs as they have been interpreted by the Supreme Court. Many of these federally assisted regulations were issued prior to the interpretations of section 504 by the Supreme Court in Davis, by lower courts interpreting Davis, and by the Supreme Court in Alexander; therefore their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence, the agency believes that there are no significant differences between this proposed rule for federally conducted programs and the Federal government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Department of Justice. It is an adaptation of a prototype prepared by the Department of Justice under Executive Order 12550 (45 FR 72995, 3 CFR, 1980 Comp., p. 298) and distributed to Executive agencies. This regulation has also been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206). It is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared. This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601-612).

Section-by-Section Analysis and Response To Comments

Section 1214.101 Purpose.

Section 1214.101 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the

Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

No comments were received on this section and it remains unchanged from the proposed rule.

Section 1214.102 Application.

The regulation applies to all programs or activities conducted by the agency. Under this section, a federally conducted program or activity is, in simple terms, anything a Federal agency does. Aside from employment, there are two major categories of federally conducted programs or activities covered by this regulation: Those involving general public contact as part of ongoing agency operations and those directly administered by the agency for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the agency's facilities. Activities in the second category include programs that provide Federal services or benefits. This regulation does not, however, apply to programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

No comments were received on this section.

Section 1214.103 Definitions.

Agency. For purposes of this regulation "agency" means ACTION.

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

Auxiliary aids. "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Although auxiliary aids are required explicitly only by @ 1214.160(a)(1), they may also be necessary to meet other requirements of the regulation. Auxiliary aids are addressed in @ 1214.160(a)(1). Comments on the definition of "auxiliary aids" are discussed in connection with that section.

Complete complaint. "Complete complaint" is defined to include all the information necessary to enable the agency to investigate the complaint. The definition of "complete complaint" enables the agency to determine the beginning of its obligation to investigate a complaint (see @ 1214.170(d)).

Facility. The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs, 28 CFR 41.3(f), except that the term "rolling stock or other conveyances" has been added and the phrase "or interest in such property" has been deleted because the term "facility" as used in this regulation refers to structures and not to intangible property rights. It should, however, be noted that the regulation applies to all programs and activities conducted by the agency regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the agency. The term "facility" is used on @@ 1214.149, 1214.150, and 1214.170(f). Comments on the definition of "facility" are discussed in connection with @ 1214.151.

Individual with handicaps. The definition of "individual with handicaps" is identical to the definition of " handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31).

Qualified individual with handicaps. The definition of "qualified individual with handicaps" is a revised version of the definition of "qualified handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

Paragraph (1) is an adaptation of existing definitions of "qualified handicapped person" for purposes of federally assisted preschool, elementary, and secondary education programs (see, e.g., 45 CFR 84.3(k)(2)). It provides that an individual with handicaps is qualified for preschool, elementary, or secondary education programs conducted by the agency, if he or she is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive these services from the agency. In other words, a handicapped person is qualified, if, considering all factors other than the handicapping condition, he or she is entitled to receive education services from the agency.

Paragraph (2) deviates from existing regulations for federally assisted programs because of intervening court decisions. It defines "qualified individual with handicaps" with regard to any program other than those covered by paragraph (1) under which a person is required to perform services or to achieve a level of accomplishment. In such programs a qualified individual with handicaps is one who can achieve the purpose of the program without modifications in the program that the agency can demonstrate would result in a fundamental alteration in its nature. This definition reflects the decision of the Supreme Court in Davis. In that case, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program was modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." Id. at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," id. at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." Id. at 410.

We have incorporated the Court's language in the definition of "qualified individual with handicaps" in order to make clear that such a person must be able to participate in the program offered by the agency. The agency is required to make modifications in order to enable an applicant with handicaps applicant to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered; not whether the applicant could benefit or obtain results from some other program that the agency does not offer. Although the revised definition allows exclusion of some individuals with handicaps from some programs, it requires that an individual with handicaps who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

The commenter suggested that the fundamental alteration portion of this definition should reference @@ 1214.150(a) and 1214.160(d) which specifies the steps taken before a final determination is made as to whether the agency met the necessary burden of proof. The agency does not believe such a reference is appropriate in a definitional section.

The commenter argued that the agency's virtually exclusive reliance on Davis above: (1) Creates a rule which is inconsistent with the federally assisted regulation guideline; (2) allows consideration of criteria extraneous to the activity sought to be engaged in, especially as it relates to employment; (3) contradicts HEW's interpretation regarding employment regarding the requirement

to be able to perform the essential functions of the job, because the phrase "level of accomplishment" is used; (4) ignores the title VI prohibition of using criteria or methods of administration which have the effect of subjecting individuals to discrimination; and (5) does not make it explicit in the rule that modifications of a program must occur if the purpose of the program can be achieved. The commenter also states that HEW has interpreted Davis to prohibit discrimination against persons with disabilities where such prohibition does not impose undue financial and administrative burdens, and that this must reflect the intent of Congress since it was not changed in the 1978 amendments.

The agency believes that Davis, a 1979 Supreme Court case, clarifies the meaning of "essential eligibility requirements" with respect to programs in which an individual "is required to perform services or to achieve a level of accomplishment." In such a program, the Court held in Davis, an individual is not qualified if he or she cannot achieve the purpose of the program without modifications that would fundamentally alter its nature. The agency believes that it is appropriate to reflect this clarification in the regulation.

Further, paragraph (4) defines "qualified individual with handicaps" for purposes of employment, and incorporate EEOC's regulations at 29 CFR part 1613.702(f). @ 1214.130 sets forth the general prohibitions against discrimination and @ 1214.130(b)(3) specifically states the title VI prohibition of using criteria or methods of administration which have the effect of subjecting individuals to discrimination. The agency believes its placement of these standards is organizationally more appropriate.

The agency has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alteration, the agency must follow the procedures established in @@ 1214.150(a) and 1214.160(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the agency head or his or her designee in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the agency head determines that an action would result in a fundamental alteration, the agency must consider options that would enable the individual with handicaps to achieve the purpose of the program but would not result in such an alteration.

For programs or activities that do not fall under either of the first two paragraphs, paragraph (3) adopts the existing definition of "qualified handicapped person" with respect to services (28 CFR 41.32(b)) in the coordination regulation for programs receiving Federal financial assistance. Under this definition, a qualified individual with handicaps is an individual with handicaps who meets the essential eligibility requirements for participation in the program or activity.

Paragraph (4) explains that "qualified individual with handicaps" means "qualified handicapped person" as that term is defined for purposes of employment in the Equal Employment Opportunity Commission's regulation at 29 CFR 163.702(f), which is made applicable to this part by @ 1214.140. Nothing in this part changes existing regulations applicable to employment.

"Section 504. " This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the agency and not to programs or activities to which it provides Federal financial assistance.

Section 1214.110 Self-Evaluation.

The agency shall conduct a self evaluation of its compliance with section 504 within one year of the effective date of this regulation.

The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be valuable as a means of establishing a working relationship with individuals with handicaps that promotes both effective and efficient implementation of section 504.

The commenter recommended that ACTION consider including in this section: (1) An assurance to be submitted with the self-evaluation that will include, among other things, that the effects of the discriminatory policy will be eliminated; (2) a transition plan for compliance; (3) specific modification requirements for all disabilities including those with impaired vision or hearing; and (4) a list of interested persons consulted.

The agency believes no modification is needed. The section uses the same provision adopted by the Department of Justice in its final rule implementing section 504 for its federally conducted programs. 28 CFR part 39.110. The Department of Justice determined that this regulatory language was appropriate after it analyzed the Federal Advisory Committee Act (5 U.S.C. app.), Executive Order 12024, and 41 CFR part 101-6, the regulation of the General Services Administration implementing the Act.

The final rule provides that the agency shall provide an opportunity for interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process and development of transition plans by submitting comments (both oral and written). @ 1214.150(d) specifically sets forth the standards for transition plans.

Section 1214.111 Notice.

Section 1214.111 requires the agency to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of the rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities; the display of informative posters in service centers and other public places; and the broadcast of information by television or radio.

The commenter felt that notification of agency policy regarding nondiscrimination should also be specifically distributed in recruitment materials as well as general information. Since recruitment of both volunteers and employees is a program or activity of the agency, the agency has not adopted this suggestion.

Section 1214.130 General prohibitions against discrimination.

Section 1214.130 is an adaption of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51).

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in @ 1214.130 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. If the agency violates a provision in any of the subsequent sections, it will also violate one of the general prohibitions found in @ 1214.130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of individuals with handicaps. The agency may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from its program simply

because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (e.g., epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question.

In addition, section 504 prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Subparagraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on program accessibility (@@ 1214.149-1214.151) and communications (@ 1214.160) are specific applications of this principle.

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, subparagraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids, benefits, or services when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the agency's programs or activities. Subparagraph (b)(1)(iv) requires that different or separate aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, subparagraph (b)(2) provides that a qualified individual with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Subparagraph (b)(1)(v) prohibits the agency from denying a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board.

Subparagraph (b)(1)(vi) prohibits the agency from limiting a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

The commenter argued that subparagraph (b)(1) should include a prohibition to "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," because this provision is included in the Department of Justice's coordination regulations for federally assisted programs (28 CFR part 41.51(b)(5)).

To the extent that assistance from the agency would provide significant support to an organization, it would constitute Federal financial assistance and the organization, as a recipient of such assistance, would be covered by the section 504 regulation for federally assisted programs. The regulatory "significant assistance" provision however, would be inappropriate in a regulation applying only to federally conducted programs or activities.

Subparagraph (b)(3) prohibits the agency from utilizing criteria or methods of administration that deny individuals with handicaps access to the agency's programs or activities. The phrase "criteria or methods of administration" refers to official written agency policies and to the actual practices of the agency. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with handicaps an effective opportunity to participate.

Subparagraph (b)(4) specifically applies the prohibition enunciated in @ 1214.130(b)(3) to the process of selecting sites for construction of new facilities or selecting facilities to be used by the agency. Subparagraph (b)(4) does not apply to construction of additional buildings at an existing site.

Subparagraph (b)(5) prohibits the agency, in the selection or procurement contractors, from using criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive Order that are designed to benefit only individuals with handicaps or a given class of individuals with handicaps may be limited to those individuals with handicaps.

Paragraph (d), discussed above, provides that the agency must administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, i.e., in a setting that enables individuals with handicaps to interact with nonhandicapped persons to the fullest extent possible.

Section 1214.140 Employment.

Section 1214.140 prohibits discrimination on the basis of handicap in employment by the agency. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. Gardner v. Morris, 75 F.2d 1271, 1277 (8th Cir. 1985); Smith v. United States Postal Service, 742 F.2d 257, 259-260 (6th Cir. 1984); Prewitt v. United States Postal Service, 662 F.2d 292, 302-04 (5th Cir. 1981). Contra McGuiness v. United States Postal Service, 744 F.2d 1318, 1320-21 (7th Cir. 1984); Boyd v. United States Postal Service, 752, F.2d 410, 413-14 (9th Cir. 1985).

Courts uniformly have held that, in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. Morgan v. United States Postal Service, 798 F.2d 1162, 1164-65 (8th Cir. 1986); Smith, 742 F.2d at 262; Prewitt, 662 F.2d at 304. Accordingly, @ 1214.140 (Employment) of this rule adopts the definitions, requirements, and procedures of section 501 as established in regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR part 1613. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (3 CFR, 1978 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap. In addition to this section, @ 1214.70(b) specifies that the agency will use the existing EEOC procedures to resolve allegations of employment discrimination.

No comments were received on this section.

Section 1214.149 Program accessibility: Discrimination prohibited.

Section 1214.149 states the general nondiscrimination principle underlying the program accessibility requirements of @@ 1214.150 and 1214.151.

No comments were received on this section.

Section 1214.150 Program accessibility: existing facilities.

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR part 41.57), with certain modifications. Thus, @ 1214.150 requires that each agency program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. The regulation also makes clear that the agency is not

required to make each of its existing facilities accessible (@ 1214.150(a)(1)). However, @ 1214.150, unlike 28 CFR part 41.57, places explicit limits on the agency's obligation to ensure program accessibility (@ 1214.150(a)(2)).

Subparagraph (a)(2) generally codifies recent case law that defines the scope of the agency's obligation to ensure program accessibility. This paragraph provides that, in meeting the program accessibility requirement, the agency is not required to take any action that would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. A similar limitation is provided in @ 1214.160(d). This provision is based on the Supreme Court's holding in Southeastern Community College v. Davis, 442 U.S. 397 (1979), that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since Davis, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modifications sought to be imposed under section 504. See, e.g., Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis (APTA), 655 F.2d 1272 (DC Cir. 1981).

Subparagraph (a)(2) and paragraph 1214.160(d) are also supported by the Supreme Court's decision in Alexander v. Choate, 469 U.S. 287 (1985). Alexander involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days per year. Plaintiffs argued that this reduction violated section 504 because it had an adverse impact on handicapped persons. The Court assumed without deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact on handicapped people, but held that the reduction was not "the sort of disparate impact" discrimination that might be prohibited by section 504 or its implementing regulation. Id. at 299.

Relying on Davis, the Court said that section 504 guarantees qualified handicapped persons "meaningful access to the benefits that the grantee offers," id. at 301, and that "reasonable adjustments in the meaningful access." Id. at n.21 (emphasis added). However, section 504 does not require " 'changes', 'adjustments', or 'modifications' to existing programs that would be 'substantial' * * * or that would constitute 'fundamental alteration(s) in the nature of a program.' " Id. at n.20 (citations omitted). Alexander supports the position, based on Davis and the earlier, lower court decisions, that in some situations, certain accommodations for a handicapped person may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. Thus, failure to include such an "undue burdens" provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

This paragraph, however, does not establish an absolute defense; it does not relieve the agency of all obligations to individuals with handicaps. Although the agency is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with handicaps receive the benefits and services of the federally conducted program or activity.

It is our view that compliance with @ 1214.150(a) would in most cases not result in undue financial and administrative burdens on the agency. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with @ 1214.150(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the agency. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee and must be accompanied

by a written statement of the reasons for that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the agency head's decision or failure to make a decision may file a complaint under the compliance procedures established in @ 1214.170.

Paragraph (b) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with handicaps. Structural changes in existing facilities are required only when there is no other feasible way to make the agency's program accessible. It should be noted that "structural changes" include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alterations to a load-bearing structural member. The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR part 41.57(b), the agency must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

No comments were received on this section.

Section 1214.151 Program accessibility: New construction and alterations.

Overlapping coverage exists with respect to new construction and alterations under section 504 and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). Section 1214.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of, the agency shall be designed, constructed, or altered to be readily accessible to and usable by individuals with handicaps in accordance with 41 CFR parts 101-19.600 to 101-19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). We believe that it is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance here because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of this standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in @ 1214.150. To the extent the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of @ 1214.151.

The commenter suggests that the regulation should require that buildings leased after the effective date of the regulation should meet the new construction standards of @ 1214.151, rather than the program accessibility standards for existing facilities in @ 1214.150.

Federal practice under section 504 has always treated newly leased buildings subject to the existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the agency believes the same program accessibility standard should apply to both owned and leased existing buildings.

In Rose v. United States Postal Service, 774 F.2d 1355 (9th Cir. 1985), the Ninth Circuit held that the Architectural Barriers Act requires accessibility at the time of lease. The Rose court did not address the issue of whether section 504 likewise requires accessibility as a condition of lease, and the case was remanded to the District Court for, among other things, consideration of that issue. The agency may provide more specific guidance on section 504 requirements for leased buildings after the litigation is completed. I83Section 1214.160 Communications.

Section 1214.160 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under @ 1214.160 (a)(1) to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They shall also include an opportunity for individuals with handicaps to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the agency (@ 1214.160(a)(1)(i)). The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under @ 1214.160(d). That paragraph limits the obligation of the agency to ensure effective communication in accordance with Davis and the circuit court opinions interpreting it (see supra preamble discussion of @ 1214.150(a)(2)). Unless not required by @ 1214.160(d), the agency shall provide auxiliary aids at no cost to the individual with handicaps.

The discussion of @ 1214.150(a), Program Accessibility: Existing Facilities, regarding the determination of undue financial and administrative burdens also applies to this section and should be referred to for a complete understanding of the agency's obligation to comply with @ 1214.160.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a person with impaired hearing. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (e.g., a meeting) or where the applicant or participant is not skilled in spoken or written language. In these cases, a sign language interpreter may be appropriate. For persons with impaired vision, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to inform the public of: (1) The communications services it offers to afford individuals with handicaps and equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective.

The agency shall ensure effective communication with persons with impaired vision or hearing involved in hearings conducted by the agency. Auxiliary aids must be afforded where necessary to ensure effective communication at the proceedings. If sign language interpreters are necessary, the agency may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (@ 1214.160(a)(1)(ii)). For example, the agency need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

Paragraph (b) requires the agency to provide information to individuals with handicaps concerning accessible services, activities, and facilities. Paragraph (c) requires the agency to provide a sign at inaccessible facilities that directs users to locations with information about accessible facilities.

The commenter suggested that the definition of auxiliary aids should be

expanded to include examples for people with physical impairments such as attendant services that may be needed to aid disabled persons to travel to meetings. The agency has not adopted the approach recommended by these comments.

To the extent that the services of an attendant are not directly related to a federally conducted program or activity, it would be inappropriate to require them at Federal expense. For example, the services of a sign language interpreter make a workshop as available to any deaf participant as it is to other participants. The need for services of interpreters arises directly out of the presentation of the information in a form that can be understood by hearing persons. However, the agency views the services of an attendant for a disabled person as generally personal in nature and not directly related to the federally conducted program.

A different conclusion, however, might be reached for Federal employees or other persons traveling for the agency. Where a disabled person who is unable to travel without an attendant is required to perform official travel, the travel expenses of an attendant, including per diem and transportation expenses, may be paid by ACTION. See 5 U.S.C. 3102(d).

The commenter argues that the term "auxiliary" implies something that is extra or discretionary, and encourages ACTION to change the term to "aids for reasonable accommodation." While the agency agrees the terms may imply something that is extra, the proposed change does not alleviate this implication. Therefore, the agency has not adopted this suggestion.

The commenter contends that reference to the Davis standard regarding undue burden is problematic. The agency has chosen to retain reference to this standard for the reasons stated regarding @ 1214.150.

The commenter also says it should be recognized that all agency resources should be considered when determining whether or not an accommodation can be made, rather than just the funds attached with the program. The commenter contends the totality of the agency's budget should be the determining factor. However, this ignores the way ACTION's budget is appropriated by Congress, and therefore the agency has not adopted this suggestion.

Section 1214.170 Compliance procedures.

Paragraph (a) specifies that paragraphs (c) through (l) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the agency will process employment complaints, in accordance with procedures established in existing regulations of the EEOC (29 CFR part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

The agency is required to accept and investigate all complete complaints for which it has jurisdiction (@ 1214.170(d)). If it determines that it does not have jurisdiction over a complaint, it shall promptly notify the complainant and make reasonable efforts to facilitate the referral of the complaint to any appropriate entity of the Federal government (@ 1214.170(e)).

Paragraph (f) requires the agency to notify the Architectural and Transportation Barriers Compliance Board (ATBCB) upon receipt of a complaint alleging that a building or facility subject to the Architectural Barriers Act was designed, constructed, or altered in a manner that does not provide ready access to and use by individuals with handicaps.

The commenter recommends providing for consultation with ATBCB to help resolve deficiencies rather than merely notifying the Board upon receipt of a complaint. This recommendation has not been incorporated since not all situations will require the Board's expert assistance.

The commenter also recommended inclusion of: (1) A provision for judicial review at the initial complaint level and not just at the appeal level; (2) a provision to ensure that all other regulations, forms and directives issued by ACTION are superceded by the nondiscrimination requirements of this regulation; (3) a provision for the availability of the Federal agency to award attorney fees in administrative proceedings; and (4) a provision for the availability of compensation to the prevailing party.

To the degree that these comments relate to employment, the agency has incorporated the regulations of EEOC in 29 CFR part 1613. Regarding nonemployment complaints, the 1978 amendments to section 504 failed to provide a specific statutory remedy for violations of section 504 in federally conducted programs. The amendment's legislative history suggesting parallelism between section 504 for federally conducted and federally assisted programs is unhelpful in this area because the fund termination mechanism used in section 504 federally assisted regulations depends on the legal relationship between a Federal funding agency and the recipients to which the Federal funding is extended.

In addition, nothing contained in title V of the Rehabilitation Act provides for the agency award of attorneys fees in administrative proceedings other than those involving Federal employment. Nor does the Equal Access to Justice Act (5 U.S.C. 504) provide for such awards in hearings conducted in agency administrative proceedings. The agency has therefore not amended its regulations to include these provisions.

Paragraph (g) requires the agency provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal. (@ 1214.179(g)). One appeal within the agency shall be provided (@ 1214.170(i)). The appeal will not be heard by the same person who made the initial determination of compliance or noncompliance.

Paragraph (l) permits the agency to delegate its authority for investigating complaints to other Federal agencies. However, the statutory obligation of the agency to make a final determination of complaince or noncompliance may not be delegated.

List of Subjects in 45 CFR Part 1214

Blind, Civil Rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped.

Title 45, Chapter XII of the Code of Federal Regulations is amended by adding a new part 1214 to read as follows:

PART 1214 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY ACTION

Sec.
1214.101 Purpose.
1214.102 Application.
1214.103 Definitions.
1214.104-1214.109 [Reserved]
1214.110 Self-evaluation.
1214.111 Notice.
1214.112-1214.129 [Reserved]
1214.130 General prohibitions against discrimination.
1214.131-1214.139 [Reserved]
1214.140 Employment.
1214.141-1214.148 [Reserved]
1214.149 Program accessibility: Discrimination prohibited.
1214.150 Program accessibility: Existing facilities.
1214.151 Program accessibility: New construction and alterations.

1214.152-1214.159 [Reserved]
1214.160 Communications.
1214.161-1214.169 [Reserved]
1214.170 Compliance procedures.

Authority: 29 U.S.C. 794; 42 U.S.C. 5057.

Dated: November 2, 1990.

Jane A. Kenny, Director.
[FR Doc. 90-26876 Filed 11-14-90; 8:45 am]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
1 CFR Part 326
ADVISORY COMMITTEE ON FEDERAL PAY
5 CFR Part 1411
ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS
5 CFR Part 1701
DEPARTMENT OF ENERGY
10 CFR Part 1040
OFFICE OF THE FEDERAL INSPECTOR FOR THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM
10 CFR Part 1535
EXPORT-IMPORT BANK OF THE UNITED STATES
12 CFR Part 410
CONSUMER PRODUCT SAFETY COMMISSION
16 CFR Part 1033
UNITED STATES INTERNATIONAL TRADE COMMISSION
19 CFR Part 201
INTERNATIONAL DEVELOPMENT COOPERATION AGENCY
Agency for International Development
22 CFR Part 219
ARMS CONTROL AND DISARMAMENT AGENCY
22 CFR Part 607
INTERNATIONAL BOUNDARY AND WATER COMMISSION, UNITED STATES AND MEXICO -- UNITED STATES SECTION
22 CFR Part 1103
BOARD FOR INTERNATIONAL BROADCASTING
22 CFR Part 1304
AMERICAN BATTLE MONUMENTS COMMISSION
36 CFR Part 406
NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES
National Endowment for the Humanities
45 CFR Part 1175
NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES
Institute of Museum Services
45 CFR Part 1181
NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE
49 CFR Part 1706
NATIONAL TRANSPORTATION SAFETY BOARD
45 CFR Part 807
MARINE MAMMAL COMMISSION
50 CFR Part 550

Enforcement of Nondiscrimination on the Basis of Handicap in Federally Conducted Programs

AGENCIES: Administrative Conference of the United States; Advisory Committee on Federal Pay; Advisory Commission on Intergovernmental Relations; Department of Energy; Office of the Federal Inspector for the Alaska Natural Gas Transportation System; Export-Import Bank of the United States; United States International Trade Commission; International Development Cooperation Agency, Agency for International Development; U.S. Arms Control and Disarmament Agency; International Boundary and Water Commission, United States and Mexico-United States Section; Board for International Broadcasting; American Battle Monuments Commission; National Foundation on the Arts and the Humanities, National Endowment for the Humanities; National Foundation on the Arts and the Humanities, Institute of Museum Services; National Commission on Libraries and Information Science; National Transportation Safety Board; Marine Mammal Commission.

49 FR 1450

January 11, 1984

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed regulation provides for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap, as it applies to programs or activities conducted by the agencies listed above.

DATES: To be assured of consideration, comments must be in writing and must be received on or before May 10, 1984. Comments should refer to specific sections in the regulation.

ADDRESSES: See individual agencies below.
FOR FURTHER INFORMATION CONTACT: See individual agencies below.

TEXT: SUPPLEMENTARY INFORMATION:

Background

The purpose of this proposed rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) , as it applies to programs and activities conducted by the following agencies: Administrative Conference of the United States; Advisory Committee on Federal Pay; Advisory Commission on Intergovernmental Relations; Department of Energy; Office of the Federal Inspector for the Alaska Natural Gas Transportation System; Export-Import Bank of the United States; United States International Trade Commission; International Development Cooperation Agency, Agency for International Development; U.S. Arms Control and Disarmament Agency; International Boundary and Water Commission , United States and Mexico-United States Section; Board for International Broadcasting; American Battle Monuments Commission; National Foundation on the Arts and the Humanities, National Endowment for the Humanities; National Foundation on the Arts and the Humanities, Institute of Museum Services; National Commission on Libraries and Information Science; National Transportation Safety Board; Marine Mammal Commission. (hereinafter "the agencies"). As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Sec. 119, Pub. L. 95-602, 92 Stat. 2982), section 504 of the Rehabilitation Act of 1973 states 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(29 U.S.C. 794) (amendment italicized).

Because the agencies are required by this amendment to promulgate implementing regulations, and because the proposed standards and procedures to be established are the same for all of the agencies, the agencies are publishing this notice of proposed rulemaking jointly. The final rule adopted by each agency will be codified in that agency's portion of the Code of Federal Regulations as indicated in the information provided for individual agencies below. The agencies agreed to joint publication of the preamble and the text of the regulation in order to expedite its issuance and minimize costs, in view of the identity in proposed standards among the agencies. If, following the public comment period, one or more of the agencies desires to promulgate a final regulation with different substantive provisions in order to account for its

particular needs identified in response to public comments, it will, of course, do so.

The substantive nondiscrimination obligations of the agencies, as set forth in this proposed rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. See 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs). This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) id.; 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); id. at 38,552 (remarks of Rep. Sarasin).

This regulation has been reviewed by the Department of Justice. It is an adaptation of a prototype prepared by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298) and distributed to Executive agencies on April 15, 1983.

This regulation has also been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206).

It is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared.

This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601-612).

Section-by-Section Analysis

Section -- .101 Purpose.

Section -- .101 states the purpose of the proposed rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

Section -- .102 Application.

The proposed regulation applies to all programs or activities conducted by the agency.

Section -- .103 Definitions.

"Assistant Attorney General." "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Although auxiliary aids are required explicitly only by @ -- .160(a)(1), they may also be necessary to meet other requirements of the regulation.

"Complete complaint." The definition of "complete complaint" enables the agency to determine the beginning of its obligation to investigate a complaint (see @ -- .170(d)).

"Facility." The definition of "facility" is similar to that in the section

504 coordination regulation for federally assisted programs, 28 CFR 41.3(f), except that the term "rolling stock or other conveyances" has been added and the phrase "or interest in such property" has been deleted to clarify its coverage. The term "facility" is used in @ -- .150 and @ -- .170(e).

" Handicapped person." The definition of " handicapped person" is a shortened version of the definition appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). In the interest of brevity, examples of handicapping conditions appearing under the term "physical or mental impairment" are deleted.

"Qualified handicapped person." The definition of "qualified handicapped person" is a revised version of the definition appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

Paragraph (1) deviates from existing regulations for federally assisted programs because of intervening court decisions. It defines "qualified handicapped person" with regard to any program under which a person is required to perform services or to achieve a level of accomplishment. In such programs a qualified handicapped person is one who can achieve the purpose of the program without modifications in the program that would result in a fundamental alteration in its nature. This definition reflects the decision of the Supreme Court in Southeastern Community College v. Davis, 442 U.S. 397 (1979). In that case, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." Id. at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," id. at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore we concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." Id. at 410.

We have incorporated the Court's language in the definition of "qualified handicapped person" in order to make clear that such a person must be able to participate in the program offered by the agency. The agency is required to make modifications in order to enable a handicapped applicant to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered; not whether the applicant could benefit or obtain results from some other program that the agency does not offer. Although the revised definition allows exclusion of some handicapped people from some programs, it requires that a handicapped person who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

For programs or activities that do not fall under the first paragraph, paragraph (2) adopts the existing definition of "qualified handicapped person" with respect to services (28 CFR 41.32(b)) in the coordination regulation for programs receiving Federal financial assistance. Under this definition, a qualified handicapped person is a handicapped person who meets the essential eligibility requirements for participation in the program or activity.

"Section 504. " This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the agency and not to programs or activities to which it provides Federal financial assistance.

Section -- .110 Self-evaluation.

The agency shall conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The process shall include consultation with interested persons, including consultation with handicapped persons or organizations representing handicapped persons. The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with handicapped persons that promotes both effective and efficient implementation of section 504.

Section -- .130 General prohibitions against discrimination.

Section -- .130 is an adaptation of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51).

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in @ -- .130 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. Whenever the agency has violated a provision in any of the subsequent sections, it has also violated one of the general prohibitions found in @ -- .130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of handicapped persons. The agency may not refuse to provide a handicapped person with an equal opportunity to participate in or benefit from its program simply because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (e.g ., epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question. It would be permissible, therefore, to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce; but it may not be permissible to automatically disqualify all those who are blind in just one eye.

Section 504, however, prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to a handicapped person be as effective as that afforded to others. The later sections on program accessibility (@@ -- .150- -- .151) and communications (@ -- .160) are specific applications of this principle.

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons, paragraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids, benefits, or services when necessary to provide handicapped persons with an equal opportunity to participate in or benefit from the agency's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified handicapped person still has the right to choose to participate in the program that is not designed to

accommodate handicapped persons.

Paragraph (b)(1)(v) prohibits the agency from denying a qualified handicapped person the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vi) prohibits the agency from limiting a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the agency from utilizing criteria or methods of administration that deny handicapped persons access to the agency's programs or activities. The phrase "criteria or methods of administration" refers to official written agency policies and the actual practices of the agency. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny handicapped persons an effective opportunity to participate.

Paragraph (b)(4) specifically applies the prohibition enunciated in @ -- .130(b)(3) to the process of selecting sites for construction of new facilities or existing facilities to be used by the agency. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the agency, in the selection of procurement contractors, from using criteria that subject qualified handicapped persons to discriminate on the basis of handicap.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only handicapped persons or a given class of handicapped persons may be limited to those handicapped persons.

Section -- .140 Employment.

Section -- .140 prohibits discrimination on the basis of handicap in employment by Executive agencies. This regulation is in accord with a recent decision of the Fifth Circuit that holds that, despite the resulting overlap of coverage with section 501 of the Rehabilitation Act of 1973, (29 U.S.C. 791), Congress intended section 504 to cover the employment practices of Executive agencies. The court also held that in order to give effect to both section 504

and section 501, the administratve procedures of section 501 must be followed in processing section 504 complaints. Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981).

Consistent with that decision, this section provides that the standards, requirements, and procedures of section 501 of the Rehabilitation Act, as established in regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR Part 1613, shall be those applicable to employment in federally conducted programs or activities. In addition to this section, @ -- .170(b) of this regulation specifies that the agency will use the existing EEOC procedures to resolve allegations of employment discrimination. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (3 CFR, 1979 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap.

Section -- .150 Program accessibility: Existing facilities.

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.56-41.58), with certain modifications. Thus, @ .150 requires that the agency's program or activity, when viewed in its entirety, be readily accessible to and usable by handicapped

persons. The regulation also makes clear that the agency is not required to make each of its existing facilities accessible (@ -- .150(a)(1)). However, @ -- .150, unlike 28 CFR 41.56-41.57, places explicit limits on the agency's obligation to ensure program accessibility (@ -- .150(a)(2)).

Paragraph (a)(2) generally codifies recent case law that defines the scope of the agency's obligation to ensure program accessibility. This paragraph provides that in meeting the program accessibility requirement the agency is not required to take any action that would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. A similar limitation is provided in @ -- .160(e). This provision is based on the Supreme Court's holding in Southeastern Community College v. Davis , 442 U.S. 397 (1979), that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since Davis, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. See, e.g., Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis (APTA), 655 F.2d 1272 (D.C. Cir. 1981). Thus, in APTA the United States Court of Appeals for the District of Columbia Circuit applied the Davis language and invalidated the section 504 regulations of the Department of Transportation. The court in APTA noted "that at some point a transit system's refusal to take modest, affirmative steps to accommodate handicapped persons might well violate section 504. But DOT's rules do not mandate only modest expenditures. The regulations require extensive modifications of existing systems and impose extremely heavy financial burdens on local transit authorities." 655 F.2d at 1278.

The inclusion of paragraph (a)(2) is an effort to conform the agency's regulation implementing section 504 to the Supreme Court's interpretation of the statute in Davis as well as to the decisions of lower courts following the Davis opinion. This paragraph acknowledges, in light of recent case law, that in some situations, certain accommodations for a handicapped person may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. The failure to include such a provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

This paragraph, however, does not establish an absolute defense; it does not relieve the agency of all obligations to handicapped persons. Although the agency is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that handicapped persons receive the benefits and services of the federally conducted program or activity.

Paragraph (b) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of handicapped persons. Structural changes in existing facilities are required only when there is no other feasible way to make the agency's program accessible. The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the agency must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after

the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section -- .151 Program accessibility: New construction and alterations.

Overlapping coverage exists with respect to new construction under section 504, section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). Section -- .151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by handicapped

persons in accordance with 41 CFR sections 101-19.600 to 101-19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). We believe that it is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required to meet the new construction standard. They are subject, however, to the requirements of @ -- .150.

Section -- .160 Communications.

Section -- .160 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under @ -- .160(a)(1) to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They shall also include an opportunity for handicapped persons to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the agency (@ -- .160). The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under @ -- .160(e). That paragraph limits the obligation of the agency to ensure effective communication in accordance with Davis and the circuit court opinions interpreting it (see supra preamble @ -- .150(a)(3)). Unless not required by @ -- .160(e), the agency shall provide auxiliary aids at no cost to the handicapped person.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly where the hearing-impaired applicant or participant is not skilled in spoken or written language. Then, a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to make clear to the public (1) the communications services it offers to afford handicapped persons an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preference regarding auxiliary aids if it can demonstrate that several different modes are effective.

The agency shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the agency. Auxiliary aids must be afforded where necessary to ensure effective communication at the proceedings. If sign language interpreters are necessary, the agency may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal

nature. @ -- .160(a)(1)(ii). For example, the agency need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

Paragraph (b) requires the agency to provide information to handicapped persons concerning accessible services, activities, and facilities. Paragraph (c) requires the agency to provide signage at inaccessible facilities that directs users to locations with information about accessible facilities.

Paragraph (d) requires the agency to take appropriate steps to provide handicapped persons with information regarding their section 504 rights under the agency's programs and activities. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

Section -- .170 Compliance procedures.

Paragraph (a) specifies that paragraphs (c) through (l) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the agency will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR Part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

The agency will designate an official responsible for coordinating implementation of this section (@ -- .170(c)). The agency is required to accept and investigate all complete complaints (@ -- .170(d)). If it determines that it does not have jurisdiction over a complaint, it shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal government (@ -- .170(e)).

Paragraph (f) requires the agency to notify the Architectural and Transportation Barriers Compliance Board upon receipt of a complaint alleging that a building or facility subject to the Archtectural Barriers Act or section 502 was designed, constructed, or altered in a manner that does not provide ready access and use to handicapped persons.

Paragraph (g) requires the agency to provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal (@ -- .170(g)). One appeal within the agency shall be provided (@ -- .170(i)). The appeal will not be heard by the same person who made the initial determination of compliance or noncompliance (@ -- .170(i)).

Paragraph (l) permits the agency to delegate its authority for investigating complaints to other Federal agencies. However, the statutory obligation of the agency to make a final determination of compliance or noncompliance may not be delegated.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
1 CFR Part 326

ADDRESS: Comments should be sent to: Administrative Conference of the United States, 2120 L Street, Suite 500, Washington, D.C. 20037.

FOR FURTHER INFORMATION CONTACT: Richard K. Berg, Esq., General Counsel, Administrative Conference of the United States, 2120 L Street, N.W., Suite 500, Washington, D.C. 20037; (202) 254-7020 TDD: (202) 724-7678.

List of Subjects in 1 CFR Part 326

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 1 of the Code of Federal Regulations be amended by adding Part 326 as set forth at the end of this document.

Richard K. Berg, General Counsel.

PART 326 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Sec.
326.101 Purpose.
326.102 Application.
326.103 Definitions.
326.104-326.109 [Reserved]
326.110 Self-evaluation.
326.111-326.129 [Reserved]
326.130 General prohibitions against discrimination.
326.131-326.139 [Reserved]
326.140 Employment.
326.141-326.149 [Reserved]
326.150 Program accessibility: Existing facilities.
326.151 Program accessibility: New construction and alterations.
326.152-326.159 [Reserved]
326.160 Communications.
326.161-326.169 [Reserved]
326.170 Compliance procedures.
326.171-326.999 [Reserved]

Authority: 29 U.S.C. 794.

ADVISORY COMMITTEE ON FEDERAL PAY
5 CFR Part 1411

ADDRESS: Comments should be sent to: Ms. Lucretia Dewey Tanner, Executive Director, Advisory Committee on Federal Pay, 1730 K Street, N.W., Suite 205, Washington, D.C. 20006.

FOR FURTHER INFORMATION CONTACT: The above named person, Telephone: (202) 653-6193, TDD: (202) 724-7678.

List of Subjects in 5 CFR Part 1411

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 5 of the Code of Federal Regulations be amended by adding Part 1411 as set forth at the end of this document.

Lucretia Dewey Tanner, Executive Director.

PART 1411 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY ADVISORY COMMITTEE ON FEDERAL PAY

Sec.
1411.101 Purpose.
1411.102 Application.
1411.103 Definitions.

1411.104-1411.109 [Reserved]
1411.110 Self-evaluation.
1411.111-1411.129 [Reserved]
1411.130 General prohibitions against discrimination.
1411.131-1411.139 [Reserved]
1411.140 Employment.
1411.141-1411.149 [Reserved]
1411.150 Program accessibility: Existing facilities.
1411.151 Program accessibility: New construction and alterations.
1411.152-1411.159 [Reserved]
1411.160 Communications.
1411.161-1411.169 [Reserved]
1411.170 Compliance procedures.
1411.171-1411.999 [Reserved]

Authority: 29 U.S.C. 794.

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS
5 CFR Part 1701

ADDRESS: Comments should be sent to Advisory Commission on Intergovernmental Relations, Suite 2000, Vanguard Building, 1111 20th Street, NW., Washington, DC 20575.

FOR FURTHER INFORMATION CONTACT: Franklin A. Steinko, Jr., Budget and Management Officer, Advisory Commission on Intergovernmental Relations, Suite 2000, Vanguard Building, 1111 20th Street, NW., Washington, DC 20575, Phone: (202) 653-5640, TDD (202) 724-7678.

List of Subjects in 5 CFR Part 1701

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 5 of the Code of Federal Regulations be amended by adding Part 1701 as set forth at the end of this document.

Franklin A. Steinko, Jr., Budget and Management Officer.

PART 1701 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

Sec.
1701.101 Purpose.
1701.102 Application.
1701.103 Definitions.
1701.104-1701.109 [Reserved]
1701.110 Self-evaluation.
1701.111-1701.129 [Reserved]
1701.130 General prohibitions against discrimination.
1701.131-1701.139 [Reserved]
1701.140 Employment.
1701.141-1701.149 [Reserved]
1701.150 Program accessibility: Existing facilities.
1701.151 Program accessibility: New construction and alterations.
1701.152-1701.159 [Reserved]
1701.160 Communications.
1701.161-1701.169 [Reserved]
1701.170 Compliance procedures.
1701.171-1701.999 [Reserved]

Authority: 29 U.S.C. 794.

DEPARTMENT OF ENERGY
10 CFR Part 1040

ADDRESS: Comments should be sent to Special Assistant for Civil Rights, U.S. Department of Energy, 1000 Independence Avenue, Washington, D.C. 20585. Mail Stop 4B-112.

FOR FURTHER INFORMATION CONTACT: Mr. Charles A. Agnew, Jr., U.S. Department of Energy, 1000 Independence Ave. SW., Room 4B-102, Voice: (202) 252-1549, TDD: (202) 724-7678, Washington, D.C. 20585.

List of Subjects in 10 CFR Part 1040

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 5 of the Code of Federal Regulations be amended by adding Subpart D to Part 1040 as set forth at the end of this document.

Charles A. Agnew, Jr., Special Assistant for Civil Rights.

PART 1040 -- [AMENDED]

Subpart D -- Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by Department of Energy

Sec.
1040.101 Purpose.
1040.102 Application.
1040.103 Definitions.
1040.104-1040.109 [Reserved]
1040.110 Self-evaluation.
1040.111-1040.129 [Reserved]
1040.130 General prohibitions against discrimination.
1040.131-1040.139 [Reserved]
1040.140 Employment.
1040.141-1040.149 [Reserved]
1040.150 Program accessibility: Existing facilities.
1040.151 Program accessibility: New construction and alterations.
1040.152-1040.159 [Reserved]
1040.160 Communications.
1040.161-1040.169 [Reserved]
1040.170 Compliance procedures.
1040.171-1040.999 [Reserved]

Authority: 29 U.S.C. 794.

OFFICE OF THE FEDERAL INSPECTOR FOR THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM
10 CFR Part 1535

ADDRESS: Comments should be sent to Rhodell G. Fields, Acting General Counsel, Office of the Federal Inspector for the Alaska Natural Gas Transportation System, 1200 Pennsylvania Avenue, N.W., Room 3411, Washington, D.C. 20044.

FOR FURTHER INFORMATION CONTACT: Rhodell G. Fields, 1200 Pennsylvania Avenue, N.W., Room 3411, Washington, D.C. 20044; (202) 275-1144 TDD: (202) 724-7678.

List of Subjects in 10 CFR Part 1535

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 10 of the Code of Federal Regulations be amended by adding Part 1535 as set forth at the end of this document.

Rhodell G. Fields, Acting General Counsel.

PART 1535 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY OFFICE OF THE FEDERAL INSPECTOR FOR THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM

Sec.
1535.101 Purpose.
1535.102 Application.
1535.103 1535 Definitions.
1535.104 1535-109 [Reserved]
1535.110 Self-evaluation.
1535.111-1535.129 [Reserved]
1535.130 General prohibitions against discrimination.
1535.131-1535.139 [Reserved]
1535.140 Employment.
1535.141-1535.149 [Reserved]
1535.150 Program accessibility: Existing facilities.
1535.151 Program accessibility: New construction and alterations.
1535.152-1535.159 [Reserved]
1535.160 Communications.
1535.161-1535.169 [Reserved]
1535.170 Compliance procedures.
1535.171-1535.999 [Reserved]

Authority: 29 U.S.C. 794.

EXPORT-IMPORT BANK OF THE UNITED STATES
12 CFR Part 410

ADDRESS: Comments should be sent to Warren W. Glick, General Counsel, Export-Import Bank of the United States, 811 Vermont Avenue N.W., Washington, D.C. 20571.

FOR FURTHER INFORMATION CONTACT: Warren W. Glick, General Counsel, Voice (566-8334), TTY (566-8846).

List of Subjects in 12 CFR Part 410

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 12 of the Code of Federal Regulations be amended by adding Part 410 as set forth at the end of this document.

Warren W. Glick, General Counsel.

PART 410 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY EXPORT-IMPORT BANK OF THE UNITED STATES

Sec.
410.101 Purpose.
410.102 Application.
410.103 Definitions.
410.104-410.109 [Reserved]
410.110 Self-evaluation.
410.111-410.129 [Reserved]
410.130 General prohibitions against discrimination.
410.131-410.139 [Reserved]
410.140 Employment.

410.141-410.149 [Reserved]
410.150 Program accessibility: Existing facilities.
410.151 Program accessibility: New construction and alterations.
410.152-410.159 [Reserved]
410.160 Communications.
410.161-410.169 [Reserved]
410.170 Compliance procedures.
410.171-410.999 [Reserved]

Authority: 29 U.S.C. 794.

CONSUMER PRODUCT SAFETY COMMISSION
16 CFR Part 1033

ADDRESS: Comments should be sent to: Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207.

FOR FURTHER INFORMATION CONTACT: Robert T. Noonan, Office of General Counsel, Telephone (301)492-6980, TDD (800) 638-8270 National, (800) 492-8104 Md only.

List of Subjects in 16 CFR Part 1033

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 16 of the Code of Federal Regulatons be amended by adding Part 1033 as set forth at the end of this document.

Sadye E. Dunn, Secretary.

PART 1033 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE CONSUMER PRODUCT SAFETY COMMISSION

Sec.
1033.101 Purpose.
1033.102 Application.
1033.103 Definitions.
1033.104-1033.109 [Reserved]
1033.110 Self-evaluation.
1033.111-1033.129 [Reserved]
1033.130 General prohibitions against discrimination.
1033.131-1033.139 [Reserved]
1033.140 Employment.
1033.141-1033.149 [Reserved]
1033.150 Program accessibility: Existing facilities.
1033.151 Program accessibility: New construction and alterations.
1033.152-1033.159 [Reserved]
1033.160 Communications.
1033.161-1033.169 [Reserved]
1033.170 Compliance procedures.
1033.171-1033.999 [Reserved]

Authority: 29 U.S.C. 794.

UNITED STATES INTERNATIONAL TRADE COMMISSION
19 CFR Part 201

ADDRESS: Comments should be sent to: Mr. Terry P. Mc.Gowan, Room 166, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436.

FOR FURTHER INFORMATION CONTACT: Mr. Terry P. McGowan, Room 166, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436; telephone 202-523-0182. TDD (202)724-7678.

List of Subjects in 19 CFR Part 201

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 19 of the Code of Federal Regulatons be amended by adding Subpart G to Part 201 as set forth at the end of this document.

Alfred Eckes, Chairman.

PART 201 -- [AMENDED]

Part 201, Subpart G -- Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the U.S. International Trade Commission

Sec.
201.101 Purpose.
201.102 Application.
201.103 Definitions.
201.104-201.109 [Reserved]
201.110 Self-evaluation.
201.111-201.129 [Reserved]
201.130 General prohibitions against discrimination.
201.131-201.139 [Reserved]
201.140 Employment.
201.141-201.149 [Reserved]
201.1150 Program accessibility: Existing facilities.
201.1151 Program accessibility: New construction and alterations.
201.1152-201.159 [Reserved]
201.160 Communications.
201.161-201.169 [Reserved]
201.170 Compliance procedures.
201.171-201.999 [Reserved]

Authority: 29 U.S.C. 794.

AGENCY FOR INTERNATIONAL DEVELOPMENT
22 CFR Part 219

ADDRESS: Comments should be sent to Office of Equal Opportunity Programs, Agency for International Development, Room 1226, SA-2, Washington, D.C. 20523.

FOR FURTHER INFORMATION CONTACT: Dennis Diamond, Office of Equal Opportunity Programs, Agency for International Development, Room 1226, SA-2, Washington, D.C. 20523 (202) 632-5766, TDD: (202) 724-7678.

List of Subjects in 22 CFR Part 219

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 22 of the Code of Federal Regulations be amended by adding Part 219 as set forth at the end of this document.

Nancy D. Frame,Assistant General Counsel for Employee and Public Affairs, Office of the General Counsel.

PART 219 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY AGENCY FOR INTERNATIONAL DEVELOPMENT, INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Sec.
219.101 Purpose.
219.102 Application.
219.103 Definitions.
219.104-219.109 [Reserved]
219.110 Self-evaluation.
219.111-219.129 [Reserved]
219.130 General prohibitions against discrimination.
219.131-219.139 [Reserved]
219.140 Employment.
219.141-219.149 [Reserved]
219.150 Program accessibility: Existing facilities.
219.151 Program accessibility: New construction and alterations.
219.152-219.159 [Reserved]
219.160 Communications.
219.161-219.169 [Reserved]
219.170 Compliance procedures.
219.171-219.999 [Reserved]

Authority: 29 U.S.C. 794.

ARMS CONTROL AND DISARMAMENT AGENCY
22 CFR Part 607

ADDRESS: Comments should be sent to Equal Employment Opportunity Officer, U.S. Arms Control and Disarmament Agency, Washington, D.C. 20451.

FOR FURTHER INFORMATION CONTACT: F. Eugene Johnson, Room 5672A, 320 21st Street, NW., Washington, D.C. 20451, Telephone: Voice (202) 632-8666; TDD (202) 724-7678.

List of Subjects in 22 CFR Part 607

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 22 of the Code of Federal Regulations be amended by adding Part 607 as set forth at the end of this document.

William J. Montgomery, Administrative Director.

PART 607 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY U.S. ARMS CONTROL AND DISARMAMENT AGENCY

Sec.
607.101 Purpose.
607.102 Application.
607.103 Definitions.
607.104-607.109 [Reserved]
607.110 Self-evaluation.
607.111-607.129 [Reserved]
607.130 General prohibitions against discrimination.
607.131-607.139 [Reserved]
607.140 Employment.
607.141-607.149 [Reserved]
607.150 Program accessibility: Existing facilities.
607.151 Program accessibility: New construction and alterations.
607.152-607.159 [Reserved]
607.160 Communications.

607.161-607.169 [Reserved]
607.170 Compliance procedures.
607.171-607.999 [Reserved]

Authority: 29 U.S.C. 794.

INTERNATIONAL BOUNDARY AND WATER COMMISSION, UNITED STATES AND MEXICO -- UNITED STATES SECTION
22 CFR Part 1103

ADDRESS: Comments should be sent to International Boundary and Water Commission, United States and Mexico, United States Section, 4110 Rio Bravo Street, El Paso, Texas 79902.

FOR FURTHER INFORMATION CONTACT: Frank P. Fullerton, Legal Adviser, International Boundary and Water Commission, United States and Mexico, United States Section, 4110 Rio Bravo Street, El Paso, Texas 79902. Telephones: Commercial: (915) 541-7393, FTS: 572-7393, TDD: (202) 724-7678.

List of Subjects in 22 CFR Part 1103

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 22 of the Code of Federal Regulations be amended by adding Part 1103 as set forth at the end of this document.

Frank P. Fullerton, Legal Adviser.

PART 1103 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY INTERNATIONAL BOUNDARY AND WATER COMMISSION, UNITED STATES AND MEXICO, UNITED STATES SECTION

Sec.
1103.101 Purpose.
1103.102 Application.
1103.103 Definitions.
1103.104-1103.109 [Reserved]
1103.110 Self-evalutation.
1103.111-1103.129 [Reserved]
1103.130 General prohibitions against discrimination.
1103.131-1103.139 [Reserved]
1103.140 Employment.
1103.141-1103.149 [Reserved]
1103.150 Program accessibility: Existing facilities.
1103.151 Program accessibility: New construction and alterations.
1103.152-1103.159 [Reserved]
1103.160 Communications.
1103.161-1103.169 [Reserved]
1103.170 Compliance procedures.
1103.171-1103.999 [Reserved]

Authority: 29 U.S.C. 794.

BOARD FOR INTERNATIONAL BROADCASTING
22 CFR Part 1304

ADDRESS: Comments should be sent to 1201 Connecticut Avenue, NW., Suite 1100, Washington, D.C. 20036.

FOR FURTHER INFORMATION CONTACT: Kathryn M. Harper, 1201 Connecticut Avenue, N.W., Suite 1100, Washington, D.C. 20036 Telephone: (202) 254-8040, TDD: (202) 724-7678.

List of Subjects in 22 CFR Part 1304

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 22 of the Code of Federal Regulations be amended by adding Part 1304 as set forth at the end of this document.

Walter R. Roberts, Executive Director.

PART 1304 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE BOARD FOR INTERNATIONAL BROADCASTING

Sec.
1304.101 Purpose.
1304.102 Application.
1304.103 Definitions.
1304.104-1304.109 [Reserved]
1304.110 Self-evaluation.
1304.111-1304.129 [Reserved]
1304.130 General prohibitions against discrimination.
1304.131-1304.139 [Reserved]
1304.140 Employment.
1304.141-1304.149 [Reserved]
1304.150 Program accessibility: Existing facilities.
1304.151 Program accessibility: New construction and alterations.
1304.152-1304.159 [Reserved]
1304.160 Communications.
1304.161-1304.169 [Reserved]
1304.170 Compliance procedures.
1304.171-1304.999 [Reserved]

Authority: 29 U.S.C. 794.

AMERICAN BATTLE MONUMENTS COMMISSION
36 CFR Part 406

ADDRESS: Comments should be sent to Room 5127 Pulaski Bldg., 20 Massachusetts Ave., NW., Washington, D.C. 20314.

FOR FURTHER INFORMATION CONTACT: Col. Clayton L. Moran (202) 272-0534, TDD: (202) 724-7678.

List of Subjects in 36 CFR Part 406

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 36 of the Code of Federal Regulations be amended by adding Part 406 as set forth at the end of this document.

Clayton L. Moran, Colonel, FA, Director, Personnel and Administration.

PART 406 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY AMERICAN BATTLE MONUMENTS COMMISSION

Sec.
406.101 Purpose.
406.102 Application.
406.103 Definitions.
406.104-406.109 [Reserved]
406.110 Self-evaluation.

406.111-406.129 [Reserved]
406.130 General prohibitions against discrimination.
406.131-406.139 [Reserved]
406.140 Employment.
406.141-406.149 [Reserved]
406.150 Program accessibility: Existing facilities.
406.151 Program accessibility: New construction and lterations.
406.152-406.159 [Reserved]
406.160 Communications.
406.161-406.169 [Reserved]
406.170 Compliance procedures.
406.171-406.999 [Reserved]

Authority: 29 U.S.C. 794.

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES
National Endownment for the Humanities
45 CFR Part 1175

ADDRESS: Comments should be sent to Old Post Office Building, Room 419, 1100 Pennsylvania Ave., N.W., Washington, D.C. 20506.

FOR FURTHER INFORMATION CONTACT: Carol M. Gordon, Director, Office of Equal Opportunity (202) 786-0410, TDD: (202) 724-7678.

List of Subjects in 45 CFR Part 1175

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 45 of the Code of Federal Regulations be amended by adding Part 1175 as set forth at the end of this document.

William Bennett, Chairman.

PART 1175 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE NATIONAL ENDOWMENT FOR THE HUMANITIES

Sec.
1175.101 Purpose.
1175.102 Application.
1175.103 Definitions.
1175.104-1175.109 [Reserved]
1175.110 Self-evaluation.
1175.111-1175.129 [Reserved]
1175.130 General prohibitions against discrimination.
1175.131-1175.139 [Reserved]
1175.140 Employment.
1175.141-1175.149 [Reserved]
1175.150 Program accessibility: Existing facilities.
1175.151 Program accessibility: New construction and alterations.
1175.152-1175.159 [Reserved]
1175.160 Communications.
1175.161-1175.169 [Reserved]
1175.170 Compliance procedures.
1175.171-1175.999 [Reserved]

Authority: 29 U.S.C. 794.

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES
Institute of Museum Services
45 CFR Part 1181

ADDRESS: Comments should be sent to: Institute of Museum Services, Old Post Office Building, Room 510, 1100 Pennsylvania Avenue, N.W., Washington, D.C. 20506.

FOR FURTHER INFORMATION CONTACT: Institute of Museum Services (202) 786-0536, TDD: (202) 724-7678.

List of Subjects in 45 CFR Part 1181

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 45 of the Code of Federal Regulations be amended by adding Part 1181 as set forth at the end of this document.

Susan E. Phillips, Director, Institute of Museum Services.

PART 1181 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE INSTITUTE OF MUSEUM SERVICES

Sec.
1181.101 Purpose.
1181.102 Application.
1181.103 Definitions.
1181.104-1181.109 [Reserved]
1181.110 Self-evaluation.
1181.111-1181.129 [Reserved]
1181.130 General prohibitions against discrimination.
1181.131-1181.139 [Reserved]
1181.140 Employment.
1181.141-1181.149 [Reserved]
1181.150 Program accessibility: Existing facilities.
1181.151 Program accessibility: New construction and alterations.
1181.152-1175.159 [Reserved]
1181.160 Communications.
1181.161-1181.169 [Reserved]
1181.170 Compliance procedures.
1181.171-1181.999 [Reserved]

Authority: 29 U.S.C. 794.

NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE
45 CFR Part 1706

ADDRESS: Comments should be sent to Dr. Sarah G. Bishop, Deputy Director, GSA ROB 7th and D Streets, S.W., Suite 3122, Washington, D.C. 20024.

FOR FURTHER INFORMATION CONTACT: Sarah G. Bishop (202) 382-0840 (Voice) or (202) 724-7678 (TDD).

List of Subjects in 45 CFR Part 1706

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 45 of the Code of Federal Regulations be amended by adding Part 1706 as set forth at the end of this document.

Toni Carbo Bearman, Executive Director.

PART 1706 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY NATIONAL COMMISSION ON LIBRARIES AND

INFORMATION SCIENCE

Sec.
1706.101 Purpose.
1706.102 Application.
1706.103 Definitions.
1706.104-1706.109 [Reserved]
1706.110 Self-evaluation.
1706.111-1706.129 [Reserved]
1706.130 General prohibitions against discrimination.
1706.131-1706.139 [Reserved]
1706.140 Employment.
1706.141-1706.149 [Reserved]
1706.150 Program accessibility: Existing facilities.
1706.151 Program accessibility: New construction and alterations.
1706.152-1706.159 [Reserved]
1706.160 Communications.
1706.161-1706.169 [Reserved]
1706.170 Compliance procedures.
1706.171-1706.999 [Reserved]

Authority: 29 U.S.C. 794.

NATIONAL TRANSPORTATION SAFETY BOARD
49 CFR Part 807

ADDRESS: Comments should be sent to: John M. Stuhldreher, General Counsel, National Transportation Safety Board, 800 Independence Avenue, S.W., Washington, D.C. 20594.

FOR FURTHER INFORMATION CONTACT: John M. Stuhldreher, General Counsel, National Transportation Safety Board, Washington, D.C. 20594; (202-382-6540), (TDD 202-724-7678).

List of Subjects in 49 CFR Part 807

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 49 of the Code of Federal Regulations be amended by adding Part 807 as set forth at the end of this document.

Patricia A. Goldman, Vice Chairman.

PART 807 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE NATIONAL TRANSPORTATION SAFETY BOARD

Sec.
807.101 Purpose.
807.102 Application.
807.103. Definitions.
807.104-807.109 [Reserved]
807.110 Self-evaluation.
807.111-807.129 [Reserved]
807.130 General prohibitions against discrimination.
807.131-807.139 [Reserved]
807.140 Employment.
807.141-807.149 [Reserved]
807.150 Program accessibility: Existing facilities.

807.151 Program accessibility: New construction and alterations.
807.152-807.159 [Reserved]
807.160 Communications.
807.161-807.169 [Reserved]
807.170 Compliance procedures.
807.171-807.999 [Reserved]

Authority: 29 U.S.C. 794.

MARINE MAMMAL COMMISSION
50 CFR Part 550

ADDRESS: Comments should be sent to John R. Twiss, Jr., Executive Director, Marine Mammal Commission, Room 307, 1625 I Street, N.W., Washington, D.C. 20006.

FOR FURTHER INFORMATION CONTACT: John R. Twiss, Jr., Executive Director, Marine Mammal Commission, Room 307, 1625 I Street, N.W., Washington, D.C. 20006; (202) 653-6237. TDD: (202) 724-7678.

List of Subjects in 50 CFR Part 550

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

It is proposed that Title 50 of the Code of Federal Regulations be amended by adding Part 550 as set forth at the end of this document.

John R. Twiss, Jr., Executive Director.

PART 550 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY MARINE MAMMAL COMMISSION

Sec.
550.101 Purpose.
550.102 Application.
550.103 Definitions.
550.104-550.109 [Reserved]
550.110 Self-evaluation.
550.111-556.129 [Reserved]
550.130 General prohibitions against discrimination.
550.131-550.139 [Reserved]
550.140 Employment.
550.141-550.149 [Reserved]
550.150 Program accessibility: Existing facilities.
550.151 Program accessibility: New construction and alterations.
550.152-550.159 [Reserved]
550.160 Communications.
550.161-550.169 [Reserved]
550.170 Compliance procedures.
550.171 [Reserved]

Authority: 29 U.S.C. 794.

Part -- -- -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY -- -- -- -- --

Sec.
-- -- .101 Purpose.
-- -- .102 Application.
-- -- .103 Definitions.
-- -- .104- -- -- .109 [Reserved]
-- -- .110 Self-evaluation.
-- -- .111- -- -- .129 [Reserved]

-- -- .130 General prohibitions against discrimination.
-- -- .131- -- -- .139 [Reserved]
-- -- .140 Employment.
-- -- .141- -- -- .149 [Reserved]
-- -- .150 Program accessibility: Existing facilities.
-- -- .151 Program accessibility: New construction and alterations.
-- -- .152- -- -- 159 [Reserved]
-- -- .160 Communications.
-- -- .161- -- -- .169 [Reserved].
-- -- .170 Compliance procedures.
-- -- .171- -- -- .999 [Reserved].

Authority: 29 U.S.C. 794.

@ -- -- .101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

@ -- -- .102 Application.

This part applies to all programs or activities conducted by the agency.

@ -- -- .103 Definitions.

For purposes of this part, the term --

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

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, telecommunication devices, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's) interpreters, notetakers, written materials, and other similar services and devices.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's actions in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. 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.

"Facility" means all or any portion of buildings, structures, equipment, roads walks, parking lots, rolling stock or other conveyances, or other real or personal property.

" Handicapped person" means any person who has a physical or mental impairment that substantially limits one more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) "Physical or mental impairment" includes --

(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.

(2) "Major life activities" includes 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 the agency 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 the agency as having such an impairment.

"Qualified handicapped person" means --

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that would result in a fundamental alteration in its nature; and

(2) With respect to any other program or activity, a handicapped person who meets the essential eligiblility requirements for participation in, or receipt of benefits from, that program or activity.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

@ -- -- .104 -- -- .109 [Reserved]

@ -- -- .110 Self-evaluation.

Within one year of the effective date of this part, the agency shall conduct, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, a self-evaluation of its compliance with section 504.

@ -- -- .111- -- -- .129 [Reserved]

@ -- -- .130 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 conducted by the agency.

(b)(1) This agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap --

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

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

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

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

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) 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) The agency 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) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would --

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would --

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a
program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

@ -- -- .131- -- -- .139 [Reserved]

@ -- -- .140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

@ -- -- .141- -- -- .149 [Reserved]

@ -- -- .150 Program accessibility: Existing facilities.

(a) General. The agency 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 --

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicappd persons; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) Methods. The agency 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 any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157) and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(c) Time period for compliance. The agency shall comply with the obligations established under this section within sixty days of the effective date of this part except that where structural changes in facilities are undertaken, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(d) Transition plan. In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency 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 agency's facilities that limit the accessibility of its programs or activities 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 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;

(4) Indicate the official responsible for implementation of the plan; and

(5) Identify the persons or groups with whose assistance the plan was prepared.

@ -- -- .151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered, by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act, 42 U.S.C. 4151-4157, as established in 41 CFR 101.600 to 101.607, apply to buildings covered by this section.

@ -- -- .152- -- -- .159 [Reserved]

@ -- -- .160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunications devices for deaf persons (TDD's) or euqally effective telecommunication systems shall be used.

(b) The agency 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.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) The agency shall take appropriate steps to provide handicapped persons with information regarding their section 504 rights under the agency's programs or activities.

(e) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. If an action required to comply with this section would result in such an alteration or such burdens, the agency 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, handicapped persons receive the benefits and services of the program or activity.

@ -- -- .161- -- -- .169 [Reserved]

@ -- -- .170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504

with respect to employment according to the procedures established in 29 CFR 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The head of the agency shall designate an official to be responsible for coordinating implementation of this section.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 22), is not readily accessible and usable to handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing --

(1) Findings of fact and conclusions of law;

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

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by @ -- -- .170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make its determination on the appeal.

(k) The time limits cited in (g) and (j) above may be extended with the permission of the Assistant Attorney General.

(1) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making th
final determination may not be delegated.

@ -- -- .171- -- -- .999 [Reserved]

[FR Doc. 84-656 Filed 1-10-84; 8:45 am]

Document Separator

ENVIRONMENTAL PROTECTION AGENCY
AGENCY: Environmental Protection Agency (EPA).

40 CFR PART 12
Enforcement of Nondiscrimination on the Basis of Handicap in the Environmental Protection Agency's Programs

[FRL-3057-3]

52 FR 30598

August 14, 1987

ACTION: Final rule.

SUMMARY: This regulation provides for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap, as it applies to programs or activities conducted by the Environmental Protection Agency (EPA).

EFFECTIVE DATE: September 14, 1987.

FOR FURTHER INFORMATION CONTACT: Ms. Nereid Maxey, Office of Civil Rights (A-105), Environmental Protection Agency, Room 211 West Tower, 401 M Street, SW., Washington, DC 20460, (202) 382-4567, TDD (202) 382-4565.

Copies of this regulation are available on tape for those with impaired vision. The tape may be listened to at or ordered from the Office of Civil Rights, EPA, at the above address. For information, please call 202/382-4575 or TDD # 202/382-4565.

TEXT: SUPPLEMENTARY INFORMATION: On May 6, 1985, EPA published a Notice of Proposed Rulemaking (NPRM) for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap as it applies to programs and activities conducted by EPA 50 FR 19136.

By the close of the comment period, July 5, 1985, EPA had received five written comments and several telephone calls requesting information about the regulation. Three of the written comments were submitted by organizations representing the interests of individuals with handicaps, one comment from a union representing EPA employees, and one comment from an EPA Laboratory Office Director. The telephone comments and questions were received from EPA employees.

The Agency read and analyzed each comment. Most comments addressed more than one issue and expressed similar opinions.

The decisions the Agency made in response to these comments, however, were not made on the basis of the number of commenters addressing the issue, but on a thorough consideration of the merits of the points of view expressed in the comments. Copies of the written comments will be made available for public inspection in Room 206 West Tower of the EPA Headquarters Office, 401 M Street, SW., Washington, DC from 9:00 am to 4:00 pm, Monday through Friday, except for legal holidays, until October 13, 1987.

Section 504 requires that regulations that apply to the programs and activities of Federal Executive agencies shall be submitted to the appropriate authorizing committees of Congress and that such regulations may take effect no earlier than the thirtieth day after they have been so submitted. The Agency has today submitted this regulation to the Senate Committee on Labor and Human Resources and its Subcommittee on the Handicapped and the House Committee on Education and Labor and its Subcommittee on Select Education pursuant to the terms of section 504. The regulation will become effective on September 14, 1987.

This rule applies to all programs and activities conducted by EPA.

Background

The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) , as it applies to programs and activities conducted by the Environmental Protection Agency. As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Sec. 119, Pub. L. 95-602, 92 Stat. 2982) and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat 1810), section 504 of the Rehabilitation Act of 1973 states that

No otherwise qualified individual with handicaps 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(29 U.S.C. 794 (1978 amendment italicized).)

The substantive nondiscrimination obligations of the agency, as set forth in this rule, are indentical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. (See 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs).) This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) id.; 124 Cong. Rec. 13,897 (remarks or Rep. Brademas); id. at 38, 552 (remarks of Rep. Sarasin).

There are, however, some language differences between this final rule and the Federal Government's section 504 regulations for federally assisted programs. These changes are based on the Supreme Court's decisions in Southeastern Community College v. Davis, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting Davis and section 504. See Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981) (APTA); see also Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F.2d 490 (1st Cir. 1983).

These language differences are also supported by the decision of the Supreme Court in Alexander v. Choate, 469 U.S. 287 712 (1985), where the Court held that the regulations to federally assisted programs did not require a recipient to modify its durational limitation on Medicaid coverage of inpatient hospital care for individuals with handicaps. Clarifying its Davis decision, the Court explained that section 504 requires only "reasonable" modifications, id. at 300, and explicitly noted that "[t]he regulations implementing section 504 [for federally assisted programs] are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access" (id. at n.21) (emphasis added).

Incorporation of these changes, therefore, makes this regulation implementing section 504 for federally conducted programs consistent with the Federal Government's regulations implementing section 504 for federally assisted programs, as they have been as interpreted by the Supreme Court. Many of these

federally assisted regulations were issued prior to the interpretations of section 504 by the Supreme Court in Davis, lower court cases interpreting Davis, and by the Supreme Court in Alexander; therefore their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence, EPA relying on advice from the Civil Rights Division, U.S. Department of Justice,

believes that there are no significant differences between this final rule for federally conducted programs and the Federal Government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Department of Justice. It is an adaptation of a prototype prepared by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298) and distributed to Executive Agencies.

This regulation has also been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206).

It is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared.

This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601-612).

One commenter believed that small entities should comply with this rule because there is a substantial number of such entities which affect a considerable number of people. The Agency believes that the commenter is confusing federally assisted regulation governs only the activities and programs conducted by EPA. For example, the regulation applies to EPA's offices and laboratories, public meetings held by EPA, and accommodations for its employees and members of the public who are handicapped entering its properties. It applies to all EPA components regardless of their size.

Section-by-Section Analysis and Response to Comments

Section 12.101 Purpose.

Section 12.101 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

We received one written comment and several telephone inquiries regarding this section. Some commenters were concerned that this regulation did not also apply to EPA's grantees and contractors. EPA grantees are covered by its federally assisted nondiscrimination regulation. Employment activities of certain EPA contractors are covered by section 503 of the Rehabilitation Act of 1973, which is administered by the U.S. Department of Labor. In order to avoid future confusion, we have added a reference to the Agency's federally assisted non- discrimination regulations found at 40 CFR Part 7 (1986).

Section 12.102 Application.

The regulation applies to all programs or activities conducted by the agency. It should be noted that EPA's programs are designed to promote a cleaner and healthier environment. Thus, at this time we anticipate, in a nonemployment context, that this regulation will have its greatest impact on ensuring that the various meetings, symposia, and hearings conducted by EPA are accessible. This regulation does, not, however, apply to programs or activities conducted outside

the United States that do not involve individuals with handicaps in the United States.

Section 12.103 Definitions.

"Agency." For purposes of this regulation "agency" means Environmental Protection Agency.

"Assistant Attorney General." "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Although auxiliary aids are required explicitly only by @ 12.160(a)(1), they may also be necessary to meet other requirements of the regulation.

Two commenters suggested that this definition be expanded to include a "laundry list" of aids such as attendant services. The Agency believes, however, that such a list could be interpreted too literally thereby limiting the use of certain aids not mentioned. We believe it is necessary for the Agency to have flexibility to expand the use of auxiliary aids as individual needs, techniques and technology change. The decision to provide attendant services, as well as all other auxiliary aids, will be made on an individual basis.

One commenter believed "that a specific statement that auxiliary aids are required in all aspects of EPA's federally conducted programs should be included in the regulation itself." The Agency believes that program accessibility does not necessarily require the use of auxiliary aids in every instance. For example, holding a public hearing in a place which is accessible to a person who uses a wheelchair and who plans to attend would make the program available to that person. However, providing a sign language interpreter at the hearing when no hearing-impaired person plans to attend would be a needless expense.

"Complete complaint." "Complete complaint" is defined to include all the information necessary to enable the agency to investigate the complaint. The definition is necessary, because the 180-day period for the agency's investigation (see @ 12.170(g)) begins when the agency receives a complete complaint.

"Facility." The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs (28 CFR 41.3(f)) except that the term "rolling stock or other conveyances" has been added and the phrase "or interest in such property" has been deleted because the term "facility," as used in the regulation, refers to structures and not to intangible property rights. It should, however, be noted that the regulation applies to all programs and activities conducted by the agency regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the agency. The term "facility" is used in @ 12.149, @ 12.150 and @ 12.170(f).

One commenter objected to the deletion of the phrase "or interest in such property" as contained in the section 504 coordination regulation for federally assisted programs. As explained in the preamble to the NPRM, the term "facility" as used in this regulation refers to structures, and does not include intangible property rights. The definition, therefore, has no effect on the scope of coverage of programs, including those conducted in facilities not included in the definition. The phrase has been omitted because the requirement that facilities be accessible would be a logical absurdity if applied to a lease, life estate, mortgage, or other intangible property interest. The regulation applies to all programs and activities conducted by the agency regardless of whether the facility in which they are conducted is owned, leased,

or used on some other basis by the agency.

"Individual with handicaps. " The definition of "individual with handicaps" is identical to the definition of " handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the statutory term " handicapped individual" to "individual with handicaps, " the legislative history of this amendment indicates that no substantive change was intended. Thus, although the term has been changed in this regulation to be consistent with the statute as amended, the definition is unchanged. In particular, although the term as revised refers to " handicaps" in the plural, it does not exclude persons who have only one handicap.

"Qualified individual with handicaps. " The definition of "qualified individual with handicaps" is a revised version of the definition "qualified handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

Paragraph (1) deviates from most existing regulations for federally assisted programs because of intervening court decisions. It defines "qualified individual with handicaps" with regard to any program under which a person is required to perform services or to achieve a level of accomplishment. In such programs a qualified individual with handicaps is one who can achieve the purpose of the program without modifications in the program that the agency can demonstrate would result in a fundamental alteration in its nature. This definition reflects the decision of the Supreme Court in Southeastern Community College v. Davis, 422 U.S. 397 (1979). In that case, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program were modified to enable to respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." Id. at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," id. at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." Id. at 410.

We have incorporated the Court's language in the definition of "qualified individual with handicaps" in order to make clear that such a person must be able to participate in the program offered by the agency. The agency is required to make modifications in order to enable an applicant with handicaps to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered -- not whether the applicant could benefit or obtain results from some other program that the agency does not offer. Although the revised definition allows exclusion of some individuals with handicaps from some programs, it requires that an individual with handicaps who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

Several commenters objected to this revised definition for a variety of reasons. Several commenters stated that the Agency incorrectly used Davis as the justification for explaining the differences between the federally assisted and the federally-conducted regulations because the Supreme Court upheld the validity of the existing regulations in Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984). This view misunderstands the Court's actions in Darrone. In that case the Court ruled on a series of issues, the most important of which was under what circumstances section 504 applies to employment discrimination by recipients. The Court did not concern itself either directly or indirectly with

the definition of "qualified individual with handicaps" or whether section 504 included limitations based on "undue financial and administrative burdens".

These commenters stated that the proposal would change the definition of "qualified individual with handicaps" for employment. "Qualified individual with handicaps" is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by @ 12.140. Nothing in this part changes existing regulations applicable to employment.

Some commenters assumed that the definition would have the effect of placing on the individual with handicaps the burden of proving that he or she is qualified. The definition has been revised to make it clear that the agency has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Further, in demonstrating that a modification would result in such an alteration, the agency must follow the procedures established in @ 12.150(a)(2) and @ 12.160(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the agency head or his or her designee in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the agency head determines that an action would result in a fundamental alteration, the agency must consider options that would enable the individual with handicaps to achieve the purpose of the program but would not result in such an alteration.

Some commenters said that the definition of "qualified individual with handicaps" places individuals with handicaps in a "Catch-22" situation: because only qualified individuals with handicaps are protected by the statute, a determination that a person is not qualified would make enforcement remedies unavailable to that person. This concern is misplaced. If the Agency determined that a individual with handicaps was not "qualified", the person could use the procedures established by @ 12.170 to challenge that determination, just as he or she could challenge any other decision that he or she believed to be discriminatory.

Some commenters argued that the definition of "qualified individual with handicaps" confused what should be two separate inquiries: Whether a person meets essential eligibility requirements and, if so, whether accommodation is required. They argued that the reference to "fundamental alteration" in the definition focuses attention on accomodations rather than on an individual with handicaps's abilities. As another commenter noted, however, the Supreme court in Davis developed the "fundamental alteration" language in a decision that was determining the nature and scope of what constitutes a qualified individual with handicaps. The Agency continues to believe that the concept of "qualified individual with handicaps" properly encompasses both the notion of "essential eligibility requirements" and the notion of program modifications that might fundamentally alter a program.

Some commenters argued that our analysis of Davis was inappropriate because Davis was decided on the basis of individual facts unique to that case or because Davis involved federally assisted and not federally conducted programs. While cases are decided on the basis of specific factual situations, courts, especially the Supreme Court, develop general principles of law for use in analyzing facts. The Davis decision was the Supreme Court's first comprehensive view of section 504, a major new civil rights statute. The Davis holding, that a person who cannot achieve the purpose of a program without fundamental changes in its nature is not a "qualified individual with handicaps, " is a general principle, a statement by the Court on how it views section 504. It is therefore necessary to reflect this principle in the Agency's regulation.

For programs or activities that do not fall under the first paragraph, paragraph (2) adopts the existing definition of "qualified individual with handicaps" with respect to services (28 CFR 41.32(b)) in the coordination

regulation for programs receiving Federal financial assistance. Under this part of the definition, a "qualified individual with handicaps" is an individual with handicaps who meets the essential eligibility requirements for participation in the program of activity.

Paragraph (3) explains that "qualified individual with handicaps" is defined for purposes of employment in the Equal Employment Opportunity Commission's regulation at 29 CFR 1613.702(f), which is made applicable to this part by @ 12.140. Nothing in this part changes existing regulations applicable to employment.

"Section 504. " This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the agency and not to programs or activities to which it provides Federal financial assistance.

Section 12.110 Self-evaluation.

The agency shall conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The agency shall provide an opportunity for interested persons, including individuals with handicaps or organizations representing individuals with handicaps, and unions representing employees to participate in the self-evaluation process by submitting comments (both oral and written).

The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with handicaps that promotes both effective and efficient implementation of section 504.

The self-evaluation will be concluded with a report to the Administrator of findings and recommendations. Within 60 days of the receipt of the report, the Administrator will direct that certain actions be taken as he/she deems appropriate.

We received one comment with respect to the self-evaluation section. while generally approving the section, the commenter suggested the section contain (1) an assurance that the effects of discrimination will be eliminated; (2) a transition plan for compliance; and, (3) a laundry list of specific modification requirements.

A requirement for a transition plan to ensure compliance with @ 12.150 is contained in @ 12.150 (d) and further reference would be redundant. When this final regulation becomes effective, the agency plans to appoint transition and self-evaluation teams to work in tandem toward achieving their respective goals. Under @ 12.110(c), the Administrator will direct appropriate actions based on the findings of the self-evaluation. Including a laundry list of requirements in the rule would negate the purpose of the self-evaluation process. The purpose of self-evaluation is to formulate recommendations in light of particular circumstances being evaluated. Including specific modification requirements in the regulation would preclude the self-evaluation from taking into account specific circumstances which might make the regulatory requirements inappropriate.

Section 12.111 Notice.

Section 12.111 requires the agency to disseminate sufficient information to employees, unions representing employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe

the agency's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

Two comments were received about this section. One argued that notice of agency policy should be distributed in recruitment materials. Inasmuch as this comment basically involves employment, it would be addressed not by this rule but by section 501 requirements. The other commenter argued that the agency should "effectively" apprise persons of their rights and protection against discrimination and suggested that we use the section promulgated by the Federal Election Commission (FEC) (11 CFR 6.111). We feel that @ 12.111 adequately addresses this point by requiring the provision of "necessary" information.

Section 12.130 General prohibitions against discrimination.

Section 12.130 is an adaptation of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51).

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in @ 12.130 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. If the agency violates a provision in any of the subsequent sections, it will also violate one of the general prohibitions found in @ 12.130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of individuals with handicaps. The agency may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from its program simply because the individual is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (e.g., epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question. It would be permissible, therefore, to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce; but it may not be permissible to automatically disqualify all those who are blind in just one eye.

One commenter argued that the use of an "irrebuttable presumption" is never justified, asked what expertise people had to make these decisions, and asked who would make such decisions. We agree to a point, referring the readers to the earlier discussion of the blind commercial vehicle operator. Agency officials making a decision based on irrebuttable presumptions would be required to research the presumption prior to making the decision.

In addition, section 504 prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on program accessibility (@@ 12.149-151) and communications (@ 12.160) are specific applications of this principle.

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, paragraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids,

benefits, or services when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the agency's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Paragraph (b)(1)(v) prohibits the agency from denying a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vi) prohibits the agency from limiting a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the agency from utilizing criteria or methods of administration that deny individuals with handicaps access to the agency's programs or activities. The phrase "criteria or methods of administration" refers to official written agency policies and the actual practices of the agency. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with handicaps an effective opportunity to participate.

Paragraph (b)(4) specifically applies the prohibition enunciated in @ 12.130(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the agency. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

One commenter suggested that the prohibition concerning selection of sites should also apply to construction of additional buildings at an existing site. The suggested prohibition could possibly prevent EPA from fully utilizing existing sites. It could be extremely disruptive of EPA site utilization to retroactively apply this section, so we have not. However, new construction on those existing sites must be accessible.

Paragraph (b)(5) prohibits the agency, in the selection of procurement contractors, from using criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

Paragraph (b)(6) prohibits the agency from discriminating against qualified individuals with handicaps on the basis of handicap in the granting of licenses or certification. A person is a "qualified individual with handicaps"

with respect to licensing or certification, if he or she can meet the essential eligibility requirements for receiving the license or certification (see @ 12.103).

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

Paragraph (b)(6) does not extend section 504 directly to the programs or activities of licensees or certified entities themselves. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities nor are they programs or activities

receiving Federal financial assistance merely by virtue of the Federal license or certificate. However, as noted above, section 504 may affect the content of the rules established by the agency for the operation of the program of activity of the licensee or certified entity, and thereby indirectly affect limited aspects of their operations.

One commenter objected to the omission of a paragraph from the regulations for federally assisted programs that prohibits a recipient from providing significant assistance to an organization that discriminates. To the extent that assistance from the agency would provide significant support to an organization, the organization, as a recipient, would be covered by the agency's section 504 regulation for federally assisted programs. The regulatory "significant assistance" provision, however, would be inappropriate in a regulation applying only to federally conducted programs or activities.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with handicaps or a given class of individuals with handicaps may be limited to those individuals with handicaps.

Paragraph (d) provides that the agency must administer programs or activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, i.e., in a setting that enables individuals with handicaps to interact with nonhandicapped persons to the fullest extent possible.

Section 12.140 Employment

Section 12.140 prohibits discrimination on the basis of handicap in employment by the Agency. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. Gardner v. Morris, 752 F.2d 1271, 1277 (8th Cir. 1985); Smith v. United States Postal Service, 742 F.2d 257, 259-260 (6th Cir. 1984); Prewitt v. United States Postal Service, 662 F.2d 292, 302-04 (5th Cir. 1981). Contra McGuiness v. United States Postal Service, 744 F.2d 1318, 1320-21 (7th Cir. 1984); Boyd v. United States Postal Service, 752 F.2d 410, 413-14 (9th Cir. 1985).

Courts uniformly have held that in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. Smith, 742 F.2d at 262; Prewitt, 662 F.2d at 304. Accordingly, @ 12.140 (Employment) of this rule adopts the definitions, requirements and procedures of section 501 as established in regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR Part 1613. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (3 CFR 1978 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap. In addition to this section, @ 12.170(b) specifies that the agency will use the existing EEOC procedures to resolve allegations of employment discrimination.

We received one comment which argued that the "whole section is too brief and weak, and does not give enough attention . . . to employment of disabled persons." The Agency disagrees. Section 501 and its implementing regulations are solely devoted to employment discrimination against individuals with handicaps. No purpose is served by duplicating them in this regulation once the public is put on notice that the employment standards under section 501 and section 504 are identical. However, to ensure that there is no misunderstanding, we have added to the definiton of "qualified individual with handicaps" (@ 12.103), subparagraph (3), which incorporates the definition in 29 CFR 1613 (EEOC's section 501 regulation), for employment purposes.

Section 12.149 Program accessibility: Discrimination prohibited

Section 12.149 states the general nondiscrimination principle underlying the program accessibility requirements of @@ 12.150 and 12.151. The Environmental

Protection Agency (EPA) is committed to making its programs accessible to individuals with handicaps; however, as noted earlier, its programs are designed to promote a cleaner and healthier environment. Thus, as previously mentioned, we anticipate, in a nonemployment context, that this regulation will have its greatest impact on insuring that the various meetings, symposia, and hearings conducted by EPA are accessible. Please note that, as discussed above with respect to @ 12.101, EPA-assisted programs and activities are not covered by this regulation but are covered by the regulation found at 40 CFR Part 7. It is that regulation which applies to EPA assistance such as building wastewater treatment plants.

Section 12.150 Program accessibility: Existing facilities

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.57), with certain modifications. Thus, @ 12.150 requires that each agency program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. The regulation also makes clear that the agency is not required to make each of its existing facilities accessible (@ 12.150(a)(1)). However, @ 12.150, unlike 28 CFR 41.57, places explicit limits on the agency's obligation to ensure program accessibility (@ 12.150(a)(2)).

Paragraph (a)(2) generally codifies recent case law that defines the scope of the agency's obligation to ensure program accessibility.

The "undue financial and administrative burdens" language found at @ 12.150(a)(2) (and paragraph (d) of @ 12.160, discussed below) is based on the Supreme Court's Davis holding that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since Davis, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. See also, e.g., Dopico v. Goldschmidt, supra; American Public Transit Association v. Lewis (APTA), supra.

Paragraphs (a)(2) and 12.160(d) are also supported by the Supreme Court's decision in Alexander v. Choate, 469 U.S. 287 (1985). Alexander involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days per year. Plaintiffs argued that this reduction violated section 504 because it had an adverse impact on individuals with handicaps. The Court assumed without deciding that section 504 reaches at least some conduct that has a unjustifiable disparate impact on individuals with handicaps but held that the reduction was not "the sort of disparate impact" discrimination that might be prohibited by section 504 or its implementing regulation. Id. at 299.

Relying on Davis, the Court said that section 504 guarantees qualified individuals with handicaps "meaningful access to the benefits that the grantee offers," id. at 301, and that "reasonable adjustments in the nature of the benefit being offered must at times be made to assure meaningful access." Id. at n.21 (emphasis added). However, section 504 does not require " 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' . . . or that would constitute 'fundamental alteration[s] in the nature of a program.' " Id. at n.20 (citations omitted).

Paragraph (a)(2) does not establish an absolute defense; it does not relieve the agency of all obligations to individuals with handicaps. Although the agency is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with handicaps receive the benefits and services of the federally conducted program or activity.

Three of the four commenters sought the deletion of "undue financial and administrative burdens" and asked that "undue hardship" be reinstated in its place. "Undue hardship" is a term of art used in the employment context. In order to be consistent with regulations issued by other executive agencies, we have retained the term "undue financial and administrative burdens" in this rule.

Two of the commenters argued that compliance decisions should be made after considering "all agency resources". As noted above and in the NPRM we agree. It should be pointed out, however, that certain of the funds which are appropriated to EPA are legislatively restricted to certain programs for which they can be used. Reprogramming of those funds may not be available to the Agency.

Paragraph (b) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with handicaps. Structural changes in existing facilities are required only when there is no other feasible way to make the agency's program accessible. The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the agency must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section 12.151 Program accessibility: New construction and alterations

Overlapping coverage exists with respect to new construction under section 504 and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). Section 12.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by individuals with handicaps in accordance with 41 CFR 101-19.600 to 101-19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). We believe that it is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required to meet accessibility standards merely by virtue of being leased. They are subject, however, to the program accessibility standards of @ 12.150. To the extent the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of @ 12.151.

Alexander supports the position, based on Davis and the earlier, lower court decisions, that in some situations, certain accommodations for an individual with handicaps may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. Thus failure to include such an "undue burdens" provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

Some commenters asserted that the holding in Davis was that the plaintiff was not a qualified individual with handicaps and that the subsequent reference to "undue financial and administrative burdens" was mere dicta. This view overlooks the interpretations of Davis provided by the Federal circuit court cases mentioned above. The APTA and Dopico decisions make it clear that financial burdens can limit the obligation to comply with section 504. See also New Mexico Association for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982). In addition, the Court in Alexander held that the "administrative costs" of subjecting any action affecting Medicaid recipients to a detailed analysis of its effects on individuals with handicaps "would be well beyond the accommodations that are required under Davis." 469 U.S. at 308.

One comment included a lengthy analysis opposing the undue burdens defense. This comment was premised on the assumption that the proposed regulation was substantively inconsistent with the regulations for federally assisted programs. This assumption is incorrect. Judicial interpretations have established that neither section 504 nor the regulations for federally assisted programs establish an unlimited obligation to modify programs or activities to accommodate individuals with handicaps. In fact, this comment acknowledged that the Department of Health, Education, and Welfare's regulation for its own federally assisted programs "took 'factors of burden and cost . . . into account.' "

This comment also argued that APTA is no longer good law, in view of the Supreme Court's decision in Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) (Conrail), in which it said that Congress intended, through the 1978 amendments to the statute, to codify the HEW regulation. Other commenters also argued that Conrail prohibits departures from the language of the federally assisted regulation. As previously noted, however, Conrail addressed only the question of employment coverage under the statute and cannot be read to mean that Congress "codified" other parts of the regulation. Furthermore, the undue burdens defense is not inconsistent with the HEW regulation; in fact, the employment provisions of the HEW regulation -- those addressed in Conrail -- do include an "undue hardship" defense. That view is confirmed by the Supreme Court's decision in Alexander. There the Court referred to its previous recognition in Conrail of the regulation as "an important source of guidance on the meaning of Section 504, " Alexander, at n.24, and at the same time, as discussed above, emphasized that section 504 does not mandate extensive costs and administrative burdens.

The agency is adopting the proposed rule's procedural requirements for application of the "fundamental alterations" and "undue financial and administrative burdens" language. The agency believes that, in most cases, making an agency program accessible will not result in undue burdens. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with @ 21.150(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the agency. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the agency head's decision or failure to make a decision may file a complaint under the compliance procedure established in @ 12.170.

A commenter has recommended that the regulation should require that buildings leased after the effective date of the regulation should meet the new construction standards of @ 12.151, rather than the program accessibility standard for existing facilities in @ 12.150. Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the agency believes the same program accessibility standard should apply to both owned and leased existing buildings.

In Rosev. United States Postal Service, 774 F.2d 1355 (9th Cir. 1985), the Ninth Circuit held that the Architectural Barriers Act requires accessibility at the time of lease. The Rose court did not address the issue of whether section 504 likewise requires accessibility as a condition of lease, and the case was remanded to the District Court for, among other things, consideration of that issue. The agency may provide more specific guidance on section 504 requirements for leased buildings after the litigation is completed.

Section 12.160 Communications.

Section 12.160 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under @ 12.160(a)(1) to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They shall also include an opportunity for individuals with handicaps to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the agency (@ 12.160(a)(1)(i)). The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under @ 12.160(d). That paragraph limits the obligation of the agency to ensure effective communication in accordance with Davis and the circuit court opinions interpreting it (see supra preamble discussion of @ 12.150(a)(2)). Unless not required by @ 12.160(d), the agency shall provide auxiliary aids at no cost to the individual with handicaps.

It is our view that compliance with @ 12.160 would in most cases not result in undue financial and administrative burdens on the agency. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with @ 12.160 would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the agency as set forth in @ 12.160(d). The decision that compliance would result in such alteration or burdens must be made by the agency head or designee and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the agency head's decision or failure to make a decision may file a complaint under the compliance procedures established in @ 12.170.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (e.g., a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. In these cases a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to make clear to the public (1) the communications services it offers to afford individuals with handicaps an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preferences

regarding auxiliary aids if it can demonstrate that several different modes are effective.

The agency shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the agency. Auxiliary aids must be afforded where necessary to ensure effective communication at the proceedings. If sign language interpreters are necessary, the agency may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (@ 12.160(a)(1)(ii)). For example, the agency need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

Three comments provided suggestions to include a "laundry list" of the types of auxiliary aids which could be used by individuals with handicaps. The agency believes the examples provided in the preamble and body of the regulation although not all-inclusive, are sufficient. We believe that other types of auxiliary aids described by the commenters can best be considered by the transition and self-evaluation teams.

Paragraph (b) requires the agency to provide information to individuals with handicaps concerning accessible services, activities, and facilities. Paragraph (c) requires the agency to provide signage at inaccessible facilities that directs users to locations with information about accessible facilities.

Section 12.170 Compliance procedures.

Paragraph (a) specifies that paragraphs (c) through (1) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the agency will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR Part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

The agency is required to accept and investigate all complete complaints (@ 12.170(d)). If it determines that it does not have jurisdiction over a complaint, it shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal Government (@ 12.170(e)).

Paragraph (f) requires the agency to notify the Architectural and Transportation Barriers Compliance Board upon receipt of a complaint alleging that a building or facility subject to the Architectural Barriers Act was designed, constructed, or altered in a manner that does not provide ready access and use by individuals with handicaps.

Paragraph (g) requires the agency to provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal (@ 12.170(g)).

Paragraph (h) requires appeals to be filed within 90 days of the receipt of the written notification required at the end of the investigation. The agency may extend this time for good cause. This time limit was increased from 30 days in the proposed rule.

Paragraph (i) provides for the Administrator or a designee to hear any appeal. In the proposed rule, the Judicial Officer was to decide appeals of agency determinations after investigation. In the interim, it was decided to preserve the Administrator's flexibility. Thus, in the final rule, all appeals are filed with the Administrator or designee.

Paragraph (j) requires that the Administrator or a designee notify the complainant of the results of the appeal within 60 days of the appeal request. If additional information is needed from the complainant, the Administrator has 60 days from receipt of this information to make an appeal determination.

Paragraph (k) allows the time limit for complaint investigation and appeal decisions to be extended with the permission of the Assistant Attorney General.

Paragraph (l) permits the agency to delegate its authority for investigating complaints to other Federal agencies. However, the statutory obligation of the agency to make a final determination of compliance or noncompliance may not be delegated.

Two commenters provided several recommendations concerning this section. It was suggested that the addresses of all EPA offices and laboratories be included in the final regulation. Such an address list would be impractical for the reader as well as the agency. The agency expects these regulations to remain in effect for some time. Regional offices and laboratories are moved from time to time and we found that once an address list is published it is usually out-of-date due to moves taking place while the list was awaiting publication. To publish such an address list would mean a continuous revision of the regulation.

The commenter also asked that the regulation provide an opportunity for a complainant to provide additional information and/or amend a complaint in the event a complete complaint is not submitted. The section allows for additional time if good cause exists which permits the Office of Civil Rights to provide additional time for a complainant to make the complaint complete.

The commenter further suggested that EPA has an absolute responsibility to refer complaints over which it has no jurisdiction to other agencies. However, complaints may be received over which no agency has jurisdiction. In other instances EPA may have no way of knowing that a particular agency has jurisdiction. In these situations, EPA cannot be held responsible for failure to refer a complaint. EPA will continue its practice of referring complaints to agencies with probable jurisdiction to the extent it can do so.

Finally, the commenter requested that EPA state that its rules and procedures do not curtail the right of a complainant to obtain direct judicial relief. Our regulation pertains to administrative processing. It in no way, in and of itself, affects a complainant's access to judicial relief.

The commenter further suggested that provisions be added addressing attorneys' fees in administrative proceedings and the availability of compensation to the prevailing party. Nothing contained in Title V of the Rehabilitation Act provides for attorneys' fees in administrative proceedings other than those involving Federal employment. We have, therefore, not included an attorneys' fee provision in the current regulation.

List of Subjects in 40 CFR Part 12

Blind, Buildings, Civil rights, Employment, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped.

For the reasons set forth in the preamble, 40 CFR Part 12 of the Code of Federal Regulations is amended as follows:

July 24, 1987.

Lee M. Thomas, Administrator.

Part 12 is added to read as follows:

PART 12 -- NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE ENVIRONMENTAL PROTECTION AGENCY

Sec.
12.101 Purpose.
12.102 Application.
12.103 Definitions.
12.104-109 [Reserved]
12.110 Self-evaluation.
12.111 Notice.
12.112-129 [Reserved]
12.130 General prohibitions against discrimination.
12.131-139 [Reserved]
12.140 Employment.
12.141-148 [Reserved]
12.149 Program accessibility: Discrimination prohibited.
12.150 Program accessibility: Existing facilities.
12.151 Program accessibility: New construction and alterations.
12.152-159 [Reserved]
12.160 Communications.
12.161-169 [Reserved]
12.170 Compliance procedures.

Authority: 29 U.S.C. 794.

@ 12.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service. Section 504 regulations applicable to recipients of financial assistance from the Environmental Protection Agency (EPA) may be found at 40 CFR Part 7 (1986).

@ 12.102 Application.

This part applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

@ 12.103 Definitions.

For purposes of this part, the term --

"Agency" means Environmental Protection Agency.

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

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. 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.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Individual with handicaps" 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. As used in this definition, the phrase:

(1) "Physical or mental impairment" includes --

(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" includes 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 the agency 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 subparagraph (1) of this definition but is treated by the agency as having such an impairment.

"Qualified individual with handicaps" means --

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity, without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) "Qualified handicapped person" as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by @ 12.140.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act

Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

@ 12.104-109 [Reserved]

@ 12.110 Self-evaluation.

(a) The agency shall, by November 13, 1987, begin a nationwide evaluation, of its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps to, participate in the self-evaluation process by submitting comments (both oral and written).

(b) The evaluation shall be concluded by September 14, 1988, with a written report submitted to the Administrator that states the findings of the self-evaluation, any remedial action taken, and recommendations, if any, for further remedial action.

(c) The Administrator shall, within 60 days of the receipt of the report of the evaluation and recommendations, direct that certain remedial actions be taken as he/she deems appropriate.

(d) The agency shall, for at least three years following completion of the evaluation required under paragraph (b) of this section, maintain on file and make available for public inspection:

(1) A list of the interested persons consulted;

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

(3) A description of any modifications made.

@ 12.111 Notice.

The agency shall make available to employees, unions representing employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the agency head finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

@@ 12.112-12.129 [Reserved]

@ 12.130 General prohibitions against discrimination.

(a) No qualified individual with handicaps 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 conducted by the agency.

(b) (1) The agency, 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 individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps 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 handicaps 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 handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

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

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

(2) The agency may not deny a qualified individual with handicaps 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) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would --

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would --

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the program or activities of entities that are licensed or certified by

the agency are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

@@ 12.131-12.139 [Reserved]

@ 12.140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

@@ 12.141-12.148 [Reserved]

@ 12.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in @ 12.150, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

@ 12.150 Program accessibility: Existing facilities.

(a) General. The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not --

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with @ 12.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or designee after considering all agency resources available for use in the funding and operation of the conducted 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, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) Methods. The agency 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 any other methods that result in making its programs or activities readily

accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) Time period for compliance. The agency shall comply with the obligations established under this section by November 13, 1987, except that where structural changes in facilities are undertaken, such changes shall be made by September 14, 1990, but in any event as expeditiously as possible.

(d) Transition plan. In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by March 14, 1988, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps to participate in the development of the transition plan by submitting comments (both oral and written). 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 agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(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 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

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

@ 12.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

@@ 12.152-12.159 [Reserved]

@ 12.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individuals with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency 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.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with @ 12.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or designee after considering all agency resources available for use in the funding and operation of the conducted 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 section would result in such an alteration or such burdens, the agency 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 handicaps receive the benefits and services of the program or activity.

@@ 12.161-12.169 [Reserved]

@ 12.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504

with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsibility for coordinating implementation of this section shall be vested in the Director of the Office of Civil Rights, EPA or his/her designate.

(d) The complainant may file a complete complaint at any EPA office. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause. The agency shall accept and investigate all complete complaints for which it has jurisdiction.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building of facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing --

(1) Findings of fact and conclusions of law;

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

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by @ 12.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Administrator or a designee.

(j) The Administrator or a designee shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the Administrator or designee determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in (g) and (j) of this section above may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

@@ 12.171-12.999 [Reserved]

[FR Doc. 87-18485 Filed 8-13-87; 8:45 am]

Document Separator

HARRY S. TRUMAN SCHOLARSHIP FOUNDATION
AGENCY: Harry S. Truman Scholarship Foundation.

45 CFR Part 1803
Nondiscrimination on the Basis of Handicap

54 FR 4794

January 31, 1989

ACTION: Final rule.

SUMMARY: This regulation applies to programs or activities conducted by the Harry S. Truman Scholarship Foundation the provisions of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, which prohibits discrimination on the basis of handicap.

EFFECTIVE DATE: This regulation becomes effective upon the expiration of 30 days after this publication during which either or both Houses of Congress are in session.

FOR FURTHER INFORMATION CONTACT: Malcolm C. McCormack, Executive Secretary, Harry S. Truman Scholarship Foundation, 712 Jackson Place NW., Washington, DC 20006, (202) 395-4831 or (202) 566-2673 (TDD) (Treasury Department relay service).

TEXT: SUPPLEMENTARY INFORMATION: On December 21, 1987 the Harry S. Truman Scholarship Foundation ("Foundation") published in the Federal Register, 52 FR 48297, a notice of proposed rulemaking. That notice solicited comments on a proposed regulation applying to programs and activities conducted by the Harry S. Truman Scholarship Foundation ("Foundation") the provisions of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) , as amended.

No comments were received. The Foundation therefore is adopting its earlier proposal as its final regulation with only minor changes to @@ 1803.10(a)(2), 1803.11(f), and 1803.11(1). These changes are made at the request of the Department of Justice. The preamble to the proposal explained the background for this regulation and analyzed each of its sections.

This regulation has been reviewed by the Department of Justice under Executive Order No. 12250 (45 FR 72 995, 3 CFR, 1980 Comp., p. 298). This regulation has also been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206). As noted in connection with publication of the proposed regulation, @ 1803.9 provides that the standards, requirements and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as elaborated in EEOC's regulations at 29 CFR Part 1613, are applicable under section 504 of the Act to employment by the Foundation.

This regulation is not a major rule within the meaning of Executive Order No. 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared.

This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act, 5 U.S.C. 601-612.

List of Subjects in 45 CFR Part 1803

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

Chapter XXVIII of Title 45 of the Code of Federal Regulations, entitled "Harry S. Truman Scholarship Program," is amended by adding Part 1803 as follows:

PART 1803 -- NONDISCRIMINATION ON THE BASIS OF HANDICAP

Sec.

1803.1 Purpose.
1803.2 Application.
1803.3 Definitions.
1803.4 Self-evaluation.
1803.5 Notice.
1803.6 General prohibitions against discrimination.
1803.7 Program accessibility: Existing facilities.
1803.8 Program accessibility: New construction and alterations.
1803.9 Employment.
1803.10 Communications.
1803.11 Compliance procedures.

Authority: 29 U.S.C. 794.

@ 1803.1 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by executive agencies.

@ 1803.2 Application.

This part applies to all programs or activities conducted by the Foundation, except for programs or activities conducted outside the United States that do not involve individual(s) with handicaps in the United States.

@ 1803.3 Definitions.

For purposes of this part, the term --

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

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of programs or activities conducted by the Foundation.

"Complete complaint" means a written statement containing: (1) Date and nature of the alleged violation of section 504; (2) the complainant's name and address; and (3) the signature of the complainant or of someone authorized to act 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.

"Executive Secretary" means the Executive Secretary of the Harry S. Truman Scholarship Foundation.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Foundation" means the Harry S. Truman Scholarship Foundation.

"General Counsel" means the General Counsel of the Harry S. Truman Scholarship Foundation.

"Individual with handicaps" 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. As

used in this definition, the phrase:

(1) "Physical or mental impairment" includes --

(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" includes 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 classified 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 the Foundation 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 subparagraph (1) of this definition, but is treated by the Foundation as having such an impairment.

"Qualified individual with handicaps" means an individual with handicaps

who meets the essential eligibility requirements for participation in, or receipt of benefits from, any Foundation program or activity. For purposes of employment, "qualified individual with handicaps" means "qualified handicapped person" as defined in 29 CFR 1613.702(f), which is made applicable to this part by @ 1803.10.

"Section 504" means section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394, 29 U.S.C. 794, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1617; the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, 92 Stat. 2955; and by the Rehabilitation Act amendments of 1986, Pub. L. 99-506, 100 Stat. 1810. As used in this part, section 504 applies only to programs or activities conducted by the Foundation and not to federally assisted programs.

@ 1803.4 Self-evaluation.

(a) The Foundation shall, within one year of the effective date of this part, evaluate, with the assistance of interested persons, including individuals with handicaps or organizations representing individuals with handicaps, its current 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 policies and practices is required, the Foundation shall proceed to make the

necessary modification.

(b) The Foundation shall, for at least three years following completion of the evaluation required under paragraph (a) of this section, maintain on file and make available for public inspection --

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

(2) A description of any modifications made.

@ 1803.5 Notice.

The Foundation shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the Foundation as the Executive Secretary finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

@ 1803.6 General prohibitions against discrimination.

(a) No qualified individual with handicaps 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 subject to this part.

(b) The Foundation may not, either directly or through arrangements with others, on the basis of handicap --

(1) Discriminate against a qualified individual with handicaps in the award or renewal of scholarships, through selection criteria or otherwise;

(2) Deny a qualified individual with handicaps the opportunity to participate as a member of boards or panels used to screen scholarship applicants;

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

(4) Otherwise subject a qualified individual with handicaps to discrimination.

(c) The Foundation may not, either directly or through arrangements with others, utilize criteria or methods of administration the purpose or effect of which would --

(1) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(2) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(d) The Foundation shall administer programs and activities in the most feasibly integrated setting appropriate to the needs of qualified individuals with handicaps.

@ 1803.7 Program accessibility: Existing facilities.

(a) The Foundation shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not necessarily require the Foundation to make each of its existing facilities accessible to and usable by individuals with handicaps, but no qualified individual with handicaps shall be denied the benefit of, be excluded from participation in, or otherwise be

subjected to discrimination under any of the Foundation's programs and activities because any of the Foundation's facilities are inaccessible to or unusable by individuals with handicaps.

(b) When the Foundation uses facilities leased or otherwise provided by the General Services Administration (GSA), it shall request GSA to make any structural changes that the Foundation determines are required to provide necessary accessibility for individuals with handicaps, and shall inform that agency of any complaints regarding accessibility by individuals with handicaps.

(c) The Foundation periodically uses meeting rooms or similar facilities made available by non-federal entities. In any instances in which such temporarily used facilities are not readily accessible to qualified individuals with handicaps, the Foundation shall make alternative arrangements so that such qualified individuals with handicaps can participate fully in the Foundation's activity.

(d) This section does not require the Foundation to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administration burdens. In those circumstances where Foundation personnel believe that the proposed action would fundamentally alter a program or activity or would result in undue financial and administrative burdens, the Foundation has the burden of proving that compliance with paragraph (a) of this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Executive Secretary after considering all agency resources available for use in the funding and operation of the conducted 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 section would result in such an alteration or such burdens, the Foundation shall take other action not resulting in such an alteration or such burdens, but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the programs or activities.

@ 1803.8 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the Foundation shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

@ 1803.9 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the Foundation. The definitions, requirements and procedures of @ 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

@ 1803.10 Communications.

(a) The Foundation shall take appropriate steps to assure that interested persons, including persons with impaired vision or hearing, can effectively communicate with the Foundation and obtain information as to the existence and availability of the Foundation's programs and activities.

(1) The Foundation shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in the scholarship interview process or other programs or activities conducted by the Foundation.

(i) In determining what type of auxiliary aid is necessary, the Foundation shall give primary consideration to the requests of the individual with handicaps.

(ii) The Foundation need not provide individually prescribed devices or other devices of a personal nature.

(2) When the Foundation communicates with applicants and beneficiaries by telephone, the Foundation shall use, for persons with impaired hearing, a telecommunication device for deaf persons or equally effective telecommunication device.

(b) The Foundation shall take appropriate steps to provide individuals with handicaps with information regarding their @ 504 rights under the Foundation's programs or activities.

(c) This section does not require the Foundation to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Foundation personnel believe that the proposed action would fundamentally alter a program or activity or would result in undue financial and administrative burdens, the Foundation has the burden of proving that compliance with paragraphs (a) and (b) of this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Executive Secretary after considering all Foundation resources available for use in the funding and operation of a conducted 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 section would result in such an alteration or such burdens, the Foundation shall take other action not resulting in such an alteration or such burdens, but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the programs or activities.

@ 1803.11 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the Foundation.

(b) The Foundation shall process complaints alleging violations of @ 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to @ 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsibility for implementation and operation of this section shall be vested in the Executive Secretary.

(d) The Foundation shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The Foundation may extend this time period for good cause.

(e) If the Foundation receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The Foundation shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is used by the Foundation that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), is not readily accessible to and usable by individuals with handicaps.

(g) The Foundation shall notify the complainant of the results of the investigation within 90 days of the receipt of a complete complaint over which

it has jurisdiction. Notification must be in a letter, and must include --

(1) Findings of fact and conclusions of law;
(2) A description of a remedy for each violation discovered; and
(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by paragraph (f) of this section. The Foundation may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the General Counsel.

(j) The Foundation shall notify the complainant of the results of the appeal within 90 days of the receipt of the request. If the Foundation determines that it needs additional information from the complainant, it shall have 90 days from the date it receives the additional information to make its determination on the appeal.

(k) The time limits cited in paragraphs (g) and (h) of this section may be extended with the permission of the Assistant Attorney General.

(l) The Foundation may delegate its authority for conducting complaint investigations to other federal agencies, but may not delegate to another agency the authority for making the final determination.

Malcolm C. McCormack, Executive Secretary.

Dated: January 19, 1989.

[FR Doc. 89-2119 Filed 1-30-89; 8:45 am]

Document Separator

DEPARTMENT OF JUSTICE
Attorney General
AGENCY: Department of Justice.

28 CFR, Part 0
Delegation of the Attorney General's Authority Under
Executive Order No. 12250

[Order No. 944-81]

46 FR 29704

June 3, 1981

ACTION: Final rule.

SUMMARY: This order delegates to the Assistant Attorney General in charge of the Civil Rights Division authority to implement Executive Order No. 12250 ("Leadership and Coordination of Nondiscrimination Laws"). The effect of this delegation is to reassign to the Assistant Attorney General for Civil Rights most of the responsibilities and duties assigned to the Attorney General by Executive Order No. 12250. This is being done to provide effective and efficient management and oversight of the Department's coordination responsibilities.

EFFECTIVE DATE: May 21, 1981.

FOR FURTHER INFORMATION CONTACT: Stewart B. Oneglia, Chief, Coordination and Review Section, Civil Rights Division, Department of Justice, Washington, D.C. 20530 (202/724-6757).

TEXT: SUPPLEMENTARY INFORMATION: This order deals with agency management. It is not required to be and has not been published in proposed form for comment under 5 U.S.C. 553(b). It is not a rule within the meaning of or subject to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. Likewise, it is not a rule within the meaning of or subject to Executive Order No. 12291 ("Federal Regulation").

Accordingly, by virtue of the authority vested in me as Attorney General by 5 U.S.C. 301, 28 U.S.C. 510, and Executive Order No. 12250, it is hereby ordered as follows:

1. Section 0.51 of Title 28, Code of Federal Regulations is revised to read as follows:

PART 0 -- ORGANIZATION OF THE DEPARTMENT OF JUSTICE

@ 0.51 Leadership and coordination of nondiscrimination laws.

(a) The Assistant Attorney General in charge of the Civil Rights Division shall, except as reserved herein, exercise the authority vested in and perform the functions assigned to the Attorney General by Executive Order No. 12250 ("Leadership and Coordination of Nondiscrimination Laws"). This delegation does not include the function, vested in the Attorney General by @@ 1-101 and 1-102 of the Executive order, of approving agency rules, regulations, and orders of general applicability issued under the Civil Rights Act of 1964 and @ 902 of the Education Amendments of 1972. Likewise, this delegation does not include the authority to issue those regulations under @ 1-303 of the Executive order which are required, by @ 0.180 of this Part, to be issued by the Attorney General.

(b) Under paragraph (a) of this section, the Assistant Attorney General in charge of the Civil Rights Division shall be responsible for coordinating the implementation and enforcement by Executive agencies of the nondiscrimination provisions of the following laws:

(1) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.).

(2) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.).

(3) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) .

(4) 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.

2. A new paragraph (i) is added to 28 CFR 0.50 to read as follows:

@ 0.50 General functions.

* * * * *

(i) Upon request, assisting, as appropriate, the Commission on Civil Rights or other similar Federal bodies in carrying out research and formulating recommendations.

Dated: May 21, 1981.

William French Smith, Attorney General.

[FR Doc. 81-16457 Filed 6-2-81; 8:45 am]

DEPARTMENT OF JUSTICE
AGENCY: Department of Justice.

28 CFR Part 42
Enforcement of Nondiscrimination on the Basis of Handicap in Department of Justice Federally Assisted Programs or Activities

[Atty. Gen. Order No. 1249-88]

53 FR 3203

February 4, 1988

ACTION: Final rule.

SUMMARY: This regulation amends the regulation issued by the Department of Justice for enforcement of section 504 of the Rehabilitation Act of 1973, as amended, in federally assisted programs or activities to include a cross-reference to the Uniform Federal Accessibility Standards (UFAS). Because some facilities subject to new construction or alteration requirements under section 504 are also subject to the Architectural Barriers Act, governmentwide reference to UFAS will diminish the possibility that recipients of Federal financial assistance would face conflicting enforcement standards. In addition, reference to UFAS by all Federal funding agencies will reduce potential conflicts when a building is subject to the section 504 regulations of more than one Federal agency.

EFFECTIVE DATE: March 7, 1988.

ADDRESS: Comments received on the Notice of Proposed Rulemaking will be available for public inspection in Room 854 of the HOLC Building, 320 First Street NW., Washington DC, from 9:00 a.m. to 5:00 p.m., Monday through Friday except legal holidays until April 4, 1988. Copies of this final rule are available on tape for persons with impaired vision. They may be obtained at the above address.

FOR FURTHER INFORMATION CONTACT: Irene Bowen, Supervisory Attorney, Community Services Unit, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, Washington, DC 20530; (202) 724-2245 [voice or TDD]; or Merrily F. Raffa, Attorney, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, Washington, DC 20530; (202) 724-2216 [voice] or 724-7678 [TDD]. These are not toll free numbers.

TEXT: SUPPLEMENTARY INFORMATION: On March 27, 1987 (52 FR 9885), the Department of Justice published a Notice of Proposed Rulemaking (NPRM) that would amend the regulation issued by the Department for enforcement of section 504 of the Rehabilitation Act of 1973, as amended, in federally assisted programs or activities to include a cross-reference to UFAS. The Department received five comments in response to the NPRM. Three comments came from State organizations representing individuals with handicaps, and two came from other such organizations. Each comment was read and carefully considered in developing this final rule. The final rule is identical to the NPRM except for substitution of the term "persons with physical handicaps" for "physically handicapped persons" in @ 42.522(b)(2). The revision was made to be consistent with section 103(d) of the Rehabilitation Act Amendments of 1986, which changed the statutory term " handicapped individual" to "individual with handicaps. "

Background

Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) , provides that No otherwise qualified individual with handicaps 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 existing Department of Justice section 504 regulation for federally assisted programs requires that new construction be designed and built to be accessible and that alterations of facilities be made in an accessible manner. It states that new construction or alteration accomplished in accordance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped, " published by the American National Standards Institute, Inc. (ANSI A117.1-1961 (R1971), meets the requirements of section 504. The revision set forth in this document will reference UFAS in place of the current standard.

On August 7, 1984, UFAS was issued by the four agencies establishing standards under the Architectural Barriers Act (49 FR 31528) (see discussion infra). This Department, as the agency responsible under Executive Order 12250 for coordinating the enforcement of section 504, has recommended that agencies amend their section 504 regulations for federally assisted programs or activities to establish that, with respect to new construction and alterations, compliance with UFAS shall be deemed to be compliance with section 504. Because some facilities subject to new construction or alteration requirements under section 504 are also subject to the Architectural Barriers Act, governmentwide reference to UFAS will diminish the possibility that recipients of Federal financial assistance would face conflicting enforcement standards. In addition, reference to UFAS by all Federal funding agencies will reduce potential conflicts when a building is subject to the section 504 regulations of more than one Federal agency.

Background of Accessibility Standards

The Architectural Barriers Act of 1968, 42 U.S.C. 4151-4157, requires certain Federal and federally funded buildings to be designed, constructed, and altered in accordance with accessibility standards. It also designates four agencies (the General Services Administration, the Departments of Defense and of Housing and Urban Development, and the U.S. Postal Service) to prescribe the accessibility standards. Section 502 of the Rehabilitation Act of 1973 established the Architectural and Transportation Barriers Compliance Board (ATBCB). In 1978 the Rehabilitation Act was amended to require the ATBCB, inter alia, to issue minimum guidelines and requirements for the standards to be issued by the four standard-setting agencies. The minimum guidelines were published on August 4, 1982 (47 FR 33862), and are codified at 36 CFR Part 1190. n1

n 1 The ATBCB Office of Technical Services is available to provide technical assistance to recipients upon request relating to the elimination of architectural barriers. Its address is: U.S. ATBCB, Office of Technical Services, 330 C Street SW., Washington, DC 20201. The telephone number is (202) 472-2700 [voice/TDD]. This is not a toll free number.

On August 7, 1984, the four standard-setting agencies issued the Uniform Federal Accessibility Standards as an effort to minimize the differences among the four agencies' Barriers Act standards, and among those standards and accessibility standards used by the private sector. The General Services Administration (GSA) and Department of Housing and Urban Development (HUD) have incorporated UFAS into their Barriers Act regulations (see 41 CFR Subpart 101-19.6 (GSA) and 24 CFR Part 40 (HUD)). In order to ensure uniformity, UFAS was designed to be consistent with the scoping and technical provisions of the ATBCB's minimum guidelines and requirements, as well as with the technical provisions of ANSI A117.1-1980, published by the American National Standards Institute (ANSI). (The 1980 ANSI standard contains few scoping provisions.) ANSI is a private, national organization that publishes recommended standards on a wide variety of subjects. ANSI's original accessibility standard, ANSI A117.1, "Specifications for Making Buildings and Facilities Accessible to, and Usable by, Physically Handicapped People," was published in 1961 and reaffirmed in

1971. The current edition, issued in 1986, is ANSI A117.1-1986. The 1961, 1980, and 1986 ANSI standards are frequently used in private practice and by State and local governments.

This regulation amends the current regulation implementing section 504 in programs or activities receiving Federal financial assistance from the Department of Justice to refer to UFAS.

This Department has determined that it will not require the use of UFAS, or any other standard, as the sole means by which recipients can achieve compliance with the requirement that new construction and alterations be accessible. To do so would unnecessarily restrict recipients' ability to design for particular circumstances. In addition, it might create conflicts with State or local accessibility requirements that may also apply to recipients' buildings and that are intended to achieve ready access and use. It is expected that in some instances recipients will be able to satisfy the section 504 new construction and alteration requirements by following applicable State or local codes, and vice versa.

Effect of Amendment

The amendment does not affect the current section 504 requirement that new facilities be designed and constructed to be readily accessible to and usable by persons with handicaps and that alterations be accessible to the maximum extent feasible. It merely provides that compliance with UFAS with respect to buildings (as opposed to "facilities," a broader term that encompasses buildings as well as other types of property) shall be deemed compliance with these requirements with respect to those buildings. Thus, for example, an alteration is accessible "to the maximum extent feasible" if it is done in accordance with UFAS. It should be noted that UFAS contains special requirements for alterations where meeting the general standards would be impracticable or infeasible (see, e.g., UFAS sections 4.1.6(1)(b), 4.1.6(3), 4.1.6(4), and 4.1.7).

The amendment also includes language providing that departures from particular UFAS technical and scoping requirements are permitted so long as the alternative methods used will provide substantially equivalent or greater access to and utilization of the building. Allowing these departures from UFAS will provide recipients with necessary flexibility to design for special circumstances and will facilitate the application of new technologies that are not specified in UFAS. As explained under "Background of Accessibility Standards," it is anticipated that compliance with some provisions of applicable State and local accessibility requirements will provide "substantially equivalent" access. In some circumstances, recipients may choose to use methods specified in model building codes or other State or local codes that are not necessarily applicable to their buildings but that achieve substantially equivalent access.

The amendment requires that the alternative methods provide "substantially" equivalent or greater access, in order to clarify that the alternative access need not be precisely equivalent to that afforded by UFAS. Application of the "substantially equivalent access" language will depend on the nature, location, and intended use of a particular building. Generally, alternative methods will satisfy the requirement if in material respects the access is substantially equivalent to that which would be provided by UFAS in such respects as safety, convenience, and independence of movement. For example, it would be permissible to depart from the technical requirement of UFAS section 4.10.9 that the inside dimensions of an elevator car be at least 68 inches or 80 inches (depending on the location of the door) on the door opening side, by 54 inches, if the clear floor area and the configuration of the car permits wheelchair users to enter the car, make a 260 turn, maneuver within reach of controls, and exit from the car. This departure is permissible because it results in access that is safe, convenient, and independent, and therefore substantially equivalent to that provided by UFAS.

With respect to UFAS scoping requirements, it would be permissible in some circumstances to depart from the UFAS new construction requirement of one accessible principal entrance at each grade floor level of a building (see UFAS section 4.1.2(8)), if safe, convenient, and independent access is provided to each level of the new facility by a wheelchair user from an accessible principal entrance. This departure would not be permissible if it required an individual with handicaps to travel an extremely long distance to reach the spaces served by the inaccessible entrances or otherwise provided access that was substantially less convenient than that which would be provided by UFAS.

It would not be permissible for a recipient to depart from UFAS' requirement that, in new construction of a long-term care facility, at least 50% of all patient bedrooms be accessible (see UFAS section 4.1.4(9)(b)), by using large accessible wards that make it possible for 50% of all beds in the facility to be accessible to individuals with handicaps. The result is that the population of individuals with handicaps in the facility will be concentrated in large wards, while able-bodied persons will be concentrated in smaller, more private rooms. Because convenience for persons with handicaps is therefore compromised to such a great extent, the degree of accessibility provided to persons with handicaps is not substantially equivalent to that intended to be afforded by UFAS.

For correctional facilities, including jails, prisons, reformatories, and other detention facilities, UFAS requires that five percent of all residential units, or at least one unit (whichever is greater), be accessible. However, all areas of common use or visitor use, and areas in which persons with physical handicaps may be employed, must be accessible (see UFAS section 4.1(9)(c)).

It should be noted that the amendment does not require that existing buildings leased by recipients meet the standards for new construction and alteration. Rather, it continues the current Federal practice under section 504 of treating newly leased buildings as subject to the program accessibility standard for existing facilities.

Buildings under design on the effective date of this amendment will be governed by the amendment if the date that bids were invited falls after the effective date. This interpretation is consistent with the General Services Administration's Architectural Barriers Act regulation incorporating UFAS, at 41 CFR Subpart 101-19.6.

The revision includes language modifying the effect of UFAS section 4.1.6(1)(g), which provides an exception to UFAS 4.1.6, Accessible buildings: alterations. Section 4.1.6(1)(g) of UFAS states that "mechanical rooms and other spaces which normally are not frequented by the public or employees of the building or facility or which by nature of their use are not required by the Architectural Barriers Act to be accessible are excepted from the requirements of 4.1.6." Particularly after the development of specific UFAS provisions for housing alterations and additions, UFAS section 4.1.6(1)(g) could be read to exempt alterations to privately owned residential housing, which is not covered by the Architectural Barriers Act unless leased by the Federal Government for subsidized housing programs. This exception, however, is not appropriate under section 504, which protects beneficiaries of housing provided as part of a federally assisted program. Consequently, the proposed amendment provides that, for purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only spaces that, because of their intended use, will not require accessibility to the public or beneficiaries, or residents or employees with handicaps.

The revision also provides that whether or not the recipient opts to follow UFAS in satisfaction of the ready access requirement, the recipient is not required to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member. This provision does not relieve recipients of their obligation under the current regulation to ensure program accessibility.

This document is an adaptation of a prototype prepared by this Department under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298).

The Architectural and Transportation Barriers Compliance Board has been consulted in the development of this document in accordance with 28 CFR 41.7.

This regulation is not a major rule within the meaning of Executive Order 12291 46 FR 13193, 3 CFR, 1981 Comp., p. 127) because it imposes no new requirements. Therefore, a regulatory impact analysis has not been prepared.

This regulation does not have an impact on small entities and, therefore, is not subject to the Regulatory Flexibility Act (5 U.S.C. 601-612).

List of Subjects in 28 CFR Part 42

Blind, Buildings, Civil rights, Employment, Equal employment opportunity, Grant programs, Handicapped, Loan programs.

For the reasons stated in the preamble, Part 42 of title 28 of the Code of Federal Regulations is amended as follows:

PART 42 -- NONDISCRIMINATION; POLICIES AND PROCEDURES

1. The authority citation for Subpart G of Part 42 is revised to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 29 U.S.C. 706, 794; E.O. 12250.

2. In @ 42.522, paragraph (b) is revised to read as follows:

@ 42.522 New construction.

* * * * *

(b) Conformance with Uniform Federal Accessibility Standards. (1) Effective as of March 7, 1988, 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 buildings. 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 usability 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.

Edwin Meese III, Attorney General.

January 27, 1988.
[FR Doc. 88-2262 Filed 2-3-88; 8:45 am]

DEPARTMENT OF JUSTICE
AGENCY: Department of Justice.

53 FR 32947

August 29, 1988

Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of Justice

ACTION: Notice of availability of draft Transition Plan and Self-Evaluation and request for comments.

SUMMARY: The Department of Justice is announcing the availability of its draft Transition Plan and Self-Evaluation for implementation of its regulation prohibiting discrimination on the basis of handicap in its federally conducted programs and activities (28 CFR Part 39). The draft describes the Department's review of its policies, practices, and facilities and their effects on individuals with handicaps involved in Department of Justice programs and activities, and the steps the Department has taken or is taking to ensure that no qualified individual with handicaps is excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any such program or activity. The purpose of this notice is to provide an opportunity for interested persons, including individuals with handicaps, and organizations representing individuals with handicaps, to participate in the self-evaluation process and the development of the transition plan by reviewing the Department's draft Transition Plan and Self-Evaluation and submitting oral and written comments.

DATE: To be assured of consideration, comments must be received on or before October 28, 1988.

ADDRESSES: Comments should be sent to the Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 66118, Washington, DC 20035-6118. The draft Transition Plan and Self-Evaluation is available for public inspection at the Coordination and Review Section, Civil Rights Division, Department of Justice, 320 First Street, NW., Room 854, Washington, DC 20530. Persons who need assistance to review the document will be provided with appropriate aids such as readers, print magnifiers, or audio tape players. A limited number of copies of the document are available. The document is available in regular and large print, on computer disc, and on audio tape. Copies may be obtained from the Coordination and Review Section.

FOR FURTHER INFORMATION CONTACT: Bert Keys, Coordination and Review Section. (202) 724-2218 (Voice) or (202) 724-7678 (TDD). (These are not toll free numbers.)

TEXT: SUPPLEMENTARY INFORMATION: Section504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibits discrimination on the basis of handicap in federally assisted programs and activities, was amended in1978 to extend its coverage to programs and activities conducted by Federal Executive agencies, including the Department of Justice. The Department's regulation implementing section504 for its federally conducted program is codified at 28 CFR Part 39. Section39.110 of that rule requires the Department to evaluate its current policies and practices for compliance with section504. Additionally, section39.150 prescribes that, in the event that structural changes are necessary to make the Department's programs accessible to individuals with handicaps, the Department shall develop a plan setting forth the steps necessary to complete these changes. The Department has combined the self-evaluation process with the development of a transition plan. This document is the result of an examination of the Department's facilities and the policies and practices by which the Department's programs are operated. Various components of the Department have identified those obstacles that might hinder the effective participation of individuals with handicaps in the Department's

programs and have either begun or already completed the process by which these potential obstacles are to be eliminated. The draft Transition Plan and Self-Evaluation thus sets forth the results of this examination and outlines the actions that the Department has taken and intends to take over the next several years.

The Department actively solicits specific, concrete public comment to help resolve issues that have been noted or to identify new issues. In particular, the public is invited to comment on how the Department can best ensure access to its programs by using telecommunication devices for deaf persons (TDD's). Also, because of the very large number of facilities (over 1,500) used by the Department throughout the United States, including its territories and possessions, the Department seeks any specific information the public may have regarding accessibility in facilities used by the Department. This information will help the Department in taking the necessary steps to improve accessibility.

Although the Department's employment program is subject to section504 under @ 39.140 of the final rule, the Department has not included employment practices as part of the self-evaluation process. The Department is subject to the requirements and procedures of section501 of the Rehabilitation Act of 1973, as amended. Section501 requires the Department to take affirmative action to hire and advance in employment qualified individuals with handicaps. The Equal Employment Opportunity Commission (EEOC) has established detailed regulations to implement section501 at 29 CFR Part 1613. The EEOC's section501 at 29 CFR Part 1613. The EEOC's section501 program includes affirmative action requirements that go beyond the nondiscrimination requirements of section504. The Department believes that further review of its employment practices in this document is unnecessary in light of its compliance with its section501 responsibilities.

The draft Transition Plan and Self-Evaluation reflects the Department's internal organizational structure. Although it is generally true that the Justice Management Division (JMD) provides administrative and management support services to all of the Department's component agencies, the largest of the Department's components, (i.e., Bureau of Prisons, Marshals Service, Immigration and Naturalization Service, Drug Enforcement Administration, and Federal Bureau of Investigation) have their own management staff and function independently of JMD. These components will directly implement their respective portions of the transition plan. The smaller components within the Department do not have their own management staff. Thus, they conducted their self-evaluations with assistance from the Civil Rights Division and will implement their respective portions of the transition plan in conjunction with JMD. The components covered by this document include:

-- The Federal Bureau of Prisons has almost 12,000 employees, a budget of 650 million dollars and maintains 47 Federal correctional institutions with over 40,000 inmates;

-- The United States Marshals Service, consisting of 94 marshals with a support staff of 2,700, provides security assistance for Federal prisoners and interacts with the public in matters related to the judicial process;

-- The Immigration and Naturalization Service has approximately 12,000 employees, a budget of about 600 million dollars, and maintains a broad network of regional and district offices to enforce the immigration laws;

-- The Executive Office for Immigration Review, which is entirely separate from the INS, includes the Board of Immigration Appeals, the Office of the Chief Immigration Judge, and 250 support staff;

-- The Drug Enforcement Administration, which enforces the controlled substances laws in coordination with Federal, State, and local law enforcement authorities, has almost 5,000 employees and field offices in15 states and the District of Columbia;

-- The Federal Bureau of Investigation has almost 23,000 employees, a budget of 1.5 billion dollars, and maintains 59 field divisions and over 400 auxiliary offices throughout the United States;

-- The Justice Management Division oversees selected management operations and provides direct administrative services to the offices, boards, and divisions of the Department;

-- The U.S. Parole Commission's 168 employees administer a parole system for Federal prisoners and develop Federal parole policy;

-- The Office of the Pardon Attorney (OPA), in consultation with the Associate Attorney General, receives and reviews all petitions for Executive clemency, initiates the necessary investigations and prepares the recommendation of the Associate Attorney General to the President in connection with consideration of all forms of Executive clemency. OPA has ten employees;

-- The Executive Office for U.S. Attorneys (EOUSA) provides general executive assistance and supervision to the 94 offices of the U.S. Attorneys which have 5,000 employees in over 150 offices throughout the United States. EOUSA also coordinates the relationship of other Department units with those offices;

-- The Executive Office for U.S. Trustees supervises the administration of all cases filed pursuant to the Bankruptcy Reform Act of 1978 with the offices of the United States Trustees. There are 88 offices of United States Trustees Executive Office and the Offices of the U.S. Trustees have a combined staff of almost 400 persons.

-- The Office of Justice Programs provides financial and technical assistance to State and local governments and nongovernmental organizations for criminal justice system improvement programs;

-- The Community Relations Service consists of ten regional offices throughout the United States that provide conciliation and mediation services to communities where disputes regarding discriminatory practices have arisen;

-- The six legal divisions (Antitrust, Civil, Civil Rights, Criminal, Land and Natural Resources and Tax) have over 3,600 employees in Washington and in several field offices. These divisions conduct litigation on a wide variety of issues where the interests of the Federal Government are involved;

-- The Foreign Claims Settlement Commission's employees determine claims of United States nationals for loss of property in specific foreign countries as a result of the nationalization or other taking of property by those governments;

-- INTERPOL -- United States National Central Bureau functions as a central conduit providing communication between this country, other INTERPOL member countries, and the INTERPOL Headquarters;

-- A variety of Executive level offices (Offices of the Attorney General, Office of the Deputy Attorney General, Office of the Associate Attorney General, Office of the Solicitor General, Office of Legal Counsel, Office of Legal Policy, Office of Intelligence Policy and Review, Office of Professional Responsibility, Office of Legislative and Intergovernmental Affairs, and the Office of Public Affairs) provide direct support to the top management officials of the Department.

Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division.
[FR Doc. 88-19499 Filed 8-26-88; 8:45 am]

Document Separator

DEPARTMENT OF JUSTICE
AGENCY: Department of Justice.

28 CFR Part 39
Enforcement of Nondiscrimination on the Basis of Handicap in Federally Conducted Programs

[Order No. 1065-84]

49 FR 35724

September 11, 1984

ACTION: Final rule.

SUMMARY: This regulation requires that the Department of Justice operate all of its programs and activities so that qualified handicapped persons are not subjected to discrimination by the Department. It sets forth standards for what constitutes discrimination on the basis of mental or physical handicap, provides a definition for handicapped person and qualified handicapped person, and establishes a detailed complaint mechanism for resolving allegations of discrimination against the Department of Justice. This regulation is issued under the authority of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in programs or activities conducted by Federal executive agencies.

EFFECTIVE DATE: October 11, 1984.

ADDRESS: Comments received on the Notice of Proposed Rulemaking will remain available for public inspection in Room 854 of the HOLC Building, 320 First Street, NW., Washington, D.C. from 9:00 a.m. to 5:30 p.m. Monday through Friday, except for legal holidays until November 13, 1984.

FOR FURTHER INFORMATION CONTACT: John L. Wodatch, Deputy Chief, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20530; (202) 724-2227 (Voice) or 724-7678 (TDD); or L. Irene Bowen, Supervisory Attorney, Handicap Unit, Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20530; (202) 724-2245 (Voice) or 724-7678 (TDD). These are not toll free numbers.

TEXT: SUPPLEMENTARY INFORMATION: On December 16, 1983, the Department of Justice published a Notice of Proposed Rulemaking (NPRM) for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap, as it applies to programs and activities conducted by the Department of Justice. 48 FR 55996. Shortly after the NPRM was published, the Department received a number of preliminary comments from handicapped individuals and from organizations representing handicapped individuals. The tone and nature of these comments indicated to the Department that some of the regulatory provisions of the NPRM were being misunderstood. As a result, the Department, on March 1, 1984, published a Supplementary Notice further explaining the NPRM and requesting comments on possible revisions to the original NPRM. 49 FR 7792.

By April 16, 1984, close of the comment period, the Department received 1,194 comments. Two hundred and six of these comments also addressed the supplemental notice. Over 90% of the comments that the Department received came from individuals (908), most frequently handicapped persons, and from organizations representing the interests of handicapped persons (180). The Department received comments from all fifty states, the District of Columbia, Puerto Rico, Canada, and Denmark. Most of the comments that the Department received were general in nature. The Department received 721 comments based on a form letter. This form letter, written before issuance of the Supplemental Notice, expressed dismay at the inclusion of the regulation's "undue financial and administrative burdens" language, asserted that the Department was imposing a lesser

requirement on the Federal government than on recipients of Federal assistance, and requested that the regulation be withdrawn. This form letter did not contain any substantive or detailed analysis. In fact, only 55 of the 1,194 comments contained specific, detailed analysis of the Department's proposal.

The Department read and analyzed each comment. Each comment was then subdivided according to one or more of over 90 issue categories. Because comments often addressed, even in general terms, more than one issue, the 1,194 comments were translated into 4,256 issue-specific comments. The decisions that the Department made in response to these comments, however, were not made on the basis of the number of commenters addressing any one point but on a thorough consideration of the merits of the points of view expressed in the comments. Copies of the written comments will remain available for public inspection in Room 854 of the HOLC Building, 320 First Street, N.W., Washington, D.C. from 9:00 a.m. to 5:30 p.m., Monday through Friday, except for legal holidays, until November 13, 1984.

Section 504 requires that regulations that apply to the programs and activities of Federal executive agencies shall be submitted to the appropriate authorizing committees of Congress and that such regulations may take effect no earlier than the thirtieth day after they have been so submitted. The Department has today submitted this regulation to the Senate Committee on Labor and Human Resources and its Subcommittee on the Handicapped and the House Committee on Education and Labor and its Subcommittee on Select Education pursuant to the terms of section 504. The regulation will become effective on October 11, 1984.

This rule applies to all programs and activities conducted by the Department of Justice. Thus, this rule regulates the activities of over 30 separate subunits in the Department, including, for example, the Federal Bureau of Investigation, the Drug Enforcement Administration, the Immigration and Naturalization Service, the Bureau of Prisons, Federal Prison Industries, and the United States Attorneys.

Background

The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) , as it applies to programs and activities conducted by the Department of Justice (DOJ). As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Sec. 119, Pub. L. 95-602, 92 Stat. 2982), section 504 of the Rehabilitation Act of 1973 states 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(29 U.S.C. 794) (amendment italicized).

The substantive nondiscrimination obligations of the agency, as set forth in this rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. See 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs). This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep.

James M. Jeffords, that the Federal government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1984) id., 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); id. at 38,552 (remarks of Rep. Sarasin).

Nine hundred and two comments that the Department received agreed that the obligations of section 504 for federally conducted programs should be identical to those developed by the Federal agencies over the past seven years for federally assisted programs. These commenters, however, objected to any language differences between the Department's proposed rule for federally conducted programs and the Department's section 504 coordination regulation for federally assisted programs (28 CFR Part 41). The commenters asserted that a number of language differences that the Department had proposed created less stringent standards for the Federal government than those applied to recipients of Federal assistance under section 504. They wrote that such a result could not be justified by Executive Order 12250, by the wording of the statute itself, nor by the legislative history of the 1978 amendments.

The commenters appear to have misunderstood the basis for inclusion of the new language in the DOJ regulation. The changes in this regulation are based on the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting Davis and section 504. See Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981) (APTA); see also Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F.2d 490 (1st Cir. 1983).

Some commenters questioned the use of Davis as justification for the inclusion of the new provisions in the federally conducted regulation. They noted that the Department had not included these changes when, subsequent to the Davis decision, it issued a regulation implementing section 504 in programs receiving Federal financial assistance from this Department. The Department's section 504 federally assisted regulation, however, was issued prior to the D.C. circuit's decision in APTA. In APTA, the Department had argued a position similar to that advocated by the commenters. Judge Abner Mikva's decision in APTA clearly rejected the Department's position in that case. Other circuit court decisions followed the APTA interpretation of Davis. Since these decisions, the Department has interpreted its section 504 regulation for federally assisted programs in a manner consistent with the language of this final rule. The Department believes that judicial interpretation of section 504 compels it to incorporate the new language in the federally conducted regulation.

Incorporation of these changes, therefore, makes this section 504 federally conducted regulation consistent with the Federal government's section 504 federally assisted regulations. Because many of these federally assisted regulations were issued prior to the judicial interpretations of Davis and its progeny, their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence the Department believes that there are no significant differences between this final rule for federally conducted programs and the Federal government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206). It is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared. This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601-612).

Section-by-Section Analysis and Response To Comments

Section 39.101 Purpose

Section 39.101 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

The Department received no comments on this section and it remains unchanged from the Department's proposed rule.

Section 39.102 Application

The regulation applies to all programs or activities conducted by the Department of Justice. Under this section, a federally conducted program or activity is, in simple terms, anything a Federal agency does. Aside from employment, there are two major categories of federally conducted programs or activities covered by this regulation: those involving general public contact as part of ongoing agency operations and those directly administered by the Department for program beneficiaries and participants. Activities in the first part include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the Department's facilities (cafeteria, library). Activities in the second category include programs that provide Federal services or benefits (immigration activities, operation of the Federal prison system). No comments were received on this section.

Section 39.103 Definitions

The Department received 469 comments on the definitions section. Most of the comment, however, concentrated on the definition of "qualified handicapped persons."

"Agency" is defined as the Department of Justice.

"Assistant Attorney General." "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Auxiliary aids are addressed in @ 39.160(a)(1). Comments on the definition of "auxiliary aids" are discussed in connection with that section.

"Complete complaint." "Complete complaint" is defined to include all the information necessary to enable the agency to investigate the complaint. The definition is necessary, because the 180 day period for the agency's investigation (see @ 39.170(g)) begins when it receives a complete complaint.

"Facility." The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs, 28 CFR 41.3(f), except that the term "rolling stock or other conveyances" has been added and the phrase "or interest in such property" has been deleted.

Twenty commenters on the NPRM objected to the omission of the phrase "or interest in such property" from the definition of "facility." As explained in the Supplemental Notice, the term "facility," as used in this regulation, refers to structures, and does not include intangible property rights. The definition, therefore, has no effect on the scope of coverage of programs, including those conducted in facilities not included in the definition. The phrase has been

omitted because the requirement that facilities be accessible would be a logical absurdity if applied to a lease, life estate, mortgage, or other intangible property interest. The regulation applies to all programs and activities conducted by the agency regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the agency. Sixty commenters supported the clarification of this issue in the Supplemental Notice.

" Handicapped person." The definition of " handicapped person" has been revised to make it identical to the definition appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). In its NPRM, the Department omitted the list of physical or mental impairments included in the definition of " handicapped persons." The Department received 19 negative comments on this omission, and, in the Supplemental Notice, requested comments on whether it should be re-inserted. On the basis of the comments received, we have included the list in the final rule.

"Qualified handicapped person" The definition of "qualified handicapped person" is a revised version of the definition appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

Subparagraph (1) of the definition states that a "qualified handicapped person" with regard to any program under which a person is required to perform services or to achieve a level of accomplishment is a handicapped person who can achieve the purpose of the program without modifications in the program that the agency can demonstrate would result in a fundamental alteration in its nature. This definition is based on the Supreme Court's Davis decision.

In Davis, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." 442 U.S. at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," id. at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." Id. at 410.

The Department incorporated the Court's language in the definition of "qualified handicapped person" in order to make clear that such a person must be able to participate in the program offered by the agency. The agency is required to make modifications in order to enable a handicapped applicant to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered; not whether the applicant could benefit or obtain results from some other program that the agency does not offer. Although the revised definition allows exclusion of some handicapped people from some programs, it requires that a handicapped person who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

Two hundred and forty-four commenters objected to this revised definition for a veriety of reasons. Several commenters stated that the Department incorrectly used Davis as the justification for explaining the differences between the federally assisted and the federally conducted regulations because the Supreme Court upheld the validity of the existing regulations in Consolidated Rail Corp.v. Darrone, 104 S. Ct. 1248 (1984). This view misunderstands the Court's actions in Darrone. In that case the Court ruled on a series of issues, the most important of which was under what circumstances section 504 applied to employment discrimination by recipients. The Court did not concern itself either directly or indirectly with the definition of "qualified handicapped

person" or whether section 504 included limitations based on "undue financial and administrative burdens."

Many commenters stated that the proposal would change the difinition of qualified handicapped person for employment. "Qualified handicapped person" is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by @ 39.140. Nothing in this part changes existing regulations applicable to employment.

Many commenters assumed that the definition would have the effect of placing on the handicapped person the burden of proving that he or she is qualified. The definition has been revised to make it clear that the agency has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alteration, the agency must follow the procedures established in @@39.150(a)(2) and 39.160(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the agency head or his or her designee in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the agency head determines that an action would result in a fundamental alteration, the agency must consider options that would enable the handicapped person to achieve the purpose of the program but would not result in such an alteration.

Some commenters said that the definition of "qualified handicapped person" places handicapped persons in a "Catch-22" situation: because only qualified handicapped persons are protected by the statute, a determination that a person is not qualified would make enforcement remedies unavailable to that person. This concern is misplaced. If the Department determined that a handicapped person was not "qualified," the person could use the procedures established by @ 39.170 to challenge that determination, just as he or she could challenge any other decision by the agency that he or she believed to be discriminatory.

Many commenters argued that the definition of "qualified handicapped person" confused what should be two separate inquiries: whether a person meets essential eligibility requirements and, if so, whether accommodation is required. They argued that the reference to "fundamental alteration" in the definition focuses attention on accommodations rather than on a handicapped person's abilities. As another commenter noted, however, the Supreme Court in Davis developed the "fundamental alteration" language in a decision that was determining the nature and scope of what constitutes a qualified handicapped person. The Department continues to believe that the concept of "qualified handicapped person" properly encompasses both the notion of "essential eligibility requirements" and the notion of program modifications that might fundamentally alter a program.

Some commenters argued that our analysis of Davis was inappropriate because Davis was decided on the basis of individual facts unique to that case or because Davis involved federally assisted and not federally conducted programs. While cases are decided on the basis of specific factual situations, courts, especially the Supreme Court, develop general principles of law for use in analyzing facts. The Davis decision was the Supreme Court's first comprehensive view of section 504, a major new civil rights statute. The Davis holding, that a person who cannot achieve the purpose of a program without fundamental changes in its nature is not a "qualified handicapped person," is a general principle, a statement by the Court on how it views section 504. It is therefore necessary to reflect it in the Department's regulation.

Subparagraph (2) of the definition adopts the existing definition in the coordination regulation of "qualified handicapped person" with respect to services for programs receiving Federal financial assistance (28 CFR 41.32(b)). Under this part of the definition, a qualified handicapped person is a

handicapped person who meets the essential eligibility requirements for participation in the program or activity.

"Section 504. " This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the agency and not to programs or activities to which it provides Federal financial assistance.

Section 39.110 Self-evaluation

This section requires that the agency conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with handicapped persons that promotes both effective and efficient implementation of section 504.

In response to preliminary comments that the proposed rule had no specific criteria for conducting a self-evaluation, we requested comment on a proposed alternative in our Supplemental Notice (49 FR 7792). We received 64 comments, 57 of which were positive. The comments generally favored adoption of the alternative section, instead of the proposed section. We agree.

With respect to the applicability of the Federal Advisory Committee Act (5 U.S.C. App. 1 et seq.) (FACA), several comments were received. They argued that the FACA is not intended to apply to meetings with a self-evaluation group comprised of private individuals because they are rather unstructured, ad hoc meetings.

Authority for interpreting FACA was delegated to the General Services Administration (GSA) by Executive Order 12024 in 1977. Regulations issued by GSA place specific limitations on the scope of the Act by delineating examples of meetings or groups not covered. 41 CFR Part 101-6. GSA identified a major issue in the promulgation of the regulations to be the extent of applicability of the Act

Some commenters believe, as a matter of general policy, that advisory groups which are not formally structured, which do not have a continuing existence, which meet to deal with specific issues, and whose meetings do not constitute an established pattern of conduct should not be covered under the Act. * * * This rule reflects our judgment that the exclusion of certain non-recurring meetings from the Act's coverage is fully consistent with the statute, its legislative history, and judicial interpretation. * * * The interim rule provides guidance for those meetings between Federal officials and non-Federal individuals which do not fall within the scope of the Act, and for which a charter and consultation with GSA is not required.
48 FR 19324 (Preamble to interim rules).

The regulations define "advisory committee" in pertinent part as:

Any committee, board, commission, council, conference, panel, task force or other similar group * * * established by * * * or utilized by * * * any agency official for the purpose of obtaining advice or recommendations on issues or policy which are within the scope of his or her responsibilities.
41 CFR 101-6. 1003 (emphasis added).

In turn, "utilized" is defined in pertinent part as a
group * * * which * * * agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.

41 CFR 101-6.1003 (emphasis added).

The GSA regulation further provides that the Act does not apply to

(g) Any meeting initiated by the President or one or more Federal official [sic] for the purpose of obtaining advice or recommendations from one individual;

(h) Except with respect to established advisory committees:

(1) Any meeting with a group initiated by the President or one or more Federal official(s) for the purpose of exchanging facts or information; or

(2) Any meeting initiated by a group with the President or one or more Federal official(s) for the purpose of expressing the group's view, provided that the President or Federal official(s) does not use the group as a preferred source of advice or recommendations;

* * * * *

(j) Any meeting initiated by a Federal official(s) with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations.
41 CFR 101-6.1004 (g), (h), and (j).

This final rule provides that the agency shall provide an opportunity for interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process and development of transition plans by submitting comments (both oral and written).

Section 39.111 Notice

The Department received negative comments on its omission of a paragraph routinely used in section 504 regulations for federally assisted programs requiring recipients to inform interested persons of their rights under section 504. In the Department's Supplemental Notice, we requested comments on inclusion of specific regulatory language. Fifty-four positive comments were received. As a result, the Department has incorporated that new provision on notice into the final rule. It appears as @ 39.111.

Section 39.111 requires the agency to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504 of this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

Section 39.111 is, in fact, a broader and more detailed version of the proposed rule's requirement (at @ 39.160(d)) that the agency provide handicapped persons with information concerning their rights. Because @ 39.111 encompasses the requirements of proposed @ 39.160(d), that latter paragraph has been deleted as duplicative.

Section 39.130 General prohibitions against discrimination

Section 39.130 is an adaptation of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51). This regulatory provision attracted relatively few public comments and has not been changed from the proposed rule.

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in @ 39.130 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. If the agency violates a provision in any of the subsequent sections, it will also violate one of the general prohibitions found in @ 39.130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of handicapped persons. The agency may not refuse to provide a handicapped person with an equal opportunity to participate in or benefit from its program simply because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (e.g., epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligiblity requirements for participation in the activity in question. It would be permissible, therefore, to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce; but it may not be permissible to disqualify automatically all those who are blind in just one eye.

In addition, section 504 prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Subparagraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to a handicapped person be as effective as that afforded to others. The later sections on program accessibility (@@ 39.149-39.151) and communications (@ 39.160) are specific applications of this principle.

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons, subparagraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids, benefits, or services when necessary to provide handicapped persons with an equal opportunity to participate in or benefit from the agency's programs or activities. Subparagraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, subparagraph (b)(2) provides that a qualified handicapped person still has the right to choose to participate in the program that is not designed to accommodate handicapped persons.

Subparagraph (b)(1)(v) prohibits the agency from denying a qualified handicapped person the opportunity to participate as a member of a planning or advisory board.

Subparagraph (b)(1)(vi) prohibits the agency from limiting a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Subparagraph (b)(3) prohibits the agency from utilizing criteria or methods of administration that deny handicapped persons access to the agency's programs or activities. The phrase "criteria or methods of administration" refers to official written agency policies and to the actual practices of the agency. This subparagraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny handicapped persons an effective opportunity to participate.

Subparagraph (b)(4) specifically applies the prohibition enunciated in @ 39.130(b)(3) to the process of selecting sites for construction of new facilities or existing facilities to be used by the agency. Subparagraph (b)(4) does not apply to construction of additional buildings at an existing site.

Subparagraph (b)(5) prohibits the agency, in the selection of procurement contractors, from using criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

Subparagraph (b)(6) prohibits the agency from discriminating against qualified handicapped persons on the basis of handicap in the granting of licenses or certification. A person is a "qualified handicapped person" with respect to licensing or certification, if he or she can meet the essential eligibility requirements for receiving the license or certification (see @ 39.103).

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

Subparagraph (b)(6) does not extend section 504 directly to the programs or activities of licensees or certified entities themselves. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities nor are they programs or activities receiving Federal financial assistance merely by virtue of the Federal license or certificate. However, as noted above, section 504 may affect the content of the rules established by the agency for the operation of the program or activity of the licensee or certified entity, and thereby indirectly affect limited aspects of its operations.

Twenty-three commenters argued that the regulation should extend to the activities of licensees or certified entities, citing Community Television of Southern California v. Gottfried, 103 S. Ct. 885 (1983). In that case, the Court held that section 504 as applied to federally assisted programs did not require the Federal Communications Commission to prohibit discrimination on the basis of handicap by licensed broadcasters, but that "the policies underlying the Communications Act" might authorize the Commission to issue a regulation governing such discrimination. The Court did not, however, indicate that section 504 itself could serve as the source of such regulatory authority.

The Court has held that "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather the words take meaning from the purposes of the regulatory legislation." National Association for the Advancement of Colored People v. Federal Power Commission, 425 U.S. 662, 669 (1976). In our view, section 504 does not of itself extend an agency's regulatory authority to the activities of licensees or certified entities. Where an agency has existing regulatory authority that is broad enough to enable it to establish a nondiscrimination requirement for its licensees or certified entities, section 504 may support the exercise of that authority. Because the Department of Justice has no such underlying authority, it cannot prohibit discrimination by licensees.

Twenty-two commenters objected to the omission of a paragraph from the regulations for federally assisted programs that prohibits a recipient from providing significant assistance to an organization that discriminates. To the extent that assistance from the agency would provide significant support to an organization, it would constitute Federal financial assistance and the organization, as a recipient of such assistance, would be covered by the agency's section 504 regulation for federally assisted programs. The

regulatory "significant assistance" provision, however, would be inappropriate in a regulation applying only to federally conducted programs or activities.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only handicapped persons or a given class of handicapped persons may be limited to those handicapped persons.

Paragraph (d), discussed above, provides that the agency must administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

Section 39.140 Employment

Section 39.140 prohibits discrimination on the basis of handicap in employment by the agency. Comments on proposed @ 39.140 identified two types of problems. First, several commenters felt that the rule's treatment of employment was not sufficiently comprehensive. They pointed out that the rule does not enumerate the employment practices covered (e.g., hiring, promotion, assignment); it does not say what must be done to avoid or correct possible discrimination (e.g., reasonable accommodation, review of preemployment tests, limitations on preemployment inquiries and the use of medical examinations); nor does it define a "qualified handicapped person" with respect to employment.

Second, one commenter objected to the rule's adoption of "the definitions, requirements and procedures of section 501 of the Rehabilitation Act" as established in rules of the Equal Employment Opportunity Commission (EEOC) at 29 CFR Part 1613. This commenter argued that EEOC's rules on physical examinations were too restrictive and claimed that the proposed rule did not limit employment coverage to the program conducted by the Federal government in a manner similar to the "program or activity" limitation on coverage of programs receiving Federal financial assistance. Finally, the commenter asserted that reliance on section 501 was misplaced because that section of the Rehabilitation Act requires affirmative action whereas section 504, which the rule implements, contains only a nondiscrimination requirement.

The original notice of proposed rulemaking explained that the regulation is in accord with Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981), which held that Congress intended section 504 to cover the employment practices of Executive agencies. In Prewitt, the court also held that, in order to give effect to sections 501 and 504, both of which cover Federal employment, the administrative procedures of section 501 must be followed. Accordingly, the proposed rule adopted the definitions, requirements and procedures of section 501 as established in EEOC's rules.

The final rule has not been changed. The Department intends to avoid duplicative, competing or conflicting standards under the Rehabilitation Act with respect to Federal employment. While the rule could define terms with respect to employment and enumerate what practices are covered and what requirements apply, reference to the Government-wide rules of the Equal Employment Opportunity Commission is sufficient and avoids duplication. The class of Federal employees and applicants for employment covered by section 504 is identical to or subsumed within that covered by section 501. To apply different or lesser standards to persons alleging violations of section 504 could lead unnecessarily to confusion in the enforcement of the Rehabilitation Act with respect to Federal employment.

Section 39.149 Program accessibility: Discrimination prohibited

The proposed regulation did not contain a general statement of the program accessibility requirement similar to that appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.56). The decision not to include this language in the proposed regulation created the misperception that a change in substance was intended. In order to remedy this

misunderstanding, the Supplemental Notice requested comments on explicitly including it. Sixty-two commenters favored inclusion of the specific regulatory language that was published in the Supplemental Notice. Consequently, the final rule has been revised to include the language of the Supplemental Notice. The language appears at @ 39.149.

Section 39.150 Program accessibility: Existing facilities

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.57), with certain modifications. Thus, @ 39.150 requires that the agency's program or activity, when viewed in its entirety, be readily accessible to and usable by handicapped persons. The regulation also makes clear that the agency is not required to make each of its existing facilities accessible (@ 39.150(a)(1)). However, @ 39.150, unlike 28 CFR 41.56-41.57, places explicit limits on the agency's obligation to ensure program accessibility (@ 39.150(a)(2)). This provision provoked 959 comments, the largest number received on any single issue. Most commenters sought the deletion of the "undue financial and administrative burdens" language from the regulation. On the basis of preliminary comments on this paragraph, the Department published clarifying language in its Supplemental Notice. The final version includes that clarification.

The "undue financial and administrative burdens" language (found at @@ 39.150(a)(2) and 39.160(d)) is based on the Supreme Court's Davis holding that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since Davis, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. See, e.g., Dopico v. Goldschmidt, supra; American Public Transit Association v. Lewis, supra (APTA). In APTA the United States Court of Appeals for the District of Columbia Circuit applied the Davis language and invalidated the section 504 regulations of the Department of Transportation (DOT). The court in APTA noted "that at some point a transit system's refusal to take modest, affirmative steps to accommodate handicapped persons might well violate section 504. But DOT's rules do not mandate only modest expenditures. The regulations require extensive modifications of existing systems and impose extremely heavy financial burdens on local transit authorities." 655 F.2d at 1278.

The inclusion of subparagraph (a)(2) is an effort to conform the agency's regulation implementing section 504 to the Supreme Court's interpretation of the statute in Davis as well as to the decisions of lower courts following the Davis opinion. This subparagraph acknowledges, in light of recent case law, that, in some situations, certain accommodations for a handicapped person may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. The failure to include such a provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

Many commenters argued that the Supreme Court's decision in Davis did not require inclusion of an undue burdens defense in this regulation. These commenters asserted that the holding in Davis was that the plaintiff was not a qualified handicapped person and that the subsequent reference to "undue financial and administrative burdens" was mere dicta. These commenters overlook the interpretations of Davis provided by the Federal circuit court cases mentioned above. The APTA and Dopico decisions make it clear that financial burdens can limit the obligation to comply with section 504. See also New Mexico Association for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982).

Many commenters argued that inclusion of the undue burdens defense was inconsistent with the position taken by Vice President Bush in his letter of March 21, 1983, in which he announced the Administration's decision not to revise the coordination regulation for federally assisted programs. The decision to include the undue burdens defense represents no contradiction with the position taken by Vice President Bush on the guidelines for federally assisted programs. In his letter the Vice President stated that "extensive change of the existing 504 coordination regulations was not required, and that with respect to those few areas where clarification might be desirable, the courts are currently providing useful guidance and can be expected to continue to do so in the future." One element of that "useful guidance" obviously comes from interpretations of the Davis decision by the lower Federal courts.

The Department has carefully considered the comments on the process that the Department should follow in determining whether a program modification would result in undue financial and administrative burdens. The Department intends to be guided by six principles in its application of the "fundamental alteration" and "undue financial and administrative burdens" language.

First, because of the extensive resources and capabilities that could properly be drawn upon for section 504 purposes by a large Federal agency like the Department of Justice, the Department explicitly acknowledges that, in most cases, making a Department program accessible will likely not result in undue burdens. Second, the burden of proving that the accommodation request will result in a fundamental alteration or undue burdens has been placed squarely on the Department of Justice, not on the handicapped person. Third, in determining whether financial and administrative burdens are undue, the Department is to consider all Department resources available for use in the funding and operation of the conducted program. Fourth, the "fundamental alteration"/"undue burdens" decision is to be made by the Attorney General or his designee and must be accompanied by a written statement of reasons for reaching such a conclusion. Fifth, if a disabled person disagrees with the Attorney General's finding, he or she can file a complaint under the complaint procedures established by the final regulation. A significant feature of this complaint adjudication procedure is the availability of a hearing before an independent administrative law judge under the due process protections of the Administrative Procedure Act. Sixth and finally, even if there is a determination that making a program accessible will fundamentally alter the nature of the program, or will result in undue financial and administrative burdens, the Department must still take action, short of that outer limit, that will open participation in the Department's program to disabled persons to the fullest extent possible.

One hundred and eighty-one commenters on the Supplemental Notice objected to the provision that the "undue burdens" decision would be based on consideration of "all agency resources available for use in the funding and operation of the conducted program," arguing that it should be based on the resources of the agency as a whole. Some argued that this formulation was required because all agency resources come from taxpayer monies and should not be used to support discrimination.

The Department's entire budget is an inappropriate touchstone for making determinations as to undue financial and administrative burdens. Many parts of the Department's budget are earmarked for specific purposes and are simply not available for use in making the Department's programs accessible to disabled persons. For example, funds for the operation of the Bureau of Prisons are unavailable for defraying the cost of a sign language interpreter at a deportation hearing conducted by the Immigration and Naturalization Service. There are extensive resources available to the Department and it is expected that the Department will, only on very rare occasions, be faced with "undue burdens" in meeting the program accessibility or communications sections of the regulation.

One commenter said that the term "undue hardship" used in regulations for federally assisted programs is more specific and less discriminatory than the term "undue burdens." The term "undue hardship" is a term of art used in connection with employment. The term "undue burdens" is taken from the Supreme Court's opinion in Davis and is appropriately included in this regulation.

Some commenters argued that section 504 creates an absolute right to access, and that cost cannot limit this right, although it may be a factor in determining timeframes for compliance. Section 504 does not create an absolute right to access. The Supreme Court stated in Davis that recipients need not undertake modifications to their programs to meet the requirements of section 504 that would result in "undue financial and administrative burdens." This understanding of section 504 and its implementing regulations for federally assisted programs is shared by the lower Federal courts, which have routinely applied the "undue burdens" limitation to accessibility issues. Congress suggested no different interpretation of section 504 when applying it to federally conducted programs. Spreading the cost of compliance over a period of time is, however, one way of avoiding undue financial and administrative burdens, and the Department will consider that as an option whenever it considers asserting that defense.

Paragraph (b) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of handicapped persons. Structural changes in existing facilities are required only when there is no other feasible way to make the agency's program accessible. The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the agency must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section 39.151 Program accessibility: New construction and alterations

Overlapping coverage exists with respect to new construction under section 504, section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C 792), and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). Section 39.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by handicapped

persons in accordance with 41 CFR 101-19.600 to 101-19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). It is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required to meet the new construction standard. They are subject, however, to the requirements of @ 39.150.

A commenter has recommended that the regulation should require that buildings leased after the effective date of the regulation should meet the new

construction standards of @ 39.151, rather than the program accessibility standard for existing facilities in @ 39.150. Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the Department believes the same program accessibility standard should apply to both owned and leased existing buildings.

Section 39.160 Communications

Section 39.160 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps include procedures for determining when auxiliary aids are necessary under @ 39.160(a)(1) to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They also include an opportunity for handicapped persons to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the agency (@ 39.160(a)(1)(i)). The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under @ 39.160(d). That paragraph limits the obligation of the agency to ensure effective communication in accordance with Davis and the circuit court opinions interpreting it (see supra preamble @ 39.150(a)(2)). Unless not required by @ 39.160(d), the agency shall provide auxiliary aids at no cost to the handicapped person.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (e.g., a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. In these cases, a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to inform the public of (1) the communications services it offers to afford handicapped persons an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preferences regarding auxiliary aids when several different modes are effective.

The agency shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the agency, e.g., INS deportation proceedings. Auxiliary aids in these proceedings must be afforded where they are necesssary to ensure effective communication at the proceedings. When sign language interpreters are necessary, the agency may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (@ 39.160(a)(1)(ii)). For example, the agency need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

Some commenters suggested that the Department's language in @ 39.160(a)(1)(ii) that states that the agency need not provide individually prescribed devices or readers for personal use or study be modified to state that such devices are not required for "nonprogram material." This suggestion has not been adopted because it is less clear than the existing formulation, which is intended to distinguish between communications that are necessary to obtain the benefits of the federal programs and those that are not and which parallels the requirements of the Federal government's section 504 regulations for federally assisted programs. For example, a federally operated library would

have to ensure effective communication between its librarian and a patron, but not between the patron and a friend who had accompanied him or her to the library.

Several comments suggested that the definition of auxiliary aids should include attendant services that may be needed to aid disabled persons to travel to meetings. Other comments recommended that in some cases attendant services may be an appropriate auxiliary aid to achieve program accessiblity.

The Department has not adopted the approach recommended by these comments.To the extent that the services of an attendant are not directly related to a federally conducted program or activity, it would be inappropriate to require them at Federal expense. For example, the services of a sign language interpreter make a workshop as available to any deaf participant as it is to other participants. The need for services of interpreters arises directly out of the presentation of information in a form that can be understood by hearing persons. However, the Department views the services of an attendant for a disabled person as generally personal in nature and not directly related to the federally conducted program.

A different conclusion, however, might be reached for Federal employees or other persons traveling for the agency. Where a disabled person who is unable to travel without an attendant is required to perform official travel, the travel expenses of an attendant, including per diem and transportation expenses, may be paid by the Department. See 5 U.S.C. 3102(d) (1982).

Paragraph (b) requires the agency to provide information to handicapped persons concerning accessible services, activities, and facilities. Paragraph (c) requires the agency to provide signage at inaccessible facilities that directs users to locations with information about accessible facilities.

Section 39.170 Compliance procedures

Section 39.170 establishes a detailed complaint processing and review procedure for resolving allegations of discrimination in violation of section 504 in the Department of Justice's programs and activities. The 1978 amendments to section 504 failed to provide a specific statutory remedy for violations of section 504 in federally conducted programs. The amendment's legislative history suggesting parallelism between section 504 for federally conducted and federally assisted programs is unhelpful in this area because the fund termination mechanism used in section 504 federally assisted regulations depends on the legal relationship between a Federal funding agency and the recipients to which the Federal funding is extended. The Department has decided that the most effective and appropriate manner in which to enforce section 504 in the federally conducted area is through an equitable complaint resolution process. Section 39.170 establishes this process.

The complaint process in the final rule is substantially the same as the one that the Department proposed. The Department received 57 comments on this section. These comments did not question the use of a complaint-responsive enforcement scheme as appropriate for section 504 for federally conducted programs. The Department continues to view its specific proposal as satisfactory.

Paragraph (a) specifies that paragraphs (c) through (l) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the agency will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR Part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

Paragraph (c) vests in the Responsible Official the responsibility for the overall management of the 504 compliance program. "Responsible Official" or "Official," as defined in @ 39.103, refers to the Director of Equal Employment

Opportunity, who is designated as the official responsible for coordinating implementation of compliance procedures set forth in @ 39.170. The definition of "Official" includes other Department Officials to whom authority has been delegated by the Official. The Assistant Attorney General for Administration has been designated as the Director of Equal Employment Opportunity for the Department. See 28 CFR 42.2(a).

Although one person has responsibility both for administering the Equal Employment Opportunity Program for the Department and for coordinating implementation of the compliance procedures under this part, the procedures for carrying out these two responsibilities are different. The Official would follow the procedures for enforcing equal employment opportunity, as set forth in 29 CFR Part 1613, only for complaints alleging employment discrimination (see @ 39.170(b)). Other complaints would be processed under the procedures in @ 39.170. Authority for processing complaints of employment discrimination has been delegated to Equal Employment Opportunity Officers in some Department components, and it is expected that authority for enforcing this part will be similarly delegated.

Subparagraphs (d) (1) and (3) provide that any person who believes that he or she has been discriminated against may file a complaint within 180 days from the date of the alleged discrimination. The Official may extend the time limit when the complainant shows good cause. Good cause could be found if, for example, (1) the complainant mistakenly filed with the wrong agency and was not informed of the mistake within the 180 days; or (2) the complainant could not reasonably be expected to know of the act or event said to be discriminatory.

Several commenters argued that the proposed rule unnecessarily restricted the right to file a complaint by not allowing an individual victim of discrimination to authorize a representative to file on his or her behalf. The final rule permits filing by the authorized representative of an individual victim, or, in the case of class discrimination, of a member of the class, as well as by an individual victim or class member. The final rule has been revised to make it clear that complaints alleging that a specific class of persons has been discriminated against may only be filed by a member of that specific class or by a representative authorized to file the complaint by a member of that class (@ 39.170(d)(1)).

The Federal Bureau of Prisons has established an Administrative Remedy Procedure for handling grievances of inmates of Federal penal institutions (28 CFR Part 542). This procedure allows an inmate to file a formal written complaint with the Warden of the Institution or with the Regional Director. While these remedies are not a substitute for the right to an independent investigation by a civil rights office and appeal to the Complaint Adjudication Officer, the final rule requires inmates to exhaust these procedural remedies before filing a complaint with the Official. The time period for filing a complaint with the Official would be extended by the time spent exhausting these remedies. This requirement applies only to inmates and does not extend to visitors and employees.

The Department received several comments on how prisoners' complaints should be handled. Some of them suggested that both the discrimination procedure and the prison grievance procedures should be invoked simultaneously. The Department believes that this proposal would require the unnecessary duplication of efforts without materially enhancing results. The Bureau of Prisons reported that thousands of inmate complaints were filed in 1983 alone and that several court decisions have held that the inmate administrative remedy procedure must be exhausted before suit can be filed. Although the volume of complaints by prison inmates might be burdensome, it is not possible now to forecast the number that will be filed. The Department believes, however, that handicapped prisoners must be afforded the right to have their complaints investigated by an office that specializes in discrimination complaints, including section 504 complaints, as well as the right to appeal to the Complaint Adjudication Officer. It is expected that the requirement that inmates first exhaust prison

administrative remedies will be effective in resolving most meritorious complaints. It may be necessary, of course, for the Department to provide additional resources to handle complaints filed under the new regulation.

Subparagraph (d)(2) requires that the name and identity of a complainant be held in confidence unless he or she waives that right in writing and except to the extent necessary for compliance purposes.

Complaints may be mailed or delivered to the Attorney General, the Responsible Official, or other agency officials. Complaints received by any agency official other than the Responsible Official must be forwarded immediately to the Responsible Official (subparagraph (d)(4)).

Paragraph (e) requires the agency to send to the Architectural and Transportation Barriers Compliance Board a copy of any complaint alleging that a building or facility subject to the Architectural Barriers Act or section 502 was designed, constructed, or altered in a manner that does not provide ready access to and use by handicapped persons.

The Official is required to accept all complete complaints over which the agency has jurisdiction (@ 39.170(f)(1)). If the Official determines that the agency does not have jurisdiction over a complaint, the Official shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal government (@ 39.170(f)(3)).

If a complaint is not complete when it is filed, the Official must notify the complainant within 30 days that additional information is needed. The complainant must furnish the necessary information within 30 days of receipt of the notice, or the complaint will be dismissed without prejudice. Filing an incomplete complaint within 180 days from the date of the alleged discrimination satisfies the requirement of subparagraph (d)(3), but the timeframes governing the Official's other obligations to process the complaint (see, e.g., @ 39.170(g)(1), @ 39.170(h)) do not begin to operate until the Official receives a complete complaint.

Within 180 days of receipt of the complete complaint, the Official is to investigate the complaint, attempt an informal resolution, and, if informal resolution is not achieved, issue a letter of findings (@ 39.170(h)). Within the time limit, the Official should make every effort to achieve informal resolution whenever possible.

In response to a suggestion from a commenter, the Department no longer refers to the letter of findings as "preliminary." The word "preliminary" has been deleted because, if there is no appeal, the determination made in the letter of findings will constitute the final agency decision.

Paragraph (h) requires that the Official's letter be sent to the complainant and respondent, and that it contain findings of fact and conclusions of law, the relief granted if discrimination is found, and notice of the right to appeal. The regulation provides that a party may appeal the Official's letter or findings to the Complaint Adjudication Officer (CAO). If neither party files an appeal from the letter of findings within 30 days after receipt of the letter, the letter will constitute the final decision of the agency (@ 39.170(i)(4)).

The Department's final rule provides an opportunity for a hearing before an administrative law judge (ALJ). The ALJ would make a recommended decision to the CAO, who would make the final agency decision. The purpose of the hearing is to provide a forum in which the complainant or respondent can have an opportunity to be heard, confront witnesses, and present evidence so that an administrative law judge can issue a recommended decision that is well-reasoned and justified on the basis of the evidence presented.

The opportunity for a hearing before an ALJ assures more impartiality and the appearance of more impartiality than a decision made by one agency official

concerning other officials of the same agency. The Department expects that agency decisions based on a hearing record would more likely survive later judicial review.

Under the regulation, another person or organization would be allowed to participate as a third party or amicus curiae if the ALJ determines that the petitioner has a legitimate interest in the proceedings, that participation will not duly delay the outcome, and that petitioner's participation may contribute materially to the disposition of the proceedings.

The Department received comments on the proposed opportunity for a hearing before an administrative law judge. Some commenters were primarily concerned that by invoking a hearing before the ALJ with the procedural safeguards adopted from the Administrative Procedure Act (APA) (5 U.S.C. 554-557), the complainant would lose the right to a de novo review of the agency's final decision, because the APA allows a Federal court only to determine if the agency's final decisions are "arbitrary and capricious" (5 U.S.C. 706(2)(A)). It is beyond our jurisdiction to specify that a de novo review is available to complaints seeking judicial review of final agency decisions. This issue is for the courts to decide. That is also true for the issue of the availability of a private right of action, either without invoking our compliance procedures or after the issuance of letters of findings.

Given the inherent conflicts of interest in situations where complaints allege discrimination on the part of the Department, it is critically important to ensure that a complaint be reviewed in a fair, independent process. The availability of a hearing before an independent ALJ would provide the appearance as well as the actuality of an impartial compliance mechanism. The Department has therefore included the provision for a hearing in the final regulation.

One comment requested the addition of a provision whereby the Department would award attorneys fees to complainants. Another comment suggested that the Equal Access to Justice Act (5 U.S.C. 504) might provide for the award of fees. Nothing contained in title V of the Rehabilitation Act provides for the agency award of attorneys fees in administrative proceedings other than those involving Federal employment. Nor does the EAJA and the Department's implementing regulations at 28 CFR Part 24 provide for such awards in hearings conducted under @ 39.170(k). We have therefore included no attorneys fee provision in the current regulations.

Under paragraph (1), the CAO renders a final agency decision after appeal without a hearing or after a hearing. The CAO directs appropriate remedial action if discrimination is found. The CAO's decision will involve reviewing the entire file, including the investigation report, letter of findings, and, if a hearing was held, the hearing record and recommended decision of the administrative law judge. The decision shall be made within 60 days of receipt of the complaint file or the hearing record.

One commenter objected to the requirement in subparagraph (1)(1) that the CAO explain specifically a decision to reject or modify the ALJ's proposed findings, arguing that it would inappropriately limit the CAO's consideration of the issues. We have adopted the suggestion and eliminated the requirement.

In response to recommendations from the Department's CAO and the Drug Enforcement Administration's ALJ, some changes have been made in the compliance procedures. Among the changes are a new requirement that the ALJ provide findings to all parties, not just the CAO, an added provision for filing exceptions to an ALJ's recommended decision, a delineation of the authorities of the ALJ, and a clarification of the responsibility for supervising compliance with the final agency decision between the Responsible Official and the CAO.

The Department also received some comments on the appropriateness of providing for an appeal by either the complainant or respondent. Some commenters

objected to allowing a respondent to obtain an administrative appeal because it could delay remedying discrimination. On the other hand, an impartial adjudicatory mechanism would require that opportunity is provided for both sides to appeal. For this reason, the Department finds it necessary and appropriate for both complainant and respondent to have the right to an administrative appeal.

List of Subjects in 28 CFR Part 39

Blind, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped.

By the authority vested in me as Attorney General by 28 U.S.C. 509, 510; 5 U.S.C. 301, and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) , and for the reasons set forth in the preamble, Chapter I of Title 28 of the Code of Federal Regulations is amended as follows:

Part 39 is added to 28 CFR Chapter I to read as follows:

PART 39 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF JUSTICE

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39.161-39.169 [Reserved]
39.170 Compliance procedures.
39.171-39.999 [Reserved]

Authority: 29 U.S.C. 794.

@ 39.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

@ 39.102 Application.

This part applies to all programs or activities conducted by the agency.

@ 39.103 Definitions.

For purposes of this part, the term --

"Agency" means the Department of Justice.

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

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Complaint Adjudication Officer" means the Complaint Adjudication Officer appointed by the Assistant Attorney General for Civil Rights.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

" 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. As used in this definition, the phrase:

(1) "Physical or mental impairment" includes --

(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; genitorurinary; 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" includes 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 the agency 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 subparagraph (1) of this definition but is treated by the agency as having such an impairment.

"Official" or "Responsible Official" means the Director of Equal Employment Opportunity of the Department of Justice or his or her designee.

"Qualified handicapped person" means --

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

"Respondent" means the organizational unit in which a complainant alleges that discrimination occurred.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Development Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

@@ 39.104-39.109 [Reserved]

@ 39.110 Self-evaluation.

(a) The agency shall, by October 11, 1985, evaluate its current 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 policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until October 11, 1987, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

@ 39.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the program or activities conducted by the agency, and make such information available to them in such manner as the Attorney General finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

@ 39.112-39.129 [Reserved]

@ 39.130 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 conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap --

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

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

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

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

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) 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) The agency 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) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would --

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would --

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified handicapped persons to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs and activites in the most integrated setting appropriate to the needs of qualified handicapped persons.

@@ 39.131-39.139 [Reserved]

@ 39.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

@@ 39.141-39.148 [Reserved]

@ 39.149 Program accessibility: Discrimination prohibited.

Except as othewise provided in @ 39.150, no qualified handicapped person shall, because the agency'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 conducted by the agency.

@ 39.150 Program accessibility: Existing facilities.

(a) General. The agency 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 --

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons;

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with @ 39.150(a) would result in such alterations or burdens. The decision that compliance would result in such alteration or burdens must be made by the Attorney General or his or her designee after considering all agency resources available for use in the funding and operation of the conducted 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, the agency shall take any other action that would not result in such an alteration on such burdens but

would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) Methods. The agency 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 any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(c) Time period for compliance. The agency shall comply with the obligations established under this section by December 10, 1984, except that where structural changes in facilities are undertaken, such changes shall be made by October 11, 1987, but in any event as expeditiously as possible.

(d) Transition plan. In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by April 11, 1985, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition by submitting comments (both oral and written). A copy of the tansition plan shall be made available for public inspection. The plan shall, at a minimum --

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities 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 compliance with this section and, at the time identify steps that will be taken during each year of the transition period; and

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

@ 39.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101.19-600 to 101.19-607, apply to buildings covered by this section.

@@ 39.152-39.159 [Reserved]

@ 39.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency 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.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with @ 39.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Attorney General or his or her designee after considering all agency resources available for use in the funding and operation of the conducted 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 section would result in such an alteration or such burdens, the agency 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, handicapped persons receive the benefits and services of the program or activity.

@@ 39.161-39.169 [Reserved]

@ 39.170 Compliance procedures.

(a) Applicability. Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) Employment complaints. The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsible Official. The Responsible Official shall coordinate implementation of this section.

(d) Filing a complaint. (1) Who may file. (i) Any person who believes that he or she has been subjected to discrimination prohibited by this part may by him or herself or by his or her authorized representative file a complaint with the Official. Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class or the authorized representative of a member of that class may file a complaint with the Official.

(ii) Before filing a complaint under this section, an inmate of a Federal penal institution must exhaust the Bureau of Prisons Administrative Remedy Procedure as set forth in 28 CFR Part 542.

(2) Confidentiality. The Official shall hold in confidence the identity of any person submitting a complaint, unless the person submits written authorization otherwise, and except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or proceeding under this part.

(3) When to file. Complaints shall be filed within 180 days of the alleged act of discrimination, except that complaints by inmates of Federal penal institutions shall be filed within 180 days of the final administrative decision of the Bureau of Prisons under 28 CFR Part 542. The Official may extend this time limit for good cause shown. For purposes of determining when a complaint is timely filed under this subparagraph, a complaint mailed to the agency shall be deemed filed on the date it is postmarked. Any other complaint shall be deemed filed on the date it is received by the agency.

(4) How to file. Complaints may be delivered or mailed to the Attorney General, the Responsible Official, or agency officials. Complaints should be sent to the Director for Equal Employment Opportunity, U.S. Department of Justice, 10th and Pennsylvania Avenue, N.W., Room 1232, Washington, D.C. 20530. If any agency official other than the Official receives a complaint, he or she shall forward the complaint to the Official immediately.

(e) Notification to the Architectural and Transportation Barriers Compliance Board. The agency shall promptly send to the Architectural and Transportation Barriers Compliance Board a copy of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-5157), or section 502 of the Rehabilitation Act, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons. The agency shall delete the identity of the complainant from the copy of the complaint.

(f) Acceptance of complaint. (1) The Official shall accept a complete complaint that is filed in accordance with paragraph (d) of this section and over which the agency has jurisdiction. The Official shall notify the complainant and the respondent of receipt and acceptance of the complaint.

(2) If the Official receives a complaint that is not complete, he or she shall notify the complainant, within 30 days of receipt of the incomplete complaint, that additional information is needed. If the complainant fails to complete the complaint within 30 days of receipt of this notice, the Official shall dismiss the complaint without prejudice.

(3) If the Official receives a complaint over which the agency does not have jurisdiction, the Official shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(g) Investigation/conciliation. (1) Within 180 days of the receipt of a complete complaint, the Official shall complete the investigation of the complaint, attempt informal resolution, and, if no informal resolution is achieved, issue a letter of findings.

(2) The Official may require agency employees to cooperate in the investigation and attempted resolution of complaints. Employees who are required by the Official to participate in any investigation under this section shall do so as part of their official duties and during the course of regular duty hours.

(3) The Official shall furnish the complainant and the respondent a copy of the investigative report promptly after receiving it from the investigator and provide the complainant and respondent with an opportunity for informal resolution of the complaint.

(4) If a complaint is resolved informally, the terms of the agreement shall be reduced to writing and made part of the complaint file, with a copy of the agreement provided to the complainant and respondent. The written agreement may include a finding on the issue of discrimination and shall describe any corrective action to which the complainant and respondent have agreed.

(h) Letter of findings. If an informal resolution of the complaint is not reached, the Official shall, within 180 days of receipt of the complete complaint, notify the complainant and the respondent of the results of the investigation in a letter sent by certified mail, return receipt requested, containing --

(1) Findings of fact and conclusions of law;

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

(3) A notice of the right of the complainant and respondent to appeal to the Complaint Adjudication Officer; and

(4) A notice of the right of the complainant and respondent to request a hearing.

(i) Filing an appeal. (1) Notice of appeals to the Complaint Adjudication Officer, with or without a request for hearing, shall be filed by the complainant or the respondent with the Responsible Official within 30 days of receipt from the Official of the letter required by paragraph (h) of this section.

(2) If a timely appeal without a request for hearing is filed by a party, any other party may file a written request for hearing within the time limit specified in paragraph (i)(1) of this section or within 10 days of the date on which the first timely appeal without a request for hearing was filed, whichever is later.

(3) If no party requests a hearing, the Responsible Official shall promptly transmit the notice of appeal and investigative record to the Complaint Adjudication Officer.

(4) If neither party files an appeal within the time prescribed in paragraph (i)(1) of this section, the Responsible Official shall certify that the letter of findings is the final agency decision on the complaint at the expiration of that time.

(j) Acceptance of appeal. The Responsible Official shall accept and process any timely appeal. A party may appeal to the Complaint Adjudication Officer from a decision of the Official that an appeal is untimely. This appeal shall be filed within 15 days of receipt of the decision from the Official.

(k) Hearing. (1) Upon a timely request for a hearing, the Responsible Official shall appoint an administrative law judge to conduct the hearing. The administrative law judge shall issue a notice to all parties specifying the date, time, and place of the scheduled hearing. The hearing shall be commenced no earlier than 15 days after the notice is issued and no later than 60 days after the request for a hearing is filed, unless all parties agree to a different date.

(2) The complainant and respondent shall be parties to the hearing. Any interested person or organization may petition to become a party or amicus curiae. The administrative law judge may, in his or her discretion, grant such a petition if, in his or her opinion, the petitioner has a legitimate interest in the proceedings and the participation will not unduly delay the outcome and may contribute materially to the proper disposition of the proceedings.

(3) The hearing, decision, and any administrative review thereof shall be conducted in conformity with 5 U.S.C. 554-557 (sections 5-8 of the Administrative Procedure Act). The administrative law judge shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He or she shall have all powers necessary to these ends, including (but not limited to) the power to --

(i) Arrange and change the date, time, and place of hearings and prehearing conferences and issue notice thereof;

(ii) Hold conferences to settle, simplify, or determine the issues in a hearing, or to consider other matters that may aid in the expeditious disposition of the hearing.

(iii) Require parties to state their position in writing with respect to the various issues in the hearing and to exchange such statements with all other parties.

(iv) Examine witnesses and direct witnesses to testify;

(v) Receive, rule on, exclude, or limit evidence;

(vi) Rule on procedural items pending before him or her; and

(vii) Take any action permitted to the administrative law judge as authorized by this part or by the provisions of the Administrative Procedure Act (5 U.S.C. 551-559).

(4) Technical rules of evidence shall not apply to hearings conducted pursuant to this paragraph, but rules or principles designed to assure production of credible evidence and to subject testimony to cross-examination shall be applied by the administrative law judge whenever reasonably necessary. The administrative law judge 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.

(5) The costs and expenses for the conduct of a hearing shall be allocated as follows:

(i) Persons employed by the agency, shall, upon request to the agency by the administrative law judge, be made available to participate in the hearing and shall be on official duty status for this purpose. They shall not receive witness fees.

(ii) Employees of other Federal agencies called to testify at a hearing shall, at the request of the administrative law judge and with the approval of the employing agency, be on official duty status during any period of absence from normal duties caused by their testimony, and shall not receive witness fees.

(iii) The fees and expenses of other persons called to testify at a hearing shall be paid by the party requesting their appearance.

(iv) The administrative law judge may require the agency to pay travel expenses necessary for the complainant to attend the hearing.

(v) The respondent shall pay the required expenses and charges for the administrative law judge and court reporter.

(vi) All other expenses shall be paid by the party, the intervening party, or amicus curiae incurring them.

(6) The administrative law judge shall submit in writing recommended findings of fact, conclusions of law, and remedies to all parties and the Complaint Adjudication Officer within 30 days after receipt of the hearing transcripts, or within 30 days after the conclusion of the hearing if no transcript is made. This time limit may be extended with the permission of the Complaint Adjudication Officer.

(7) Within 15 days after receipt of the recommended decision of the administrative law judge, any party may file exceptions to the decision with the Complaint Adjudication Officer. Thereafter, each party will have ten days to file reply exceptions with the Officer.

(l) Decision. (1) The Complaint Adjudication Officer shall make the decision of the agency based on information in the investigative record and, if a hearing is held, on the hearing record. The decision shall be made within 60 days of receipt of the transmittal of the notice of appeal and investigative record pursuant to @ 39.170(i)(2)(ii) or after the period for filing exceptions ends, whichever is applicable. If the Complaint Adjudication Officer determines that he or she needs additional information from any party, he or she shall request the information and provide the other party or parties an opportunity to respond to that information. The Complaint Adjudication Officer shall have 60 days from receipt of the additional information to render the decision on the appeal. The Complaint Adjudication Officer shall transmit his or her decision by letter to the parties. The decision shall set forth the findings, remedial action required, and reasons for the decision. If the decision is based on a hearing record, the Complaint Adjudication Officer shall consider the recommended decision of the administrative law judge and render a final decision based on the entire record. The Complaint Adjudication Officer may also remand the hearing record to the administrative law judge for a fuller development of the record.

(2) Any respondent required to take action under the terms of the decision of the agency shall do so promptly. The Official may require periodic compliance reports specifying --

(1) The manner in which compliance with the provisions of the decision has been achieved;

(ii) The reasons any action required by the final decision has not yet been taken; and

(iii) The steps being taken to ensure full compliance.

The Complaint Adjudication Officer may retain responsibility for resolving disagreements that arise between the parties over interpretation of the final agency decision, or for specific adjudicatory decisions arising out of implementation.

@@ 39.171-999 [Reserved]

Dated: September 5, 1984.

William French Smith, Attorney General.

[FR Doc. 84-24003 Filed 9-10-84; 8:45 am]

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES
AGENCY: Institute of Museum Services, NFAH.

45 CFR Part 1180
Regulations Under Section 504 of the Rehabilitation Act of 1973, Nondiscrimination on Basis of Handicap in Federally Assisted Programs and Activities

54 FR 36330

September 1, 1989

ACTION: Notice of proposed rulemaking.

SUMMARY: The Institute of Museum Services issues regulations under section 504 of the Rehabilitation Act of 1973 (prohibiting discrimination on the basis of handicap in Federally assisted programs of IMS).

DATE: Comments must be received on or before October 30, 1989.

ADDRESSES: Comments should be addressed to Mamie Bittner, Public Information Officer, Institute of Museum Services, Room 510, 1100 Pennsylvania Ave. NW., Washington, DC 20506 (786-0536). Comments will be available for public inspection at the above address from 9:00 a.m. to 5:00 p.m. Monday through Friday except legal holidays.

FOR FURTHER INFORMATION CONTACT: Mamie Bittner, Public Information Officer, Institute of Museum Services, Room 510, 1100 Pennsylvania Ave., NW., Washington, DC 20506, (202) 786-0536 (Voice) or (202) 786-9136 (TDD). These are not toll-free numbers.

TEXT: SUPPLEMENTARY INFORMATION:

1. General Background.

The Museum Services Act ("the Act"), which is Title II of the Arts, Humanities and Cultural Affairs Act of 1976, was enacted on October 8, 1976 and amended on December 4, 1980.

The purpose of the Act is stated in section 202, 20 U.S.C. 961, as follows:

It is the purpose of [the Museum Services Act] to encourage and assist museums in their educational role in conjunction with formal systems of elementary, secondary, post-secondary education and with programs of nonformal education for all age groups: to assist museums in modernizing their methods and facilities so that they may be better able to conserve our cultural, historic, and scientific heritage: and to ease the financial burden borne by museums as a result of their increasing use by the public.

The Act establishes an Institute of Museum Services (IMS) consisting of a National Museum Services Board (Board) and a Director. IMS is an independent agency placed in the National Foundation on the Arts and Humanities (National Foundation). Public Law 97-100, December 23, 1981; Public Law 97-394, December 30, 1982.

The act lists a number of illustrative activities for which grants may be made, including assisting museums to meet their administrative costs for preserving and maintaining their collections, exhibiting them to the public, and providing educational programs to the public. During fiscal year 1987 IMS provides four types of grant assistance to museums: (1) General operating support; (2) conservation assistance; (3) museum assessment assistance; and (4) assistance to professional museum organizations.

2. Need for the Regulations.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, provides in pertinent part:

No otherwise qualified individuals with handicaps in the United States, as defined in section 706(7) of [Title 29], 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. * * *

Prior regulations of IMS have specified the applicability of section 504 to programs of assistance administered by IMS. Compare 43 CFR 1180.44, F.R. 27733 (June 17, 1983) with former 45 CFR 64.17, 45 FR 53419 (Aug. 11, 1980), See also 45 FR 53415 (Aug. 11, 1980). Thus, formulation by the Board of rules regarding the applicability of section 504 does not establish a new statutory requirement for IMS recipients. Prior to the transfer of IMS to the National Foundation, regulations of the Education Department (of which IMS was then a part) governed the operation of section 504 as it related to programs of IMS. With the transfer of IMS to the National Foundation it is necessary to establish regulations governing the administration of section 504 as it pertains to these programs in the context of the status of IMS as an agency within the National Foundation.

In 1986 IMS issued regulations under section 504 relating to the enforcement of nondiscrimination on the basis of handicap in programs or activities conducted by the Institute itself. 45 CFR part 1181. These regulations implement section 119 of the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978 and apply to all programs or activities conducted by the agency. 45 CFR 1181.102. It is now appropriate for IMS to issue revised regulations pertaining to nondiscrimination on the basis of handicap in federally assisted programs carried out by museums or other recipients under the Museum Services Act through grants or other financial assistance provided by IMS.

3. Description.

A purpose for the transfer of IMS to the National Foundation was to improve coordination of the policies of IMS with those of other agencies in the National Foundation. The Board has determined that, in formulating regulations under section 504, it would be consistent with this purpose for IMS to look to analogous rules adopted by the National Endowment for the Humanities (NEH), which is also an agency within the National Foundation. A number of reasons support this determination.

(1) By inter-agency agreement, IMS looks to NEH for administrative services with respect to section 504 matters. Making the NEH regulations applicable to IMS programs will facilitate a more efficient administration of section 504 to meet the needs of handicapped visitors to museums served by IMS.

(2) The Board desires to minimize the degree to which museums assisted both by IMS and by the Endowments, as well as members of the affected target population, must look to different sets of regulations to govern the same cross-cutting issue.

(3) The NEH regulations have been developed in light of particular questions which cultural institutions face in achieving compliance with section 504.

(4) Many museums which participate in programs administered by IMS are presumably familiar with the NEH regulations under section 504 and thus will more readily understand their responsibilities under its provisions.

For these reasons the Board determined to make applicable to IMS programs the NEH regulations under section 504 which are found in 45 CFR part 1170, 46 FR

55897 (Nov. 12, 1981).

Part 1170 was issued by NEH in 1981 and was based on the regulation for federally assisted programs issued by the Department of Health, Education, and Welfare (HEW) in 1977 (42 FR 22676) and later transferred to the Department of Health and Human Services (45 CFR part 84). Since 1977 a number of significant court opinions have been issued interpreting section 504 and the regulations implementing it. Because of this developing case law, regulations implementing section 504 in federally conducted programs issued in recent years by the IMS and more than 40 other agencies explicitly provide, unlike part 1170, that, in communicating with individuals with handicaps and ensuring that a program or activity is accessible, the Federal agency is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of the program or activity or in undue financial and administrative burdens (45 CFR 1181.150(a), 1181.160(d) (IMS); see also, e.g., 28 CFR 39.150(a), 39.160(d) (Department of Justice); 45 CFR 1153.150(a), 1153.160(d) (NEA); 45 CFR 1175.150(a), 1175.160(d) (NEH). These provisions which were recently upheld in Department of Justice Handicapped Employees Association v. Meese, No. 84-5645 (E.D. Pa., Oct. 9, 1987), are based on the Supreme Court's ruling in Southeastern Community College v. Davis, 442 U.S. 397 (1979), that section 504 and the HEW regulation implementing it do not require actions that would have such effects. These provisions are also supported by Alexander v. Choate, 469 U.S. 287 (1985), in which the Court noted that section 504 and its implementing regulations at the time require "reasonable adjustments in the nature of the benefit offered * * * to assure meaningful access" (469 U.S. at 301 n. 21), but do not require " 'changes;' 'adjustments;' 'modifications' to existing programs that would be 'substantial' * * * or that would constitute 'fundamental alteration[s] in the nature of a program.' " Id. at n. 20 (citations omitted). Thus, although the NEH regulation that IMS proposes to adopt does not include the language found in the more recently issued regulations for federally conducted programs, it does not provide recipients, by virtue of judicial interpretation, the same fundamental alteration/undue burdens defenses. [See e.g., Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F. 2d 490 (1st Cir., 1983); Dopico v. Goldschmidt, 687 F. 2d 644 (2d. Cir. 1982);] American Public Transit Association v. Lewis, 655 F. 2d 1272 (D.C. Cir., 1981). I11Numerous section 504 regulations for federally conducted programs, including the final rule issued by the Advisory Council on Historic Preservation also contain a clarification of the requirements of the statute as applied to historic preservation programs (36 CFR 812.150 (a)(2), (b)(2) (Advisory Council on Historic Preservation)); see also, e.g., 45 CFR 1153.150 (a)(2), (b)(2) (NEA); 45 CFR 2104.150 (a)(2), (b)(2) (Commission of Fine Arts)). In order to avoid a possible conflict between the congressional mandates to preserve historic properties on the one hand and to eliminate discrimination against individuals with handicaps on the other, these regulations provide that in historic preservation programs the agency is not required to take any action that would result in a substantial impairment of significant historic features of an historic property (i.e., a property that is listed or eligible for listing in the National Register of Historic Places or designated as historic under a statute of the appropriate State or local government body). Nevertheless, because the primary benefit of an historic preservation program is uniquely the experience of the historic property itself, the regulations require the agency to give priority to methods of providing program accessibility that permit individuals with handicaps to have physical access to the historic property. When such access cannot be provided, however, the regulations permit the agency to adopt alternative methods for providing program accessibility. Such methods include using audio-visual materials to depict those portions of an historic property that cannot otherwise be made accessible, assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible, or adopting other innovative methods. IMS will follow this approach in applying 45 CFR Part 1170 to programs that have preservation of historic properties as a primary purpose. I844. Executive Order 12291. I11These proposed regulations have been reviewed in accordance with Executive Order 12291. They are classified as non-major because they do not meet the criteria for major regulations established in the order. I845. Regulatory

Flexibility Act Certification. I11The Director certifies that these proposed regulations will not have a significant economic impact on a substantial number of small entities. I11To the extent that these proposed regulations affect States and State agencies, they will not have an impact on small entities because States and State agencies are not considered to be small entities under the Regulatory Flexibility Act. I11These regulations will affect certain museums receiving Federal financial assistance under the Museum Services Act. However, they will not have a significant economic impact on the small entities affected because they do not impose excessive regulatory burdens or require unnecessary Federal supervision. I846. Invitation to Comment. I11Interested persons are invited to submit comments and recommendations regarding these proposed regulations. Written comments and recommendations may be sent to the address given at the beginning of this preamble. All comments received on or before the 60th day after publication of this document will be considered in developing the final regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 510, 1100 Pennsylvania Avenue NW., Washington, DC, between the hours of 9:00 a.m. and 5:00 p.m., Monday through Friday of each week except Federal holidays.

7. List of Subjects in 45 CFR Part 1180.

Blind; Buildings; Civil Rights; Employment; Equal employment opportunity; Equal educational opportunity; Handicapped; Historic places; Historic preservation; Museums; National boards.

Lois Burke Shepard, Director Institute of Museum Services.

PART 1180 -- [AMENDED]

The Institute of Museum Services proposes to amend Subchapter E of Chapter XI of Title 45 of the Code of Federal Regulations as follows:

1. The authority citation for part 1180 is revised to read as follows:

Authority: 20 U.S.C. 961-968; Pub. L. 97-100, 95 Stat. 1414; Pub. L. 97-394, 96 Stat. 1994; 29 U.S.C. 794.

2. Part 1180 is amended by revising S 1180.44 to read as follows:

@ 1180.44 Federal statutes and regulations on nondiscrimination.

(a) Each grantee shall comply with the following statutes:

Subject	Statute
Discrimination on the basis of race, color or national origin	Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d through 2000d-4).
Discrimination on the basis of sex	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681-1683).
Discrimination on the basis of handicap	Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) .
Discrimination on the basis of age.	The Age Discrimination Act (42 U.S.C. 8101) et seq.

(b)-(c) [reserved]

(d) Regulations under section 504 of the Rehabilitation Act of 1973.

The Institute applies the regulations in 45 CFR part 1170, issued by the National Endowment for the Humanities and relating to nondiscrimination on the basis of handicap in federally assisted programs and activities, in determining the compliance of museums with section 504 of the Rehabilitation Act of 1973 as it applies to recipients of Federal financial assistance from the Institute. These regulations apply to each program or activity that receives such assistance. In applying these regulations, references to the "Endowment" or

the "agency" shall be deemed to be references to the Institute and references to the "Chairman" shall be deemed to be references to the Director.

[FR Doc. 89-20465 Filed 8-31-89; 8:45 am]

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES
AGENCY: Institute of Museum Services, NFAH.

45 CFR Part 1180
Regulations Under Section 504 of the Rehabilitation Act of 1973, Nondiscrimination of Basis of Handicap in Federally Assisted Programs and Activities

55 FR 51102

December 12, 1990

ACTION: Final Rule.

SUMMARY: The Institute of Museum Services issues regulations under section 504 of the Rehabilitation Act of 1973 (prohibiting discrimination on the basis of handicap in Federally assisted programs of IMS). These regulations do not implement the Americans with Disabilities Act.

EFFECTIVE DATES: This rule is effective on or before January 11, 1991.

FOR FURTHER INFORMATION CONTACT: Mamie Bittner, Public Information Officer, Institute of Museum Services, Room 510, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, (202) 786-0536 (Voice) or (202) 786-9136 (TDD). These are not toll-free numbers.

TEXT: SUPPLEMENTARY INFORMATION:

1. General Background

The Museum Services Act ("the Act"), which is title II of the Arts, Humanities and Cultural Affairs Act of 1976, was enacted on October 8, 1976. As subsequently amended, it appears in 20 U.S.C. 961-68.

The purpose of the Act is stated in section 202, 20 U.S.C. 961, as follows:

It is the purpose (of the Museum Services Act) to encourage and assist museums in their educational role, in conjunction with formal systems or elementary, secondary, post-secondary education and with programs on nonformal education for all age groups; to assist museums in modernizing their methods and facilities so that they may be better able to conserve our cultural, historic, and scientific heritage: and to ease the financial burden borne by museums as a result of their increasing use by the public.

The Act establishes an Institute of Museum Services (IMS) consisting of a National Museum Services Board (Board) and a Director. IMS is an independent agency placed in the National Foundation on the Arts and the Humanities (National Foundation). 20 U.S.C. 962.

The Act lists a number of illustrative activities for which grants may be made, including assisting museums to meet their administrative costs for preserving and maintaining their collections, exhibiting them to the public, and providing educational programs to the public. During fiscal year 1990 IMS provides four types of grant assistance to museums: (1) General operating support; (2) conservation assistance; (3) museum assessment assistance; and (4) assistance to professional museum organizations.

2. Need for the Regulations

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, provides in pertinent part:

No otherwise qualified individual with handicaps in the United States, as defined in (section 706(8) of Title 29), shall, solely by reason of her or 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.* * *

Prior regulations of IMS have specified the applicability of section 504 to programs of assistance administered by IMS. Compare 45 CFR 1180.44 48 FR 27733 (June 17, 1983) with former 45 CFR 64.17, 45 FR 53419 (August 11, 1980), See also 45 FR 53415 (Aug. 11, 1980). Thus, formulation by the Board of rules regarding the applicability of section 504 does not establish a new statutory requirement for IMS recipients. Prior to the transfer of IMS to the National Foundation, regulations of the Education Department (of which IMS was then a part) governed the operation of section 504 as it related to programs of IMS. With the transfer of IMS to the National Foundation it is necessary to establish regulations governing the administration of section 504 as it pertains to these programs in the context of the status of IMS as an agency within the National Foundation.

In 1986 IMS issued regulations under section 504 relating to the enforcement of nondiscrimination on the basis of handicap in programs or activities conducted by the Institute itself. 45 CFR part 1181. These regulations implement section 119 of the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978 and apply to all programs or activities conducted by the agency. 45 CFR 1181.102. It is now appropriate for IMS to issue revised regulations pertaining to nondiscrimination on the basis of handicap in federally assisted programs carried out by museums or other recipients under the Museum Services Act through grants or other financial assistance provided by IMS.

3. Description

A purpose for the transfer of IMS to the National Foundation was to improve coordination of the policies of IMS with those of other agencies in the National Foundation. The Board has determined that, in formulating regulations under section 504, it would be consistent with this purpose for IMS to look to analogous rules adopted by the National Endowment for the Humanities (NEH), which is also an agency within the National Foundation. A number of reasons support this determination. (1) By inter-agency agreement, IMS looks to NEH for administrative services with respect to section 504 matters. Making the NEH regulations applicable to IMS programs will facilitate a more efficient administration of section 504 to meet the needs of handicapped visitors to museums served by IMS.

(2) The Board desires to minimize the degree to which museums assisted both by IMS and by the Endowments, as well as members of the affected target population, must look to different sets of regulations to govern the same cross-cutting issue.

(3) The NEH regulations have been developed in light of particular questions which cultural institutions face in achieving compliance with section 504.

(4) Many museums which participate in programs administered by IMS are presumably familiar with the NEH regulations under section 504 and thus will more readily understand their responsibilities under its provisions.

For these reasons the Board determined to make applicable to IMS programs the NEH regulations under section 504 which are found in 45 CFR part 1170, 46 FR 55897 (Nov. 12, 1981).

Part 1170 was issued by NEH in 1981 and was based on the regulation for federally assisted programs issued by the Department of Health, Education, and Welfare (HEW) in 1977 (42 FR 22676) and later transferred to the Department of Health and Human Services (45 CFR part 84). Since 1977 a number of significant court opinions have been issued interpreting section 504 and the regulations implementing it. Because of this developing case law, regulations implementing

section 504 in federally conducted programs issued in recent years by the IMS and more than 40 other agencies explicitly provide, unlike part 1170, that, in communicating with individuals with handicaps and ensuring that a program or activity is accessible, the Federal agency is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of the program or activity or in undue financial and administrative burdens (45 CFR 1181.150(a), 1181.160(d) (IMS); see also, e.g., 28 CFR 39.150(a) 39.160(d) (Department of Justice); 45 CFR 1175.150(a), 1175.160(d) (NEH). These provisions, which were upheld in Department of Justice Handicapped Employees Association v. Meese, No. 84-5645 (E.D. Pa., Oct. 9, 1987), are based on the Supreme Court's ruling in Southeastern Community College v. Davis, U.S. 397 (1979), that section 504 and the HEW regulations implementing it do not require actions that would have such effects. These provisions are also supported by Alexander v. Choate, 469 U.S. 287 (1985), in which the Court noted that section 504 and its implementing regulations at the time require "reasonable adjustments in the nature of the benefit offered * * * to assure meaningful access" (469 U.S. at 301 n. 21), but do not require " 'changes;' 'adjustments;' or 'modifications' to existing programs that would be 'substantial' * * * or that would constitute 'fundamental alterations(s) in the nature of a program' " Id. at n. 20 (citations omitted). Thus although the NEH regulation that IMS proposes to adopt does not include the language found in the more recently issued regulations for federally conducted programs, it does provide recipients, by virtue of judicial interpretation, the same fundamental alteration/undue burdens defenses. (See e.g., Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F. 2d 490 (1st Cir., 1983); Dopico v. Goldschmidt, 687 F. 2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis, 655 F. 2d 1272 (D.C. Cir., 1981).

Numerous section 504 regulations for federally conducted programs, including the final rule issued by the Advisory Council on Historic Preservation, also contain a clarification of the requirements of the statute as applied to historic preservation programs (36 CFR 812.150(a)(2), (b)(2) (Advisory Council on Historic Preservation)); see also e.g., 45 CFR 1153.150(a)(2), (b)(2) (NEA); 45 CFR 2104.150 (a)(2), (b)(2) (Commission of Fine Arts)). In order to avoid a possible conflict between the congressional mandates to preserve historic properties on the one hand and to eliminate discrimination against individuals with handicaps on the other, these regulations provide that in historic preservation programs the agency is not required to take any action would result in a substantial impairment of significant historic features of an historic property (i.e., a property that is listed or eligible for listing in the National Register of Historic Places or designated as historic under a statute of the appropriate State or local government body).

Nevertheless, because the primary benefit of an historic preservation program is uniquely the experience of the historic property itself, the regulations require the agency to give priority to methods of providing program accessibility that permit individuals with handicaps to have physical access to the historic property. When such access cannot be provided, however, the regulations permit the agency to adopt alternative methods for providing program accessibility. Such methods include using audio-visual materials to depict those portions of an historic property that cannot otherwise be made accessible, assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible, or adopting other innovative methods. IMS will follow this approach in applying 45 CFR part 1170 to programs that have preservation of historic properties as a primary purpose.

4. Public participation

A notice of proposed rulemaking setting forth the rule and accompanying discussion was published on September 1, 1989 at 54 FR 36330. No comments were received in response to the notice of proposed rulemaking and the rule is being issued in final form without changes in the text that appeared in the September 1 Federal Register document.

5. Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are classified as nonmajor because they do not meet the criteria for major regulations established in the order.

6. Regulatory Flexibility Act Certification

The Director certifies that these regulations will not have a significant economic impact on a substantial number on small entities. To the extent that these regulations affect States and State agencies, they will not have an impact on small entities because States and State agencies are not considered to be small entities under the Regulatory Flexibility Act.

These regulations will affect certain museums receiving Federal financial assistance under the Museum Services Act. However, they will not have a significant economic impact on the small entities affected because they do not impose excessive regulatory burdens or require unnecessary Federal supervision.

List of Subjects in 45 CFR Part 1180

Daphne Wood Murray, Director Institute of Museum Services.

PART 1180 -- [AMENDED]

The Institute of Museum Services amends subchapter E of chapter XI of title 45 of the Code of Federal Regulations as follows:

1. The authority citation for part 1180 is revised to read as follows:
   Authority: 20 U.S.C. 961-968; Pub. L. 97-100, 95 Stat. 1414; Pub. L. 97-394, 96 Stat. 1994; 29 U.S.C. 794.

2. Part 1180 is amended by revising @ 1180.44 to read as follows:

@ 1180.44 Federal statutes and regulations on nondiscrimination.

(a) Each grantee shall comply with the following statutes:

Subject	Statute
Discrimination on the basis of race, color or national origin	Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d through 2000d-4)
Discrimination on the basis of sex	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681-1683).
Discrimination on the basis of handicap	Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) .
Discrimination on the basis of age	The Age Discrimination Act (420 U.S.C. 8101 et. seq).

(b)-(c) [reserved]

(d) Regulations under section 504 of the Rehabilitation Act of 1973. The Institute applies the regulations in 45 CFR Part 1170, issued by the National Endowment for the Humanities and relating to nondiscrimination on the basis of handicap in federally assisted programs and activities, in determining the compliance of museums with section 504 of the Rehabilitation Act of 1973 as it applies to recipients of Federal financial assistance from the Institute. These regulations apply to each program or activity that receives such assistance. In applying these regulations, references to the "Endowment" of the "agency" shall be deemed to be references to the Institute and references to the "Chairman" shall be deemed to be references to the Director.

FR Doc. 90-29002 Filed 12-11-90; 8:45 am]

SECURITIES AND EXCHANGE COMMISSION
AGENCY: Securities and Exchange Commission.

17 CFR Part 200
Handicapped Persons; Accessibility to Open Meetings

[Rel. Nos. 33-6856; 34-27794; 35-25054; 39-2236; IC-17374; IA-1223]

55 FR 10234

March 20, 1990

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is revising subpart I, part 200 of title 17 to include a notice of accessibility to handicapped persons of open meetings of the Commission. This revision will advise handicapped persons who are planning to attend a public Commission meeting and who require auxiliary aids (such as a sign language interpreter) that they should contact the Selective Placement Coordinator, Office of Personnel, to make the necessary arrangements.

EFFECTIVE DATE: March 20, 1990.

FOR FURTHER INFORMATION CONTACT: Carol K. Scott, Assistant General Counsel (202-272-2472), or Fran L. Paver (202-272-2453), Office of the General Counsel, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

TEXT: SUPPLEMENTARY INFORMATION: On July 8, 1988, the Commission joined with other federal agencies in issuing final rules (53 FR 25872) to implement section 504 of the Rehabilitation Act of 1973, as amended. These rules were adopted by the Commission as part of subpart L of 17 CFR part 200. The rules concern the enforcement of nondiscrimination on the basis of handicap in programs and activities conducted by the Commission. To further ensure that handicapped persons can enjoy full access to and participation in open Commission meetings, the Commission is amending its regulations pertaining to public observance of Commission meetings, 17 CFR subpart I, to include a notice of the procedures necessary to obtain auxiliary aids, such as sign language interpreters.

List of Subjects in 17 CFR Part 200

Federal buildings and facilities, Handicapped.

Text of Amendments

For the reasons set out in the preamble, the Commission is amending part 200 chapter II, title 17 of the Code of Federal Regulations as follows:

PART 200 -- ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart I -- Regulations Pertaining to Public Observation of Commission Meetings

1. The authority citation for part 200, subpart I, is revised to read as follows:

Authority: 5 U.S.C. 552b, unless otherwise noted. Section 200.410 also is issued under 29 U.S.C. 794.

2. Section 200.410 is amended by adding a new paragraph (d) to read as follows:

@ 200.410 Miscellaneous.

* * * * *

(d) Access to public meetings. Any member of the public who plans to attend a public meeting of the Commission, and who requires an auxiliary aid such as a sign language interpreter, should contact the Commission's Selective Placement Coordinator, Office of Personnel at (202) 272-7065 or TDD number (202) 272-2552, prior to the meeting to make the necessary arrangements. The Selective Placement Coordinator will take all reasonable steps to accommodate requests made in advance of the scheduled meeting date.

By the Commission.

Dated: March 13, 1990.

Jonathan G. Katz, Secretary.

[FR Doc. 90-6306 Filed 3-19-90; 8:45 am]

ADVISORY COUNCIL ON HISTORIC PRESERVATION
Institute of Museum Services, National Endowment for the Arts, Enforcement of Nondiscrimination on the Basis of Handicap in Federally Conducted Programs
AGENCIES: Advisory Council on Historic Preservation, Institute of Museum Services, National Endowment for the Arts.

52 FR 31645

August 21, 1987

National Foundation on the Arts and the Humanities

ACTION: Notice of Request for comments.

SUMMARY: Each of the above-referenced agencies has participated in a Department of Justice sponsored joint publication of final rules (51 FR 22880) implementing section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) . Section 504, as amended, prohibits discrimination on the basis of handicap in programs or activities conducted by Federal executive agencies.

Each agency's regulations requires it to conduct a self-evaluation of its compliance with section 504. Since these agencies share a common facility, they have determined it useful to conduct certain parts of their separate self-evaluation processes jointly, including sharing the services of five outside consultants with disabilities. As part of these evaluations, the agencies now request comments from interested persons on the accessibility of the way they conduct their separate programs and common facility to disabled persons.

DATE: Comments must be submitted on or before September 21, 1987.

ADDRESS: Comments on the accessibility operation of the programs of the Advisory Council for Historic Preservation may be submitted to: Frank Suman, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

Comments on the accessibility operation of the programs of the Institute of Museum Services may be submitted to: James Wieber, Institute of Museum Services, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

Comments on the accessibility operation of the programs of the National Endowment for the Arts may be submitted to: Paula Terry, National Endowment for the Arts, Office for Special Constituencies, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 682-5532 or TDD 682-5496.

Comments on the facility in which all these agencies are located, the Nancy Hanks Center at the Old Post Office building, 1100 Pennsylvania Avenue, NW., Washington, DC 20506 may be submitted to any of the agencies.
FOR FURTHER INFORMATION CONTACT:

Advisory Council on Historic Preservation: See comment section.

Institute of Museum Services: See comment section.

National Endowment for the Arts: See comment section.

TEXT: SUPPLEMENTARY INFORMATION: Each agency's regulations are based on a prototype developed by the Department of Justice and contain comparable requirements. The regulations of the Advisory Council on Historic Preservation are codified at 36 CFR Part 812; the Institute of Museum Services at 45 CFR Part 1181; and the National Endowment for the Arts at 48 CFR Part 1153. Section XX .110 of each agency's regulations requires that it evaluate its policies and

practices in light of section 504 and provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting oral or written comments on the accessibility of the agency's programs and facility. All comments will be considered as part of the self-evaluation process. Following the completion of the self-evaluation process, each agency's self-evaluation will be on file and available for public inspection, with each agency's description of areas examined, any problems identified, and any modifications made. See XX .110(c). Access to these files may be obtained by contacting the person listed under the comment section of this preamble.

Robert D. Bush, Executive Director, Advisory Council on Historic Preservation.
Lois Burke Shepard, Director, Institute of Museum Services.
Keith Stephens, Assistant Director for Administration, National Endowment for the Arts.

August 18, 1987.

[FR Doc. 87-19110 Filed 8-20-87; 8:45 am]

PANAMA CANAL COMMISSION
AGENCY: Panama Canal Commission.

35 CFR Part 257
Enforcement of Nondiscrimination on the Basis of Handicap in Panama Canal Commission Programs

52 FR 26001

July 10, 1987

ACTION: Final rule.

SUMMARY: This regulation requires that the Panama Canal Commission operate its programs and activities to assure nondiscrimination against qualified individuals with handicaps. It sets forth standards for what constitutes discrimination on the basis of mental or physical handicap, provides a definition for "individual with handicaps" and "qualified individual with handicaps" , and establishes a complaint mechanism for resolving allegations of discrimination. This regulation is issued under the authority of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in programs or activities conducted by Federal executive agencies.

DATES: This rule is effective August 10, 1987.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Rhode, Jr., Office of the Secretary, Panama Canal Commission, Suite 550, 2000 L Street NW., Washington, DC 20036-4996 (Tel. No. 202-634-6441 TDD) or Mr. John L. Haines, Jr., General Counsel, Panama Canal Commission, APO Miami 34011-5000 (Tel. No. 011-507-52-7511). Copies of this regulation will be made available on tape for persons with impaired vision who request them.

TEXT: SUPPLEMENTARY INFORMATION: The Panama Canal Commission published proposed regulations concerning the enforcement of nondiscrimination on the basis of handicap on June 11, 1986 at 51 FR 21314. One comment was received concerning the proposed regulation, and the proposed regulation is adopted without substantive change.

Background

The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) , as it applies to certain programs and activities conducted by Panama Canal Commission. As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Section 119, Pub. L. 95-602, 92 Stat. 2982) and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810), section 504 of the Rehabilitation Act of 1973 states that:

No otherwise qualified individual with handicaps 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Section 504 requires that regulations that apply to the programs and activities of Federal executive agencies be submitted to the appropriate

authorizing committees of Congress and that such regulations take effect no earlier than the thirtieth day after they have been so submitted. The Panama Canal Commission is submitting these regulations to the Senate Committee on Labor and Human Resources and to the House Committee on Education and Labor. This rule will become effective on August 10, 1987.

The substantive nondiscrimination obligations of the agency, as set forth in this rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. See 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs). This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment during debate on the floor of the House of Representatives that the Federal Government should have the same obligations under section 504 as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) (remarkes of Rep. Jeffords); 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); 124 Cong. Rec. at 38,552 (remarks of Rep. Sarasin).

There are, however, some language differences between this final rule and the Federal government's section 504 regulations for federally assisted programs. These changes are based on the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting Davis and section 504. See Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981); (APTA); See also Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F.2d 490 (1st Cir. 1983).

These language differences are also supported by the decision of the Supreme Court in Alexander v. Choate, 469 U.S. 287 (1985), where the Court held that the regulations for federally assisted programs did not require a recipient to modify a limitation on the duration of Medicaid coverage for inpatient hospital care for handicapped persons. Clarifying its Davis decision, the Court explained that section 504 requires only "reasonable" modifications, id. at 300, and explicitly noted that "[t]he regulations implementing section 504 [for federally assisted programs] are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." Id., at n. 21 [emphasis added].

Incorporation of these language changes makes this regulation consistent with the section 504 regulations for federally assisted programs as they have been interpreted by the Supreme Court. Many of the regulations for federally assisted programs were issued prior to the Davis decision, the lower court cases interpreting Davis, and the Alexander decison; therefore, their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these regulations for federally assisted programs must be interpreted to reflect the holdings of the Federal judiciary. Hence, the Panama Canal Commission believes that there are no significant differences between this final rule for federally conducted programs and the Federal government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298), and by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206).

This regulation is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared. This regulation does not have an impact on small entities and is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601 through 612).

Section-by-Section Analysis

Section 257.101 Purpose

Section 257.101 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973, to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

Section 257.102 Application.

The regulation applies to all programs or activities conducted by the agency except for programs or activities conducted outside the United States which do not involve individuals with handicaps in the United States.

Section 257.103 Definitions.

"Agency." For purposes of this regulation "agency" means the Panama Canal Commission.

"Assistant Attorney General." "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Auxiliary aids are addressed in @ 257.160(a)(1), and are discussed further in the analysis of that section.

"Complete complaint." A "complete complaint" is defined to include all the information necessary to enable the agency to investigate a complaint. The definition is necessary because the 180-day period for the agency's investigation (see @ 257.170(d)) begins when it receives a complete complaint.

"Facility." The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs, 28 CFR 41.3(f), except that the phrase "or interest in such property" has been deleted and the phrase "rolling stock or other conveyances" has been added. The phrase, "or interest in such property," is deleted, because the term "facility" as used in this regulation, refers to structures and not to intangible property rights. It should, however, be noted that the regulation applies to all programs and activities conducted by the agency involving individuals with handicaps in the United States, regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the agency. The term "facility" is used in @@ 257.149, 257.150 and 257.170(f).

"Individual with handicaps. " The definition of "individual with handicaps" is identical to the definition of " handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the statutory term " handicapped individual" to "individual with handicaps, " the legislative history of this amendment indicates that no substantive change was intended. Thus, although the term has been changed in this regulation to be consistent with the statute as amended, the definition is unchanged. In particular, although the term as revised refers to " handicaps" in the plural, it does not exclude persons who have only one handicap.

"Qualified individual with handicaps. " The definition of "qualified individual with handicaps" is a revised version of the definition of "qualified handicapped person" appears in the section 504 coordination

regulation for federally assisted programs (28 CFR 41.32).

Paragraph (1) deviates from existing regulations for federally assisted programs because of intervening court decisions. It defines "qualified individual with handicaps" with regard to any program under which a person is required to perform services or to achieve a level of accomplishment. In such programs a qualified individual with handicaps is one who can achieve the purpose of the program without modifications in the program that the agency can demonstrate would result in a fundamental alteration in its nature. This definition reflects the decision of the Supreme Court in Southeastern Community College v. Davis.

In that case, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment prevented her from participating in the clinical training portion of the program. The Court found that, if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." 442 U.S. at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," id. at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." Id. at 410.

We have incorporated the Court's language in the definition of "qualified individual with handicaps" in order to make it clear that such a person must be able to participate in the program offered by the agency. The agency is required to make modifications in order to enable an applicant with handicaps to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered, not whether the applicant could benefit or obtain results from some other program that the agency does not offer. Although the revised definition allows exclusion of some individuals with handicaps from some programs, it requires that an individual with handicaps who is capable of achieving the purpose of the program be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

The definition of "qualified individual with handicaps" has been revised to make it clear that the agency has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alteration, the agency must follow the procedures established in @@ 257.150(a) and 257.160(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the agency head or his designee in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the agency head determines that an action would result in a fundamental alteration, the agency must consider options that would enable an individual with handicaps to achieve the purpose of the program but would not result in such an alteration.

Paragraph (2) explains that "qualified individual with handicaps" means "qualified handicapped person," as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by @ 257.140(2) of this rule. Nothing in this part changes existing regulations applicable to employment.

For programs or activities that do not fall under the first two paragraphs, paragraph (3) adopts the existing definition of "qualified handicapped person" with respect to services in the coordination regulation for programs receiving

Federal financial assistance (28 CFR 41.32(b)). Under this definition, a qualified individual with handicaps is an individual with handicaps who meets the essential eligibility requirements for participation in the program or activity.

"Section 504. " This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the agency and not to programs or activities to which it provides Federal financial assistance.

Section 257.110 Self-evaluation.

This section requires that the agency conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with handicaps that promotes effective and efficient implementation of section 504.

This final rule uses the same provision adopted by the Department of Justice in its final rule implementing section 504 for its federally conducted programs. 28 CFR 39.110. The Department of Justice determined that this regulatory language was appropriate after it had analyzed the Federal Advisory Committee Act (5 U.S.C. app.) Executive Order 12024, and 41 CFR Part 101-6, the regulation of the General Services Administration implementing the Act.

This final rule provides that the agency shall afford an opportunity for interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process and development of transition plans (@ 257.150(d)) by submitting comments (both oral and written).

Section 257.111 Notice.

Section 257.111 requires the agency to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

Section 257.130 General prohibitions against discrimination.

Section 257.130 is an adaptation of the corresponding section of the coordination regulation under section 504 for programs or activities receiving Federal financial assistance (28 CFR 41.51).

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in @ 257.130 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. Whenever the agency has violated a provision in any of the subsequent sections, it has also violated one of the general prohibitions found in @ 257.130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of individuals with handicaps. The agency may not refuse to provide an individual with handicaps

with an equal opportunity to participate in or benefit from its program simply because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (e.g., epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question. The Department of Justice has said, for example, in the prototype regulations that it would be permissible to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce, but it may not be permissible to disqualify automatically all those who are blind in just one eye.

Section 504, however, prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on program accessibility (@@ 257.149, 257.150 and 257.151) and communications (@ 257.160) are specific applications of this principle.

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, paragraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids, benefits, or services when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the agency's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided to individuals with handicaps only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits or services would be more effective, paragraph (b)(2) provides that a qualified individual with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Paragraph (b)(1)(v) prohibits the agency from limiting a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the agency from utilizing criteria or methods of administration that deny individuals with handicaps access to the agency's programs or activities. The phrase "criteria or methods of administration" refers to official written agency policies and the actual practices of the agency. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with handicaps an effective opportunity to participate.

Paragraph (b)(4) specifically applies the prohibition enunciated in @ 257.130(b)(3) to the process of selecting sites for construction of new facilities or existing facilities to be used by the agency. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the agency, in the selection of procurement contractors, from using criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with handicaps or a given class of individuals with handicaps may be limited to those individuals with handicaps.

Paragraph (d), discussed above, provides that the agency must administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, i.e., in a setting that enables individuals with handicaps to interact with nonhandicapped person to the fullest extent possible.

Section 257.140 Employment.

Section 257.140 prohibits discrimination on the basis of handicap in employment. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. Gardner v. Morris, 752 F.2d 1271, 1277 (8th Cir. 1985); Smith v. U.S. Postal Service, 742 F.2d 257, 259-260 (6th Cir. 1984); Prewitt v. U.S. Postal Service, 662 F.2d 292, 302-304 (5th Cir. 1981). Contra McGuinness v. U.S. Postal Service, 744 F.2d 1318, 1320-21 (7th Cir. 1984); Boyd v. U.S. Postal Service, 752 F.2d 410, 413-414 (9th Cir. 1985).

Courts uniformly have held that in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. Smith, 742 F.2d at 262, Prewitt, 662 F.2d at 304. Accordingly, @ 257.140 (Employment) of this rule adopts the definitions, requirements, and procedures of section 501 as established in regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR Part 1613. (It should be noted, however, that section 501 and 29 CFR Part 1613 apply not only to handicapped persons in the United States but also to the employment of U.S. citizens outside the United States.) In addition to this section, @ 257.170(b) of this regulation specifies that the agency will use the existing EEOC procedures to resolve allegations of employment discrimination.

The final rule has not been changed. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap. While this rule could define terms with respect to employment and enumerate what practices are covered and what requirements apply, the agency is adopting the EEOC's recommendation that, in order to avoid duplicative, competing, or conflicting standards with respect to Federal employment, reference in these regulations to the government-wide EEOC rules is sufficient. The class of Federal employees and applicants covered by section 504 is identical to or subsumed within that covered by section 501. To apply different or lesser standards to persons alleging violations of section 504 could lead unnecessarily to confusion in the enforcement of the Rehabilitation Act with respect to Federal employment.

Section 257.149 Program accessibility: Discrimination prohibited.

Section 257.149 states the general nondiscrimination principle underlying the program accessibility requirements of @@ 257.150 and 257.151.

Section 257.150 Program accessibility: Existing facilities.

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.56 through 41.58), with certain modifications. Thus, @ 257.150 requires that the agency's program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. The regulation also makes clear that the agency is not required to make each of its existing facilities accessible (@ 257.150(a)(1)). Section 257.150(a)(2), unlike 28 CFR 41.56 and 41.57, places explicit limits on the agency's obligation to ensure program accessibility.

Paragraph (a)(2) generally codifies case law that defines the scope of the agency's obligation to ensure program accessibility. This paragraph provides

that in meeting the program accessibility requirement the agency is not required to take any action that would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. A similar limitation is provided in @ 257.160(d). This provision is based on the Supreme Court's holding in Southeastern Community College v. Davis, that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since Davis, the courts of appeals have applied this limitation on a showing that only one of the two undue burdens would be created as a result of the modification sought to be imposed under section 504. See e.g., Dopico v. Goldschmidt, supra; American Public Transit Association v. Lewis, supra (cited as APTA).

This interpretation is also supported by the recent decision of the Supreme Court in Alexander v. Choate, supra. Alexander involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days a year. The plaintiffs argued that this reduction violated section 504, because it had an adverse impact on handicapped persons. The Court assumed without deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact on handicapped people, but held that the reduction was not "the sort of disparate impact" discrimination that might be prohibited by Section 504 or its implementing regulations. 469 U.S. at 299. Relying on Southeastern Community College v. Davis, the Court said that section 504 guarantees qualified handicapped persons "meaningful access to the benefits that the [Federal] grantee offers", Id. at 301, and that "reasonable adjustments in the nature of the benefit being offered must at times be made to assure meaningful access." Id. at n. 21 (emphasis added). However, section 504 does not require " 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' * * * or that would constitute 'fundamental alteration[s] in the nature of a program.' " Id. at n. 20 (citations omitted).

Alexander supports the position, based on Davis and the earlier, lower court decisions, that in some situations, certain accommodations for a handicapped person may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. Thus, failure to include such an "undue burdens" provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation. This provision is unchanged from the proposed rule.

The agency is adopting the proposed rule's procedural requirements for application of the "fundamental alteration" and "undue financial and administrative burdens" language. The agency believes that, in most cases, making an agency program accessible will not result in undue burdens. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with @ 257.150(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the agency. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the agency head's decision or failure to make a decision may file a compliant under the compliance procedures established in @ 257.170. Finally, even if there is a determination that making a program accessible will fundamentally alter the nature of the program, or will result in undue financial and administrative burdens, the agency must still take actions, short of that outer limit, that will open participation in the agency program to individuals with handicaps to the fullest extent possible.

Paragraph (b)(1) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to

accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with the provision of services in the most integrated setting appropriate to the needs of individuals with handicaps. Structural changes in existing facilities are required only when there is no other feasible way to make the agency's program accessible. The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits, as appropriate.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the agency must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section 257.151 Program accessibility: News construction and alterations.

Overlapping coverage exists with respect to new construction under section 504 and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 through 4157). Section 257.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by individuals with handicaps in accordance with 41 CFR 101-19.600 through 101-19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 through 4157). We believe that it is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in @ 257.150. To the extent that the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of @ 257.151.

Federal practice under section 504 has always treated newly-leased buildings as subject to the program accessibility standard for existing facilities. Unlike the construction of new buildings, where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the agency believes the same program accessibility standard should apply to both owned and leased existing buildings.

In Rose v. United States Postal Services, 774 F.2d. 1355 (9th Cir. 1985), the Ninth Circuit held that the Architectural Barriers Act requires accessibility at the time of lease. The Rose court did not address the issue of whether section 504 likewise requires accessibility as condition of lease, and the case was remanded to the District Court for, among other things, consideration of that issue. The agency may provide more specific guidance on section 504 requirements for leased buildings after the litigation is completed.

Section 257.160 Communications.

Section 257.160 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under @ 257.160(a)(1) to

afford an individual with handicaps and equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They shall also include an opportunity for individuals with handicaps to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the agency [@ 257.160(a)(1)(i)]. The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under @ 257.160(d). That paragraph limits the obligation of the agency to ensure effective communication in accordance with Davis and the circuit court opinions interpreting it (see discussion of @ 257.150(a)(3)). Unless not required by @ 257.160(d), the agency shall provide auxiliary aids at no cost to the individual with handicaps.

The regulation requires the agency to provide auxiliary aids to ensure that individuals with handicaps have "an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency." Where the form of communication is different for individuals with handicaps than for non- handicapped people (e.g., oral instead of written for person with impaired vision, sign language instead of speech for persons with impaired hearing) the effectiveness of the communication is the appropriate measurement of equality of treatment.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (e.g., a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. Then, a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to make clear to the public (1) the communications services it offers to afford individuals with handicaps an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective. The agency shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the agency. Auxiliary aids must be afforded where necessary to ensure effective communication at the proceedings.

If sign language interpreters are necessary, the agency may require that it be given reasonable advance notice of the need for an interpreter. Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (@ 257.160(a)(1)(ii)). For example, the agency need not provide eyeglasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

The language in @ 257.160(a)(1)(ii) that states that the agency need not provide individually prescribed devices or readers for personal use is intended to distinguish between communications that are necessary to obtain the benefits of Federal programs and those that are not. This language parallels the requirements of the Federal government's section 504 regulations for federally assisted programs. For example, a federally operated library would have to ensure effective communication between its librarian and a patron, but not between the patron and a friend who had accompanied him or her to the library.

Paragraph (b) requires the agency to provide information to individuals with handicaps concerning accessible services, activities, and facilities. Paragraph (c) requires the agency to provide signs at inaccessible facilities that direct users to locations with information about accessible facilities.

Section 257.170 Compliance procedures.

The compliance procedures in this section follow the same basic scheme as the Justice Department's regulations. These regulations are less detailed, however. To the extent that the Commission determines that additional compliance procedures are warranted, they will be adopted in the form of internal regulations. Paragraph (a) specifies that paragraphs (c) through (l) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the agency will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR Part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

The agency is required to accept and investigate all complete complaints (@ 257.170(d)). If it determines that it does not have jurisdiction over a complaint, it shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal government (@ 257.170(e)). The agency has not adopted a rule requiring the referral of a complaint to the appropriate agency, because there may be circumstances in which there is not any agency which has jurisdiction over the matter complained of or the complaint does not contain sufficient information for the Commission to determine which agency has responsibility.

Paragraph (f) requires the agency to notify the Architectural and Transportation Barriers Compliance Board upon receipt of a complaint alleging that a building or facility subject to the Architectural Barriers Act was designed, constructed, or altered in a manner that does not provide ready access to and use by individuals with handicaps.

Paragraph (g) requires the agency to provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal. One appeal within the agency shall be provided (@ 257.170(i)). The appeal will not be heard by the same person who made the initial determination of compliance or noncompliance (@ 257.170(i)).

Paragraph (l) permits the agency to delegate its authority for investigating complaints to order Federal agencies. However, the statutory obligation of the agency to make a final determination of compliance or noncompliance may not be delegated.

List of Subjects in 35 CFR Part 257

Blind, Buildings, Civil rights, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped.

11For the reasons set forth in the preamble, 35 CFR Chapter I is amended as follows.

Dated: May 15, 1987.

D.P. McAuliffe, Administrator.

A new Part 257 is added to read as follows:

PART 257 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY PANAMA CANAL COMMISSION

Sec.
257.101 Purpose.
257.102 Application.
257.103 Definitions.
257.104-257.109 [Reserved]
257.110 Self-evaluation.
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257.112-257.129 [Reserved]
257.130 General prohibitions against discrimination.
257.131-257.139 [Reserved]
257.140 Employment.
257.141-257.148 [Reserved]
257.149 Program accessibility: Discrimination prohibited.
257.150 Program accessibility: Existing facilities.
257.151 Program accessibility: New construction and alterations.
257.152-257.159 [Reserved]
257.160 Communications.
257.161-257.169 [Reserved]
257.170 Compliance procedures.
257.171-257.999 [Reserved]

Authority: 29 U.S.C. 794.

@ 257.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

@ 257.102 Application.

This part applies to all programs or activities conducted by the agency except for programs or activities conducted outside the United States which do not involve individuals with handicaps in the United States.

@ 257.103 Definitions.

For purposes of this part, the term --

"Agency" means the Panama Canal Commission.

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

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, materials in Braille, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory actions in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. 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.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Individual with handicaps" 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. As used in this definition, the phrase:

(1) "Physical or mental impairment" includes --

(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" includes functions such as caring for oneself, 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 the agency 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 the agency as having such an impairment.

"Qualified individual with handicaps" means --

(1) With respect to any covered agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(2) With respect to employment, an individual with handicaps who meets the definition of "qualified handicapped person" set forth in 29 CFR 1613.702(f), which is made applicable to this part by @ 257.140; and

(3) With respect to any other covered program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub.

L. 99-506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

@@ 257.104-257.109 [Reserved]

@ 257.110 Self-evaluation.

(a) The agency shall, by July 11, 1988, evaluate its current 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 policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps, or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the evaluation required under paragraph (a) of this section, maintain on file and make available for public inspection --

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

(2) A description of any modifications made.

@ 257.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the agency head finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

@@ 257.112-257.129 [Reserved]

@ 257.130 General prohibitions against discrimination.

(a) No qualified individual with handicaps 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 conducted by the offices of the agency located in the United States.

(b)(1) The agency, 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 individual with handicaps the opportunity to participate in or benefit from the aid, benefit or service;

(ii) Afford a qualified individual with handicaps 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 handicaps 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 handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified

individuals with handicaps with aid, benefits, or services that are as effective as those provided to others; or

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

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissible separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would --

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would --

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

@@ 257.131-257.139 [Reserved]

@ 257.140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

@@ 257.141-257.148 [Reserved]

@ 257.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in @ 257.150 no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded

from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

@ 257.150 Program accessibility: Existing facilities.

(a) General. The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not --

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with @ 257.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his designee after considering all agency resources available for use in the funding and operation of the conducted 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, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) Methods -- (1) General. The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignments 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 any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 through 4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) Time period for compliance. The agency shall comply with the obligations established under this section by October 8, 1987, except that where structural changes in facilities are undertaken, such changes shall be made by July 10, 1990, but in any event as expeditiously as possible.

(d) Transition plan. In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by January 11, 1988, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). 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 agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(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 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;

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

@ 257.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151 through 4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

@@ 257.152-257.159 [Reserved]

@ 257.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency 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.

(c) The agency shall provide signs at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with @ 257.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his designee after considering all agency resources available for use in the funding and operation of the conducted 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 section would result in such an alteration or such burdens, the agency 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 handicaps receive the benefits and services of the program or activity.

@@ 257.161-257.169 [Reserved]

@ 257.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsibility for implementation and operation of this section shall be vested in the Director of Equal Opportunity.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 through 4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing --

(1) Findings of fact and conclusions of law;

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

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt by the complainant of decision required by @ 257.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by Administrator of the Panama Canal Commission.

(j) The Administrator shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the Administrator determines that it needs additional information from the complainant, he shall have 60 days from the date it receives the additional information to make its determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated.

@@ 257.171-257.999 [Reserved]

[FR Doc. 87-15657 Filed 7-9-87; 8:45 am]

GENERAL SERVICES ADMINISTRATION
AGENCY: General Services Administration.

41 CFR Part 105-8
Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by General Services Administration

56 FR 9862

March 8, 1991

ACTION: Final rule.

SUMMARY: This final regulation requires that the General Services Administration (GSA) operate all of its programs and activities to ensure nondiscrimination against qualified individuals with handicaps. It sets forth standards for what constitutes discrimination on the basis of mental or physical handicap, provide a definition for individuals with handicaps and qualified individual with handicaps, and establishes a detailed complaint mechanism for resolving allegations of discrimination against GSA. This regulation is issued under the authority of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in programs or activities conducted by Federal Executive agencies.

EFFECTIVE DATE: March 8, 1991.

FOR FURTHER INFORMATION CONTACT: Myrtle K. Cook, Civil Rights Division, General Services Administration, (202) 501-1368 or (202) 501-0702 (TDD). These are not toll-free numbers.

TEXT: SUPPLEMENTARY INFORMATION: On March 22, 1989, GSA published a Notice of Proposed Rulemaking (NPRM) for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap, as it applies to programs and activities conducted by GSA. 54 FR 11750.

By July 20, 1989, close of the comment period, GSA received numerous comments, the majority of which were from organizations representing individuals with handicaps. Each comment was read and analyzed. Decisions that GSA made in response to those comments were not made on the basis of the number of commenters addressing any one point but on a consideration of the merits of the points of view expressed in the comments.

Section 504 requires that regulations that apply to the programs and activities of Federal agencies shall be submitted to the appropriate authorizing committees of Congress and that such regulations may take effect no earlier than the thirtieth day after they have been submitted. GSA will submit this regulation to the Senate Committee on Labor and Human Resources and its Subcommittee on the Handicapped and the House Committee on Education and Labor and its Subcommittee on Select Education pursuant to the terms of section 504.

The regulation will become effective on March 8, 1991.

This rule applies to all programs and activities conducted by GSA.

Background

The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) , as it applies to programs and activities conducted by GSA.

On August 28, 1984, GSA participated in a joint publication of an NPRM issued by twenty-one agencies proposing identical standards and procedures for

implementing section 504. (49 FR 34132.) Following the public comment period, however, the agency determined that the rule as proposed would be inadequate for GSA's purposes in light of the agency's unique responsibilities for the buildings in which the Federal Government is housed. On March 22, 1989, GSA published an NPRM, which addressed with specificity the manner in which GSA would carry out its statutory responsibilities as the Government's "landlord," in order to enhance the abilities of other Federal agencies to offer their programs in a manner accessible to individuals with handicaps. It also outlined proposed procedures for cooperation between GSA and Federal tenant agencies when the accessibility of a Federal agency's programs is affected by the inaccessibility of a building under GSA's control.

As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (sec. 119, Pub. L. 95-602, 92 Stat. 2982), the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810), and Handicapped Programs Technical Amendments Act of 1988 (sec. 206(d) Pub. L. 100-630, 102 Stat. 3312), section 504 of the Rehabilitation Act of 1973 states that:

No otherwise qualified individual with handicaps in the United States, * * * shall, solely by reason of her or 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees. (29 U.S.C. 794 (1978 amendment italicized)).

Apart from language tailored to GSA's role as the Federal landlord, the substantive nondiscrimination obligations of the agency, as set forth in this rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. (See 28 CFR part 41 (section 504 coordination regulation for federally assisted programs)). This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) id.; 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); id. at 38,552 (remarks of Rep. Sarasin).

There are, however, some language differences between this rule and the Federal Government's section 504 regulations for federally assisted programs. Many of these changes are based on the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting Davis and section 504. See Dopico v. Goldschmidt, 687 F. 2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis, 655 F. 2d 1272 (D.C. Cir. 1981) (APTA); see also Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F. 2d 490 (1st Cir. 1983).

These language differences are also supported by the decision of the Supreme Court in Alexander v. Choate, 469 U.S. 287 (1985), where the Court held that the regulations for federally assisted programs did not require a recipient to modify its durational limitation on Medicaid coverage of inpatient hospital care for handicapped persons. Clarifying its Davis decision, the Court explained that section 504 requires only "reasonable" modifications, id. at 300, and explicitly noted that "[t]he regulations implementing section 504 [for federally assisted programs] are consistent with the view that reasonable

adjustments in the nature of the benefit offered must at times be made to assure meaningful access." Id. at n.21 (emphasis added).

Incorporation of these changes, therefore, makes this regulation implementing section 504 for federally conducted programs consistent with the Federal Government's regulations implementing section 504 for federally assisted programs as they have been interpreted by the Supreme Court. Many of these federally assisted regulations were issued prior to the interpretation of section 504 by the Supreme Court in Davis, by lower courts interpreting Davis, and by the Supreme Court in Alexander; therefore their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence the agency believes that there are no significant differences between this rule for federally conducted programs and the Federal Government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Department of Justice. It is an adaptation of a prototype prepared by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298) and distributed to Executive agencies. This regulation has also been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206). It is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared. This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601-612).

Section-by-Section Analysis

Section 105-8.101 Purpose

Section 105-8.101 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

Section 105-8.102 Application

The regulation applies to all programs or activities conducted by GSA. Under this section, a federally conducted program or activity is, in simple terms, anything GSA does. Aside from employment, there are two major categories of federally conducted programs or activities covered by this regulation: Those involving general public contact as part of ongoing agency operations and those directly administered by GSA for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the GSA facilities. Activities in the second category include programs that provide Federal services or benefits. This regulation does not, however, apply to programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

Section 105-8.103 Definitions

Assistant Attorney General. "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids. "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the agency's programs or activities. The definition provides examples of commonly used auxiliary aids.

Although auxiliary aids are required explicitly only by @ 105-8.160(a)(1), they may also be necessary to meet other requirements of the regulation.

One commenter suggested expanding the definition of "auxiliary aids", renaming "auxiliary aids" to read "aids for reasonable accommodation", and including the services of attendants.

The items set out in the definition are clearly intended as examples, and are not intended to constitute an exhaustive list. Thus the regulation contemplates and, in appropriate cases, requires other auxiliary aids as well. The agency believes that attendant services are generally personal in nature and that they are therefore generally not required. Therefore, there is no need to change the text of the regulation.

Complete Complaint. "Complete complaint" is defined to include all the information necessary to enable the agency to investigate the complaint. The definition is necessary because the 180 day period for the agency's investigation (see @ 105-8-170-7) begins when the agency receives a complete complaint.

Facility. The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs (28 CFR 41.3(f)) except that the term "rolling stock or other conveyances" has been added and the phrase "or interest in such property" has been deleted because the term "facility," as used in this regulation, refers to structures and not to intangible property rights. It should, however, be noted that the regulation applies to all programs and activities conducted by GSA regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by GSA. The term "facility" is used in @@ 105-8.149, 105-8.150, and 105-8.170-5.

Historic preservation pro grams, Historic properties, and Substantial impairment. These terms are defined in order to aid in the interpretation of @@ 105-8.150-1(b) and 105-8.150-2(b), which relate to accessibility of historic preservation programs

Individual with handicaps. The definition of "individual with handicaps" is identical to the definition of " handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the statutory term " handicapped individual" to "individual with handicaps, " the legislative history of this amendment indicates that no substantive change was intended. Thus, although the term has been changed in this regulation to be consistent with the statute as amended, the definition is unchanged. In particular, although the term as revised refers to " handicaps" in the plural, it does not exclude persons who have only one handicap.

Qualified individual with handicaps. The definition of "qualified individual with handicaps" is a revised version of the definition of "qualified handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

The first paragraph of the definition deviates from existing regulations for federally assisted programs because of intervening court decisions. It defines "qualified individual with handicaps" with regard to any program under which a
person is required to perform services or to achieve a level of accomplishment. In such programs a qualified individual with handicaps is one who can achieve the purpose of the program without modifications in the program that the agency can demonstrate would result in a fundamental alteration in its nature.

Section 105-8.154 Program accessibility: Exceptions specifies the steps to be taken before a final determination is made as to whether a proposed action would result in a fundamental alteration in the nature of a program or activity or in

undue financial and administrative burdens. The definition reflects the decision of the Supreme Court in Davis. In that case, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." Id. at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," id. at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It, therefore, concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." Id. at 410.

We have incorporated the Court's language in the definition of "qualified individual with handicaps" in order to make clear that such a person must be able to participate in the program offered by the agency. The agency is required to make modifications in order to enable an applicant with handicaps to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered, not whether the applicant could benefit or obtain results from some other program that the agency does not offer. Although the revised definition allows exclusion of some individuals with handicaps from some programs, it requires that an individual with handicaps who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

The agency has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alteration, the agency must follow the procedures established in @ 105-8.154 and @ 105-8.160(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the agency head or his or her designee in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the agency head determines that an action would result in a fundamental alteration, the agency must consider options that would enable the individual with handicaps to achieve the purpose of the program but would not result in such an alteration.

For programs or activities that do not fall under the first paragraph, the second paragraph adopts the existing definition of "qualified handicapped person" with respect to services (28 CFR 41.32(b)) in the coordination regulation for programs receiving Federal financial assistance. Under this definition, a qualified individual with handicaps is an individual with handicaps who meets the essential eligibility requirements for participation in the program or activity.

The third paragraph explains that "qualified individual with handicaps" means "qualified handicapped person" as that term is defined for purposes of employment in the Equal Employment Opportunity Commission's regulation at 29 CFR 1613.702(f), which is made applicable to this subpart by @ 105-8.140. Nothing in this subpart changes existing regulations applicable to employment.

Two commenters suggested that the fundamental alteration portion of @ 105-8.103 Definitions -- "Qualified individual with handicaps, " should reference @ 105 8.154. This point has been adequately addressed in the preamble.

Section 504. This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the agency and not to programs or activities to which it provides Federal financial assistance.

Section 105-8.110 Self-evaluation

The agency small conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with handicaps that promotes both effective and efficient implementation of section 504.

Section 105-8.111 Notice

Section 105-8.111 requires the agency to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

One commenter proposed the inclusion of provisions for assurances, transition plans and specific modification requirements. Federal agencies generally require that their recipients sign assurances that they will not discriminate in their programs receiving assistance. Because there are not two entities involved here (e.g., a Federal agency and a recipient) but only one (Federal agency), assurances are not appropriate. Provisions for transition plans and modifications are addressed in @@ 105-8.110 and 105-8.150-4.

Section 105-8.130 General Prohibitions Against Discrimination

Section 105-8.130 is an adaptation of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51).

Paragraph 105-8.130(a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in @ 105-8.130 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. If the agency violates a provision in any of the subsequent sections, it will also violate one of the general prohibitions found in @ 105-8.130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph 105-8.130(b) prohibits overt denials of equal treatment of individuals with handicaps. The agency may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from its program simply because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (e.g., epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question. It would be permissible, therefore, to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce; but it may not be

permissible to automatically disqualify all those who are blind in only one eye.

In addition, section 504 prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph 1058.130(b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on program accessibility (@@ 105-8.149 to 105-8.151) and communications (@ 105-8.160) are specific applications of this principle.

Despite the mandate of subsection 105-8.130(d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, @ 105-8.130(b)(1)(iv), in conjunction with @ 105-8.130(d) permits the agency to develop separate or different aids, benefits, or services when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the agency's programs or activities.

Paragraph 105-8.130(b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, @ 105-8.130(b)(2) provides that qualified individuals with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Paragraph 105-8.130(b)(1)(v) prohibits the agency from denying a qualified individual with handicaps the opportunity to participate as a member of a plannin g or advisory board.

Paragraph 105-8.130(b)(1)(vi) prohibits the agency from limiting a qualified individual with handicaps the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service. Paragraph 105-8.130(b)(3) prohibits the agency from utilizing criteria or methods of administration that deny individuals with handicaps access to the agency's programs or activities. The phrase "criteria or methods of administration" refers to official written agency policies and to the actual practices of the agency. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with handicaps an effective opportunity to participate.

Paragraph 105-8.130(b)(4) specifically applies the prohibition enunciated in @ 105-8.130(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the agency. Paragraph 105-8.130(b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph 105-8.130(b)(5) prohibits the agency, in the selection of procurement contractors, from using criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

Paragraph 105-8.130(b)(6) prohibits the agency from discriminating against qualified individuals with handicaps on the basis of handicap in the granting of licenses or certification. A person is a "qualified individual with handicaps" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification (see @ 105-8.103).

In addition, the agency may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. For example, the agency must comply with this requirement when establishing safety standards for

the operations of licensees. In that case, the agency must ensure that standards that it promulgates do not discriminate against the employment of qualified individuals with handicaps in an impermissible manner.

Paragraph 105-8.130(b)(6) does not extend section 504 directly to the programs or activities of licensees or certified entities themselves. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities nor are they programs or activities receiving Federal financial assistance merely by virtue of the Federal license or certificate. However, as noted above, section 504 may affect the content of the rules established by the agency for the operation of the program or activity of the licensee or certified entity, and thereby indirectly affect limited aspects of their operations.

One commenter suggested that paragraph 105-8.130(b)(6) extend to the programs or activities of licensees or certified entities. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities. We believe that extending section 504 to licensees or certified entities is not appropriate and, therefore, this suggestion is not adopted.

Paragraph 105-8.130(c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with handicaps or a given class of individuals with handicaps may be limited to those individuals with handicaps.

Paragraph 105-8.130(d), discussed above, provides that the agency must administer programs and activities in the most integrated settin g appropriate to the needs of qualified individuals with handicaps, i.e., in a setting that enables individuals with handicaps to interact with nonhandicapped persons to the fullest extent possible.

One commenter objected to the omission of a paragraph from the regulations for federally assisted programs that prohibits a recipient from providing significant assistance to an organization that discriminates. The suggested language in effect states that agencies may not "aid or perpetuate discrimination" against qualified individuals with handicaps by providing significant assistance to an agency, organization or person that discriminates on the basis of handicap. Assistance from the agency that would provide significant support to an organization constitutes Federal financial assistance and the organization, as a recipient of such assistance, would be covered by the agency's section 504 regulation for federally assisted programs. Therefore, the "significant assistance" provision would be inappropriate in a regulation applying only to federally conducted programs or activities.

Section 105-8.140 Employment

Section 105-8.140 prohibits discrimination on the basis of handicap in employment by the agency. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. Gardner v. Morris, 752 F. 2d 1271, 1277 (8th Cir. 1985); Smith v. United States Postal Service, 742 F. 2d 257, 259-260 (6th Cir. 1984); Prewitt v. United States Postal Service, 662 F. 2d 292, 302-04 (5th Cir. 1981). Contra McGuiness v. United States Postal Service, 744 F. 2d 1318, 1320-21 (7th Cir. 1984); Boyd v. United States Postal Service, 752 F. 2d 410, 413-14 (9th Cir. 1985).

Courts uniformly have held that, in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. Smith, 742 F. 2d at 262; Prewitt, 662 F. 2d at 304. Accordingly, @ 105-8.140 (Employment) of this rule adopts the definitions, requirements, and procedures of section 501 as established in regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR part 1613. Responsibility for coordinating enforcement of Federal laws prohibiting

discrimination in employment is assigned to the EEOC by Executive Order 12067 (3 CFR, 1978 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap. In addition to this section, @ 105-8.170(2) specifies that the agency will use the existing EEOC procedures to resolve allegations of employment discrimination.

Section 105-8.148 Consultation With the Architectural and Transportation Barriers Compliance Board

Section 105-8.148 provides that GSA must consult with the Architectural and Transportation Barriers Compliance Board (ATBCB) in carrying out GSA's responsibilities under this subpart as they relate to architectural barriers in GSA controlled facilities that house Federal agencies.

Section 105-8.149 Program Accessibility: Discrimination Prohibited

Section 105-8.149 states the general nondiscrimination principle underlying the program accessibility requirements of @@ 105-8.150 and 105-8.151.

Section 105-8.150 Program Accessibility: Existing Facilities

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.57), with certain modifications. Section 105-8.150 requires that each agency program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. The regulation also makes clear that the agency is not required to make each of its existing facilities accessible (@ 105-8.150-1(a)).

Paragraph (b), which establishes a special limitation on the obligation to ensure program accessibility in historic preservation programs, is discussed below in connection with paragraph 105-8.150-2(b).

Paragraph 105-8.150-2(a) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with handicaps. Structural changes in existing facilities are required only when there is no other feasible way to make the agency's program accessible. (It should be noted that "structural changes" include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alterations to a load-bearing structural member.) The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraph 105-8.150-1(b) provides an additional limitation on the obligation to ensure program accessibility that is applicable only to historic preservation programs. In order to avoid possible conflict between the congressional mandates to preserve historic properties on the one hand and to eliminate discrimination against individuals with handicaps on the other, @ 105-8.150-1(b) provides that in historic preservation programs the agency is not required to take any action that would result in a substantial impairment of significant historic features of a historic property.

Nevertheless, because the primary benefit of a historic preservation program is uniquely the experience of the historic property itself, @ 105-8.150-2(b) requires the agency to give priority to methods of providing program accessibility that permit individuals with handicaps to have physical access to the historic property. This priority on physical access may also be viewed as a specific application of the general requirement that the agency administers programs in the most integrated setting appropriate to the needs of qualified

individuals with handicaps (@ 105-8.130(d)). Only when providing physical access would result in a substantial impairment of significant historic features, in a fundamental alteration in the nature of the program, or in undue financial and administrative burdens, may the agency adopt alternative methods for providing program accessibility that do not ensure physical access. Examples of some alternative methods are provided in @ 105-8.150-2(b).

The special limitation on program accessibility set forth in @ 105-8.150-1(b) is applicable only to programs that have preservation of historic properties as a primary purpose (see supra discussion of definition of "historic preservation program," @ 105-8.103). Narrow application of the special limitation is justified because of the inherent flexibility of the program accessibility requirement. Where historic preservation is not a primary purpose of the program the agency is not bound to a particular facility. It can relocate all or part of its program to an accessible facility, make home visits, or use other standard methods of achieving program accessibility without making structural alterations that might impair significant historic features of the historic property.

Subsection 105-8.150-3 and -4 establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), GSA must make any necessary structural changes in facilities it occupies as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within one year of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section 105-8.151 Program Accessibility: New Construction and Alterations

Overlapping coverage exists with respect to new construction and alterations under section 504 and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). Section 105-8.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by individuals with handicaps in accordance with 41 CFR 101-19.600 to 101-19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). We believe that it is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required by the regulation to meet accessibility standards simply by virtue of being leased. However, GSA programs carried out in those buildings are subject to the program accessibility standard for existing facilities in @ 105-8.150. To the extent the buildings are newly constructed or altered, that must also meet the new construction and alteration requirements of @ 105-8.151. Programs carried out in those buildings by agencies other than GSA are subject to the program accessibility standards in those agencies' regulations.

Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the agency believes the same program accessibility standard should apply to both owned and leased existing buildings. However, in leasing space, GSA must first attempt to find space that meets all the requirements of the Uniform Federal Accessibility Standards (UFAS). If no such bid is received, other bids may be accepted. GSA's preference is for buildings complying with UFAS.

Two developments have occurred in Federal policy and practice for leasing activities. First, GSA revised its standard leasing solicitation for offers (SFO) to include GSA's preference for leased space complying with UFAS. The SFO is the document that sets forth the Government's leasing requirements and that is used by builders in developing responsive bids. Second, the ATBCB amended in 1988 its minimum guidelines and requirements, which preceded the establishment of UFAS, to establish requirements for standards for buildings leased by the Federal Government [36 CFR 1190.34 (1989)]. The minimum guidelines and requirements apply to leased buildings even if they are not altered. Section 1190.34(a) requires that any building or facility that is to be leased by the Federal Government, without having been designed or constructed in accordance with its specifications, comply with the standards for new construction (@ 1190.31), incorporate the features listed in the standards for alterations (@ 1190.33(c)), or, if no such space is available, be altered to include certain accessible elements and spaces. GSA will revise UFAS to include these leasing provisions.

In Rose v. United States Postal Service, 774 F.2d 1355 (9th Cir. 1985), the Ninth Circuit held that the Architectural Barriers Act requires accessibility at the time of lease. The Rose court did not address the issue of whether section 504 likewise requires accessibility as a condition of lease, and the case was remanded to the District Court for, among other things, consideration of that issue. The agency may provide more specific guidance on section 504 requirements for leased buildings after the litigation is completed.

Section 105-8.152 Program Accessibility: Assignment of Space.

This section and the next are written especially to address the following major areas: (1) GSA's authorities and responsibilities for assignment of space (@ 105-8.152); and (2) occupant agencies' transition plans are required by each agency's section 504 regulation (@ 105-8.153). These two sections are intended to deal with the interplay between GSA's responsibilities as the Federal Government's "landlord" and other agencies' section 504 obligations to make programs accessible, as well as with the interaction between GSA and Federal tenant agencies when the accessibility of a Federal agency's programs is affected by the inaccessibility of a building under GSA's control. GSA has unique responsibilities for space owned and leased by the Federal Government, pursuant to the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 471 et seq. and various sections of titles 40 and 44 (1982) and the Public Buildings Act of 1959, as amended (40 U.S.C. 601-616 (1982)). For example, GSA has the authority and responsibility to perform centralized property management functions for agencies of the Federal Government. 40 U.S.C. 490. GSA is authorized to alter or otherwise arrange for alterations for occupant agencies on either a no-cost or reimbursable basis. Id. at sections 490(j) and 603. GSA also has exclusive statutory authority and responsibility to construct most types of new public buildings. Id. at section 601. GSA has interpreted and further defined these duties in its Federal Property Management Regulations, 41 CFR chapter 101, subchapter D (1986).

Section 105-8.152 is intended to ensure that assignment or reassignment of space will not result in one or more of an occupant agency's programs or activities being inaccessible to individuals with handicaps. GSA is responsible to ensure that federally owned space or space leased from nonfederal sources does not make an occupant agency's programs inaccessible. While GSA is ultimately responsible for the accessibility of the space under its control, the nature of program accessibility requires the participation of the occupant agency in decisions affecting its space. Unless the occupant agency analyzes its own programs and determines which facilities must be altered to make its programs accessible to individuals with handicaps, GSA cannot proceed in a cost-effective manner.

Prior to the assignment or reassignment of space to a Federal agency, GSA must consult with the agency to ensure that the assignment or reassignment will not result in one or more of the agency's programs or activities being

inaccessible to individuals with handicaps. If the agency informs GSA that use of the space will result in one or more of the agency's programs being inaccessible, GSA must take one or more of the following actions to make the programs accessible: (1) Arrange for alterations to facilities; (2) locate and provide alternative space that will not result in one or more of the agency's programs being inaccessible; or (3) take any other actions that result in making the agency's programs accessible. Under this proposal, GSA may not require the agency to accept space that results in one or more of the agency's programs being inaccessible.

Section 105-8.154, which contains exceptions to the program accessibility requirements, is applicable to this section.

Section 105-8.153 Program Accessibility: Interagency Cooperation

Over the next several years, Federal agencies are required to evaluate their own programs and develop transition plans when structural changes are necessary to achieve the goal of program accessibility. The agencies generally cannot, however, perform or contract for these changes unless authorized by GSA. In other words, those agencies that are required by their section 504 transition plan to alter GSA-controlled buildings must request that GSA approve these alterations.

Section 105-8.153 establishes a framework for GSA to effectively receive and process agencies' requests for structural changes or other actions under GSA's control. Upon receipt of an agency's transition plan, GSA must assist or advise the requesting agency in providing or arranging for the requested action within the time frames specified in the transition plan.

GSA's role in this area will, however, be more than merely reactive. GSA intends to participate with these Federal agencies in the development of their transition plans. In this capacity GSA can and should call upon its resources to ensure that an agency's decision to request an alteration is well-informed. Even before agency transition plans are completed, GSA expects to conduct a survey of buildings under its control in order to facilitate compliance with @ 105-8.153. Further, GSA intends to take the lead in coordinating accessibility issues related to those buildings under GSA control with several Federal agencies as tenants. For example, if two Federal agencies occupying different floors of the same building each request that public meeting space on their floors be made accessible, GSA should take the lead in determining with the two agencies if their accessibility needs would be met by altering and sharing one room.

Section 105-8.153 provides that GSA, upon request from an occupant agency engaged in the development of a transition plan under section 504, must participate with the occupant agency in the development of the transition plan and provide information and guidance to the occupant agency. Upon request, GSA must conduct space inspections to assist the agency in determining whether a current assignment results in one or more of the occupant agency's programs or activities being inaccessible. (@ 105-8.152(a)).

Subsection 105-8.153-2 establishes procedures for GSA to deal with an occupant agency's request for new space, additional space, relocation to accessible space, alterations, or other actions under GSA's control that are needed to ensure program accessibility in the requesting agency's programs as required by the agency's section 504 transition plan.

Like @ 105-8.152, @ 105-8.153 covers only those buildings that are under GSA's control. It does not address the situation where GSA has delegated management responsibilities to the sole occupant of a Federal building. Nor does it specify the mechanism by which cost reimbursement between GSA and other Federal agencies will be made. Determinations as to the amount of funds needed for alterations, which agency will obtain the funds, and the time frame within

which the funds will be obtained will be made on a case-by-case basis.

Section 105-8.154 Program Accessibility Exceptions

Section 105-8.154 places explicit limits in the agency's obligation to comply with the provisions concerning accessibility to GSA's program, assignment of space to other agencies, and cooperation with other agencies. It generally codifies recent case law that defines the scope of the agency's obligation to ensure program accessibility. This section provides that in meeting the program accessibility requirements of @@ 105-8.150, .152, and .153, GSA is not required to take any action that would result in a fundamental alteration in the nature of GSA's program or activity or in undue financial and administrative burdens. A
similar limitation is provided in @ 105-8.160(d). This provision is based on the Supreme Court's holding in Southeastern Community College v. Davis, 442 U.S. 397 (1979), that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since Davis, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. See, e.g., Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1989); American Public Transit Association v. Lewis, (APTA), 655 F.2d 1272 (D.C. Cir. 1981).

Section 105-8.154 and @ 105-8.160(d) are also supported by the Supreme Court's Decision in Alexander v. Choate, 469 U.S. 287 (1985). Alexander involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days per year. Plaintiffs argued that this reduction violated section 504 because it had an adverse impact on individuals with handicaps. The Court assumed without deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact on individuals with handicaps but held that the reduction was not "the sort of disparate impact" discrimination that might be prohibited by section 504 or its implementing regulation. Id. at 299.

Relying on Davis, the Court said that section 504 guarantees qualified handicapped persons "meaningful access to the benefits that the grantee offers," id. at 301, and that "reasonable adjustments in the nature of the benefit being offered must at times be made to assure meaningful access." Id. at n.21 (emphasis added). However, section 504 does not require " 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' * * * or that would constitute 'fundamental alteration[s] in the nature of a program.' " Id. at n.20 (citations omitted). Alexander supports the position, based on Davis and the earlier, lower court decisions, that in some situations, certain accommodations for an individual with handicaps may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. Thus, failure to include such an "undue burdens" provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

This section, however, does not establish an absolute defense; it does not relieve the agency of all obligations to individuals with handicaps. Although the agency is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with handicaps receive the benefits and services of the federally conducted program or activity.

It is our view that compliance with @@ 105-8.150, .152, and .153 would in most cases not result in undue financial and administrative burdens on GSA. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of the conducted

program or activity should be considered. The burden of proving that compliance with any of these three sections would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with GSA. The decision that compliance would result in such alteration or burdens must be made by the Administrator or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. See @ 105-8.154. Any person who believes that he or she or any specific class of persons has been injured by the Responsible Official's decision or failure to make a decision may file a complaint under the compliance procedures established in @ 105-8.170.

One commenter suggested that the total resources of the agency should be considered in determining whether or not an accommodation can be made, rather than just the funds "available for use in the funding and operation of the program or activity." Since many of the agency's funds are earmarked for specific purposes and are therefore, unavailable for use elsewhere, the entire agency budget is not an appropriate consideration.

Section 105-8.160 Communications

Section 105-8.160 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under @ 105-8.160(a) to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They shall also include an opportunity for individuals with handicaps to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the agency (@ 105-8.160(a)(1)(i)). The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under @ 105-8.160(d). That paragraph limits the obligation of the agency to ensure effective communication in accordance with Davis and the circuit court opinions interpreting it (see supra preamble discussion of @ 105-8.154). Unless not required by @ 105-8.160(d) the agency shall provide auxiliary aids at no cost to the individual with handicaps.

The discussion of @ 105-8.154 Program accessibility: Exceptions, regarding the determination of undue financial and administrative burdens, also applies to this section and should be referred to for a complete understanding of the agency's obligation to comply with @ 105-8.160.

In some circumstances, a note pad and written materials may be sufficient to permit effective communication with a person with hearing impairments. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (e.g., a meeting) or where the applicant or participant with hearing impairments is not skilled in spoken or written language. In these cases, a sign language interpreter may be appropriate. For persons with vision impairments, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to inform the public of (1) the communications services it offers to afford individuals with handicaps an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective.

The agency shall ensure effective communication with persons with vision and hearing impairments involved in hearings conducted by the agency. Auxiliary aids must be afforded where necessary to ensure effective communication at the proceedings. If sign language interpreters are necessary, the agency may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a

personal nature (@ 105-8.160(a)(1)(i)). For example, the agency need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

Paragraph 105-8.160(b) requires the agency to provide information to individuals with handicaps concerning accessible services, activities, and facilities. Paragraph 105-8.160(c) requires the agency to provide signage at inaccessible facilities that directs users to locations with information about accessible facilities.

Section 105-8.170 Compliance Procedures

Section 105-8.170 establishes a detailed complaint processing and review procedure for resolving allegations of discrimination in violation of section 504 in GSA's programs or activities. It is based on the Department of Justice's rule for its programs (28 CFR 39.170) and provides an opportunity for a hearing before an administrative law judge.

Subsection 105-8.170-1 specifies that subsections 105-8.170 through .170-13 establish the procedures for processing complaints other than employment complaints. Subsection 105-8.170-2 provides that the agency will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

Subsection 105-8.170-3 vests in the Responsible Official the responsibility for the overall management of the section 504 compliance program. "Responsible Official" or "Official," as defined in @ 105-8.103, refers to the Director of Civil Rights Division, who is designated as the official responsible for coordinating implementation of compliance procedures set forth in @ 105-8.170. The definition of "Official" includes other GSA Officials to whom authority has been delegated by the Official.

Paragraph 105-8.170-4 (a) and (c) provide that any person who believes that he or she has been discriminated against may file a complaint within 180 days from the date of the alleged discrimination. The Official may extend the time limit when the complainant shows goods cause. Good cause could be found if, for example, (1) the complainant mistakenly filed with the wrong agency and was not informed of the mistake within the 180 days; or (2) the complainant could not reasonably be expected to know of the act or event said to be discriminatory.

Paragraph 105-8.170-4(b) requires that the name and identity of a complainant be held in confidence unless he or she waives that right in writing and except to the extent necessary for compliance purposes.

Complaints may be mailed or delivered to the Administrator, the Responsible Official, or other agency Officials. Complaints received by any agency official other than the Responsible Official must be forwarded immediately to the Responsible Official (paragraph 105-8.170-4(d)).

Subsection 105-8.170-5 requires the agency to send to the Architectural and Transportation Barriers Compliance Board quarterly reports of complaints alleging that a building or facility subject to the Architectural Barriers Act was designed, constructed, or altered in a manner that does not provide ready access to and use by individuals with handicaps.

The Responsible Official is required to accept all complete complaints over which the agency has jurisdiction (@ 105-8.170-6(a)). If the Official determines that the agency does not have jurisdiction over a complaint, the Official shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal Government (@ 105-8.170-6(d)).

If a complaint is not complete when it is filed, the Official must notify the complainant within 30 days that additional information is needed. The complainant must furnish the necessary information within 30 days of receipt of the notice, or the complaint will be dismissed without prejudice. Filing an incomplete complaint within 180 days from the date of the alleged discrimination satisfies the requirement of paragraph 105-8.170-4(c), but the time frames governing the Official's other obligations to process the complaint (see e.g., @@ 105-8.170-7 and 105-8.170-8) do not begin to operate until the Official receives a complete complaint.

Within 180 days of receipt of the complete complaint, the Official is to investigate the complaint, attempt an informal resolution, and, if informal resolution is not achieved, issue a letter of findings (@ 105-8.170-7). Within the time limit, the Official should make every effort to achieve informal resolution whenever possible.

Subsection 105-8.170-8 requires that the Official's letter be sent to the complainant and respondent, and that it contain findings of fact and conclusions of law, the relief granted if discrimination is found, and notice of the right to appeal. If neither party files an appeal from the letter of findings within 30 days after receipt of the letter, the letter will constitute the final decision of the agency (@ 105-8.170-9).

The regulation provides that a party may appeal the Official's letter of findings to the Special Counsel for Ethics and Civil Rights. Subsection 105-8.170-11 provides an opportunity for a hearing before an administrative law judge (ALJ). The ALJ would make a recommended decision to the Special Counsel for Ethics and Civil Rights, who would make the final agency decision. The purpose of the hearing is to provide a forum in which the complainant or respondent can have an opportunity to be heard, confront witnesses, and present evidence so that an ALJ can issue a recommended decision that is well-reasoned and justified on the basis of the evidence presented.

It would be expected that an opportunity for a hearing before an ALJ would assure more impartiality and the appearance of more impartiality than a decision made by one agency official concerning other officials of the same agency. It would also be expected that agency decisions based on a hearing record would more likely survive later judicial review.

Another person or organization would be allowed to participate as a third party or amicus curias if the ALJ determines that the petitioner has a legitimate interest in the proceedings, that participation will not unduly delay the outcome, and the petitioner's participation may contribute materially to the disposition of the proceedings.

Under subsection 105-8.170-12, the Special Counsel for Ethics and Civil Rights renders a final agency decision after appeal without a hearing or after a
hearing. The Special Counsel directs appropriate remedial action if discrimination is found. The Special Counsel's decision will involve reviewing the entire file, including the investigative report, preliminary finding, and, if a hearing was held, the hearing record and recommended decision of the ALJ. If it is the decision of the Special Counsel to reject or modify the recommended decision of the judge, the reasons for the rejection or a modification will be put in writing and made part of the decision (@ 105-8.170-12(a)). The decision shall be made within 60 days of receipt of the complaint file or the hearing record.

One commenter provided four suggestions concerning compliance proceedings. First, the commenter stated that GSA should obtain the expertise of ATBCB to help resolve deficiencies regarding construction or location of facilities. GSA will solicit the assistance of the ATBCB to resolve deficiencies regarding construction or assist in location of facilities under @ 105-8.148. No additional provision is needed.

Second, the commenter urged that a provision should be made for judicial review at the initial complaint level in addition to the one provided at the appeal level. This issue is beyond the scope of this regulation and is for the courts to decide.

Third, the commenter suggested GSA should take actions to ensure that other regulations, forms and directives issued by GSA are superseded by the nondiscrimination requirements of this part. Upon publication of this rule, GSA will do so but a provision in this rule is unnecessary.

Fourth, the commenter suggested the rule should allow for attorney fees during the administrative proceedings and compensation to the prevailing party. Such provisions are statutory and beyond the scope of this regulation and is for the courts to declde.

Section 105-8.171 Complaints Against an Occupant Agency

Section 105-8.171 deals with complaints against an occupant agency alleging that the agency's program is inaccessible because existing facilities under GSA's control contain architectural barriers. In these cases, the occupant agency will likely require assistance from GSA in devising and implementing remedies for violations of section 504 that may be found to exist. The section provides that in such cases GSA and the occupant agency that originally received the complaint are jointly responsible for complaint resolution. In our view, early GSA involvement in the complaint process will result in a more speedy, efficient complaint resolution system. The section makes GSA jointly responsible for complaints only when an occupant agency sends a copy of a complete complaint to GSA. GSA must make reasonable efforts to follow the time frames for complaint resolution that go into effect under the notifying occupant agency's rules when it receives a complete complaint.

List of Subjects in 41 CFR Part 105-8

Administrative practice and procedure, Buildings, Civil rights, Equal employment opportunity, Federal buildings and facilities, Government property management, Handicapped.

For reasons stated in the preamble, chapter 105 of title 41 of the Code of Federal Regulations is amended as follows:

Part 105-8 is added to read as follows:

PART 105-8 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY GENERAL SERVICES ADMINISTRATION

Sec.
105-8.101 Purpose.
105-8.102 Application.
105-8.103 Definitions.
105-8.104 -- 105-8.109 [Reserved]
105-8.110 Self-evaluation.
105-8.111 Notice.
105-8.112 -- 105-8.129 [Reserved]
105-8.130 General prohibitions against discrimination.
105-8.131 -- 105-8.39 [Reserved]
105-8.140 Employment.
105-141 -- 105-8.147 [Reserved]
105-8.148 Consultation with the Architectural and Transportation Barriers Compliance Board.
105-8.149 Program accessibility: Discrimination prohibited.
105-8.150 Program accessibility: Existing facilities.
105-8.150-1 General.
105-8.150-2 Methods.
105-8.150-3 Time period for compliance.

105-8.150-4 Transition plan.
105-8.151 Program accessibility: New construction and alterations.
105-8.152 Program accessibility: Assignment of space.
105-8.153 Program accessibility: Interagency cooperation.
105-8.153-1 General.
105-8.153-2 Requests from occupant agencies.
105-8.154 Program accessibility: Exceptions.
105-8.155 -- 105-8.159 [Reserved]
105-8.160 Communications.
105-8.161 -- 105-8.169 [Reserved]
105-8.170 Compliance procedures.
105-8.170-1 Applicability.
105-8.170-2 Employment complaints.
105-8.170-3 Responsible Official.
105-8.170-4 Filing a complaint.
105-8.170-5 Notification to the Architectural and Transportation Barriers Compliance Board.
105-8.170-6 Acceptance of complaint.
105 8.170-7 Investigation/conciliation.
105-8.170-8 Letter of findings.
105-8.170-9 Filing an appeal.
105-8.170-10 Acceptance of appeals.
105-8.170-11 Hearing.
105-8.170-12 Decision.
105-8.170-13 Delegation.
105-8.171 Complaints against an occupant agency.

Authority: 29 U.S.C. 794.

Grant B. Williams,

Director, Civil Rights Division.

[FR Doc. 91-5394 Filed 3-7-91; 8:45 am]

Document Separator

Executive Office of the President
Office of Administration
Office of Personnel Management
Merit Systems Protection Board
Office of the Special Counsel
Federal Labor Relations Authority
National Aeronautics and Space Administration
Securities and Exchange Commission
Overseas Private Investment Corporation
AfricanDevelopment Foundation
National Labor Relations Board
National Archives and Records Administration
Veterans Administration
Federal Emergency Management Agency

Enforcement of Nondiscrimination on the Basis of Handicap in Federally Conducted Programs

AGENCIES: Executive Office of the President, Office of Personnel Management, Merit Systems Protection Board, Office of the Special Counsel (MSPB), Federal Labor Relations Authority, National Aeronautics and Space Administration, Securities and Exchange Commission, Overseas Private Investment Corportation, African Development Foundation, National Labor Relations Board, National Archives and Records Administration, Federal Emergency Management Agency.

3 CFR PART 102
5 CFR PART 723
5 CFR PART 1207
5 CFR PART 1262
5 CFR PART 2416
14 CFR PART 1251
17 CFR PART 200
22 CFR PART 711
22 CFR PART 1510
29 CFR PART 100
36 CFR PART 1208
38 CFR PART 15
44 CFR PART 16
52 FR 25124

July 2, 1987

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed regulation requires that the agencies listed above operate all of their programs and activities to ensure nondiscrimination against qualified individuals with handicaps. It sets forth standards for what constitutes discrimination on the basis of mental or physical handicap, provides a definition for individual with handicaps and qualified individual with handicaps, and establishes a complaint mechanism for resolving allegations of discrimination. This regulation is issued under the authority of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in programs or activities conducted by Federal Executive agencies.

DATE: To be assured of consideration, comments must be in writing and must be received on or before August 31, 1987. Comments should refer to specific sections in the regulation.

ADDRESSES: See individual agencies below. Copies of this notice will be made available on tape for persons with impaired vision who request them. They will be provided by the Coordination and Review Section, Civil Rights Division, Department of Justice, Washington, DC 20530, (202) 724-2222 (voice) or (202) 724-7678 (TDD).

FOR FURTHER INFORMATION CONTACT: See individual agencies below.
ADDRESSES: Comments should be sent to Arnold Intrater, General Counsel, Office of Administration, Executive Office of the President, Washington, DC 20503.

Comments received will be available for public inspection at the Executive Office of the President Library, Room G-102, New Executive Office Building, Washington, DC 20503 from 8:30 a.m. to 5:30 p.m., Monday through Friday, except legal holidays. As access to the building is restricted because of security considerations, persons desiring entry should call 395-3654 (voice) or 456-6213 (TDD) in advance.

FOR FURTHER INFORMATION CONTACT: Arnold Intrater, (202) 456-6226 (voice) or (202) 456-6213 (TDD).
ADDRESSES: Comments should be sent to Mr. Raleigh Neville, U.S. Office of Personnel Management, Room 6504, Washington, DC, 20415. Comments received will be available for public inspection at Room 6504, 1900 E St., NW., Washington, DC from 10:00 a.m. to 3:30 p.m. Monday through Friday except legal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Raleigh Neville, (202) 632-6817, TDD: Mr. John Gimperling, (202) 632-6272.
ADDRESSES: Comments should be sent to Merit Systems Protection Board, 1120 Vermont Avenue, NW., 8th Floor, Washington, DC 29419. Comments received will be available for public inspection at the above address from 8:30 a.m. to 5:00 p.m. Monday through Friday except legal holidays.

FOR FURTHER INFORMATION CONTACT: Darrell L. Netherton, (202) 653-5805 (voice), (202) 653-8896 (TDD).
ADDRESSES: Comments should be sent to the Office of the Special Counsel, 1120 Vermont Avenue, NW., Suite 1100, Washington, DC, 20005. Comments received will be available for public inspection at the above address from 8:30 a.m. to 5:00 p.m. Monday through Friday except legal holidays.

FOR FURTHER INFORMATION CONTACT: John Marshall Meisburg, Jr., General Attorney, FTS 653-7307, (202) 653-7307 (voice) or (202) 724-7678 (TDD).
ADDRESSES: Comments should be sent to Orinda R. Nelson, Associate Director, Equal Employment Opportunity, Federal Labor Relations Authority, 500 C Street, SW., Washington, DC 20424. Comments received will be available for public inspection at the above address from 8:15 a.m. to 4:45 p.m. Monday through Friday except legal holidays.

FOR FURTHER INFORMATION CONTACT: Orinda R. Nelson (202) 382-0992 (voice) or (202) 724-7678 (TDD).
ADDRESSES: Comments should be sent to Ms. Lynda Sampson, Handicapped and Aged Employment Program Manager, National Aeronautics and Space Administration, Room 6111, 400 Maryland Avenue, SW., Washington, DC 20546. Comments received will be available for public inspection at the above address from 10:00 a.m. to 3:00 p.m. Monday through Friday except legal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Lynda Sampson (202) 453-2177 (voice) or (202) 426-1436 (TDD).
ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comment letters should refer to File No. S7-17-87. All comments received will be available for public inspection and copying in the Commission's Public Reference Room.

FOR FURTHER INFORMATION CONTACT: Nancy A. Wolynetz, Selective Placement Coordinator, 450 Fifth Street, NW., Washington, DC (202) 272-2550 (voice) or (202) 272-2552 (TTD); or Jeanne G. Hartford, Special Counsel, Office of the Executive Director, 450 Fifth Street, NW., Washington, DC (202) 272-2700.

Administrative practice and procedure, Blind, Buildings, Civil Rights, Employment, Equal Education Opportunity, Equal Employment Opportunity, Federal buildings and facilities, Freedom of Information, Handicapped, Historic

Places, Historic Preservation, Government Employees, Privacy, Securities.

It is proposed that Part 200 Title 17 of the Code of Federal Regulations be amended as follows:

ADDRESSES: Comments should be sent to: Jane H. Chalmers, Deputy General Counsel, Overseas Private Investment Corporation, 1615 M St., NW Suite 400, Washington, DC 20527.

Comments received will be available for public inspection at 1615 M Street, NW., Suite 400, Washington, DC 20527 from 9:30 a.m. to 5:00 p.m. Monday through Friday except legal holidays.

FOR FURTHER INFORMATION CONTACT: Jane H. Chalmers (202) 457-7200 (voice) or (202) 724-7678 (TDD).
ADDRESSES: Comments should be sent to the Office of the General Counsel, 1625 Massachusetts Avenue, NW., Suite 600, Washington, DC, 20036. Comments received will be available for public inspection at the above address from 8:30 a.m. to 5:00 p.m. Monday through Friday except legal holidays.

FOR FURTHER INFORMATION CONTACT: Paul Magid, General Counsel, 1625 Massachusetts Avenue, NW., Suite 600, Washington, DC, 20036 (202) 673-3916 (voice) or (202) 724-7678 (TDD).
ADDRESSES: Comments should be sent to John C. Truesdale, Executive Secretary, National Labor Relations Board, 1717 Pennsylvania Avenue, NW., Washington, DC 20570. Comments received will be available for public inspection at the above address from 8:30 a.m. to 5:00 p.m. Monday Through Friday except legal holidays.

FOR FURTHER INFORMATION CONTACT: Ernest Russell, Director of Administration, National Labor Relations Board, 1717 Pennsylvania Avenue, NW., Washington, DC (202) 254-9200 or (202) 634-1699 (TDD).
ADDRESSES: Comments should be sent to: Adrienne C. Thomas, Director, Program Policy and Evaluation Division, National Archives (NAA), Washington, DC 20408.

Comments received will be available for public inspection at Room 409, National Archives Building, 8th & Pennsylvania Avenue, NW., Washington, DC 20408, from 8:45 a.m. to 5:15 p.m. Monday through Friday except legal holidays.

FOR FURTHER INFORMATION CONTACT: Adrienne C. Thomas or Nancy Y. Allard, TDD: 202/523-0774, Non-TDD: 202/523-3215, Room 409, National Archives Building, 8th & Pennsylvania Avenue, NW., Washington, DC 20408.
ADDRESSES: Comments should be sent to the Administrator of Veterans Affairs (271A); Veterans Administration; 810 Vermont Avenue NW.; Washington, DC 20420. Comments received will be available for public inspection at the above address in the Veterans Services Unit, room 132, from 8:00 a.m. to 4:30 p.m. Monday through Friday except legal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Lynn Batts, Office of Equal Opportunity, (202) 233-2150 or (202) 233-3710 (TDD).
ADDRESSES: Comments should be sent to Rules Docket Clerk, Room 840, Federal Emergency Management Agency, 500 C Street SW., Washington, DC, 20472. Comments received will be available for public inspection at the above address for 8:30 a.m. to 5:00 p.m. Monday through Friday except legal holidays.

FOR FURTHER INFORMATION CONTACT: Alan Clive, Equal Employment Manager, Room 815, 500 C. Street SW., Washington, DC (202) 646-3957 (voice) or 646-4117 (TDD).

TEXT: SUPPLEMENTARY INFORMATION:

Background

The purpose of this proposed rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) , as it applies to programs and activities conducted by the following agencies

(hereinafter "the agencies"): Executive Office of the President, Office of Personnel Management, Merit Systems Protection Board, Office of the Special Counsel (MSPB), Federal Labor Relations Authority, National Aeronautics and Space Administration, Securities and Exchange Commission, Overseas Private Investment Corporation, African Development Foundation, National Labor Relations Board, National Archives and Records Administration, Veterans Administration, Federal Emergency Management Agency. As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Sec. 119, Pub. L. 95-602, 92 Stat. 2982) and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810), section 504 of the Rehabilitation Act of 1973 states that

No otherwise qualified individual with handicaps 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(29 U.S.C. 794 (1978 amendment italicized).)

Because the agencies are required by this amendment to promulgate implementing regulations, and because the proposed standards and procedures to be established are the same for all of the agencies, the agencies are publishing this notice of proposed rulemaking jointly. The final rule adopted by each agency will be codified in that agency's portion of the Code of Federal Regulations as indicated in the information provided for individual agencies below. The agencies agreed to joint publication of the preamble and the text of the regulation in order to expedite its issuance and minimize costs, in view of the identity in proposed standards among the agencies. If, following the public comment period, one or more of the agencies desires to promulgate a final regulation with different substantive provisions in order to account for its particular needs indentified in response to public comments, it will, of course, do so.

The substantive nondiscrimination obligations of the agency, as set forth in this proposed rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. (See 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs).) This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) id.; 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); id. at 38,552 (remarks of Rep. Sarasin).

There are, however, some language differences between this proposed rule and the Federal Government's section 504 regulations for federally assisted programs. These changes are based on the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting Davis and section 504. See Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981) (APTA); see also Rhode Island Handicapped Action Committe v. Rhode Island Public Tansit Authority, 718 F.2d 490 (1st Cir. 1983).

These language differences are also supported by the decision of the Supreme Court in Alexander v. Choate, 469 U.S. 287 (1985), where the Court held that the regulations for federally assisted programs did not require a recipient to modify its durational limitation on Medicaid coverage of inpatient hospital care for handicapped persons. Clarifying its Davis decision, the Court explained that section 504 requires only "reasonable" modifications, id. at 300, and explicitly noted that "[t]he regulations implementing section 504 [for federally assisted programs] are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." Id. at n.21 (emphasis added).

Incorporation of these changes, therefore, makes this regulation implementing section 504 for federally conducted programs consistent with the Federal Government's regulations implementing section 504 for federally assisted programs as they have been interpreted by the Supreme Court. Many of these federally assisted regulations were issued prior to the interpretations of section 504 by the Supreme Court in Davis, by lower courts interpreting Davis, and by the Supreme Court in Alexander; therefore their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence the agencies believe that there are no significant differences between this proposed rule for federally conducted programs and the Federal Government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Department of Justice. It is an adaptation of a prototype prepared by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298) and distributed to Executive agencies. This regulation has also been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206). It is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared. This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601-612).

Section-by-Section Analysis

Section XX .101 Purpose.

Section XX .101 states the purpose of the proposed rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

Section XX .102 Application.

The regulation applies to all programs or activities conducted by the agencies. Under this section, a federally conducted program or activity is, in simple terms, anything a Federal agency does. Aside from employment, there are two major categories of federally conducted programs or activities covered by this regulation: Those involving general public contact as part of ongoing agency operations and those directly administered by the agencies for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the agency's facilties. Activities in the second category include programs that provide Federal services or benefits. This regulation does not, however, apply to programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

Section XX .103 Definitions.

"Assistant Attorney General." "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Although auxiliary aids are required explicitly only by @ XX .160(a)(1), they may also be necessary to meet other requirements of the regulation.

"Complete complaint." "Complete complaint" is defined to include all the information necessary to enable the agency to investigate the complaints. The definition is necessary, because the 180 day period for the agency's investigation (see @ XX .170(g)) begins when the agency receives a complete complaint.

"Facility." The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs (28 CFR 41.3(f)) except that the term "rolling sock or other conveyances" has been added and the phrase "or interest in such property" has been deleted because the term "facility," as used in this regulation, refers to structures and not to intangible property rights. Is should, however, be noted that the regulation applies to all program and activities conducted by the agency regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the agency. The term "faciltiy" is used @@ XX .149, XX .150, and XX .170(f).

"Historic preservation programs," "Historic properties," and "Substantial impairment." These terms are defined in order to aid in the interpretation of @ XX .150 (a)(2) amd (b)(2), which relate to accessibility of historic preservation programs.

"Individual with handicaps. " The definition of "individual with handicaps" is identical to the definition of " handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the statutory term " handicapped individual" "individual with handicaps, " the legislative history of this amendment indicates that no substantive change was intended. Thus, although the term has been changed in this regulation to be consistent with the statute as amended, the definition is unchanged. In particular, although the term as revised refers to " handicaps" in the plural, it does not exclude persons who have only one handicap.

"Qualified individual with handicaps. " The definition of "qualified individual with handicaps" is a revised version of the definition of "qualified handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

Paragraph (1) is an adaptation of existing definitions of "qualified handicapped person" for purposes of federally assisted preschool, elementary, an secondary education programs (see, e.g., 45 CFR 84.3(k)(2)). It provides that an individual with handicaps is qualified for preschool, elementary, or secondary education programs conducted by the agency, if he or she is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive these services from the agency. In other words, an individual with handicaps is qualified if, considering all factors other than the handicapping condition, he or she is entitled to receive education service from the agency.

Paragraph (2) deviates from existing regulations for federally assisted programs because of intervening court decisions. It defines "qualified individual with handicaps" with regard to any program other than those covered by paragraph (1) under which a person is required to perform services or to achieve a level of accomplishment. In such programs a qualified individual with handicaps is one who can achieve the purpose of the program without modifications in the program that the agency can demonstrate would result in a fundamental alteration in its nature. This definition reflects the decision of the Supreme Court in Davis. In that case, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." Id. at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," Id. at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." Id. at 410.

We have incorporated the Court's language in the definition of "qualified individual with handicaps" in order to make clear that such a person must be able to participate in the program offered by the agency. The agency is required to make modifications in order to enable an applicant with handicaps to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered; not whether the applicant could benefit or obtain results from some other program that the agency does not offer. Although the revised definition allows exclusion of some individuals with handicaps from some programs, it requires that an individual with handicaps

who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

The agency has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alteration, the agency must follow the procedures established in @ XX .150(a) and @ XX .160(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the agency head or his or her designee in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the agency head determines that an action would result in a fundamental alteration, the agency must consider options that would enable the individual with handicaps to achieve the purpose of the program but would not result in such an alteration.

For programs or activities that do not fall under either of the first two paragraphs, paragraph (3) adopts the existing definition of "qualified handicapped person" with respect to services (28 CFR 41.32(b)) in the coordination regulation for programs receiving Federal financial assistance. Under this definition, a qualified individual with handicaps is an individual with handicaps who meets the essential eligibility requirements for participation in the program or activity.

Paragraph (4) explains that "qualified individual with handicaps" means "qualified handicapped person" as that term is defined fo puposes of employment in the Equal Employment Opportunity Commission's regulation at 29 CFR 1613.702(f), which is made applicable to this part by @ XX .140. Nothing in this

part changes existing regulations applicable to employment.

"Section 504. " This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the agency and not to programs or activities to which it provides Federal financial assistance.

Section XX .110 Self-evaluation.

The agency shall conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with handicaps that promotes both effective and efficient implementation of secton 504.

Section XX .111 Notice.

Section XX .111 requires the agency to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

Section XX .130 General prohibitions against discrimination.

Section XX .130 is an adaptation of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51).

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in @ XX .130 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. If the agency violates a provision in any of the subsequent sections, it will also violate one of the general prohibitions found in @ XX .130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of individuals with handicaps. The agency may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from its program simply because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (e.g., epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question. It would be permissible, therefore, to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce; but it may not be permissible to automatically disqualify all those who are blind in just one eye.

In addition, section 504 prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph (b)(1)(iii), therefore, requires that the opportunity to participate

or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on program accessibility (@@ XX .149- XX .151) and communications (@ XX .160) are specific applications of this principle.

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, paragraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids, benefits, or services when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the agency's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Paragraph (b)(1)(v) prohibits the agency from denying a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vi) prohibits the agency from limiting a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the agency from utilizing criteria or methods of administration that deny individuals with handicaps access to the agency's programs or activities. The phrase "criteria or methods of administration" refers to official written agency policies and to the actual practices of the agency. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with handicaps an effective opportunity to participate.

Paragraph (b)(4) specifically applies the prohibition enunciated in @ XX .130(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the agency. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the agency, in the selection of procurement contractors, from using criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

Paragraph (b)(6) prohibits the agency from discriminating against qualified individuals with handicaps on the basis of handicap in the granting of licenses or certification. A person is a "qualified individual with handicaps" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification (see @ XX .103).

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

Paragraph (b)(6) does not extend section 504 directly to the programs or activities of licensees or certified entities themselves. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities nor are they programs or activities

receiving Federal financial assistance merely by virtue of the Federal license or certificate. However, as noted above, section 504 may affect the content of the rules established by the agency for the operation of the program or activity of the licensee or certified entity, and thereby indirectly affect limited aspects of their operations.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with handicaps or a given class of individuals with handicaps may be limited to those individuals with handicaps.

Paragraph (d), discussed above, provides that the agency must administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, i.e., in a setting that enables individuals with handicaps to interact with nonhandicapped persons to the fullest extent possible.

Section XX .140 Employment.

Section XX .140 prohibits discrimination on the basis of handicap in employment by the agency. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. Gardner v. Morris, 752 F.2d 1271, 1277 (8th Cir. 1985); Smith v. United States Postal Service, 742 F.2d 257, 259-260 (6th Cir. 1984); Prewitt v. United States Postal Service, 662 F.2d 292, 302-04 (5th Cir. 1981). Contra McGuiness v. United States Postal Service, 744 F.2d 1318, 1320-21 (7th Cir. 1984); Boyd v. United States Postal Service, 752 F.2d 410, 413-14 (9th Cir. 1985).

Courts uniformly have been that, in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. Smith, 742 F.2d at 262; Prewitt, 662 F.2d at 304. Accordingly, @ XX .140 (Employment) of this rule adopts the definitions, requirements, and procedures of section 501 as established in regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR Part 1613. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (3 CFR 1978 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap. In addition to this section, @ XX .170(b) specifies that the agency will use the existing EEOC procedures to resolve allegations of employment discrimination.

Section XX .149 Program Accessibility: Discrimination Prohibited.

Section XX .149 states the general nondiscrimination principle underlying the program accessibility requirements of @@ XX .150 and XX .151.

Section XX .150 Program Accessibility: Existing Facilities.

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.57), with certain modifications. Thus, @ XX .150 requires that each agency program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. The regulation also makes clear that the agency is not required to make each of its existing facilities accessible (@ XX .150(a)(1)). However, @ XX .150, unlike 28 CFR 41.57, places explicit limits on the agency's obligation to ensure program accessibility (@ XX .150(a)(2), (a)(3)).

Paragraph (a)(2), which establishes a special limitation on the obligation to ensure program accessibility in historic preservation programs, is discussed below in connection with paragraph (b).

Paragraph (a)(3) generally codifies recent case law that defines the scope of the agency's obligation to ensure program accessibility. This paragraph provides that in meeting the program accessibility requirement the agency is not required to take any action that would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. A similar limitation is provided in @ XX .160(d). This provision is based on the Supreme Court's holding in Southeastern Community College v. Davis , 442 U.S. 397 (1979), that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since Davis , circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. See, e. g., Dopico v. Goldschmidt , 687 F.2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis , (APTA), 655 F.2d 1272 (D.C. Cir. 1981).

Paragraphs (a)(3) and @ XX .160(d) are also supported by the Supreme Court's decision in Alexander v. Choate , 469 U.S. 287 (1985). Alexander involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days per year. Plaintiffs argued that this reduction violated section 504 because it had an adverse impact on handicapped persons. The Court assumed without deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact on handicapped people, but held that the reduction was not "the sort of disparate impact" discrimination that might be prohibited by section 504 or its implementing regulation. Id. at 299.

Relying on Davis , the Court said that section 504 guarantees qualified handicapped persons "meaningful access to the benefits that the grantee offers," id . at 301, and that "reasonable adjustments in the nature of the benefit being offered must at times be made to assure meaningful access." Id . at n. 21 (emphasis added). However, section 504 does not require " 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' *** or that would constitute 'fundamental alteration[s] in the nature of a program.' " Id . at n. 20 (citations omitted). Alexander supports the position, based on Davis and the earlier, lower court decisions, that in some situations, certain accommodations for a handicapped person may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. Thus failure to include such an "undue burdens" provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

This paragraph, however, does not establish an absolute defense; it does not relieve the agency of all obligations to individuals with handicaps. Although the agency is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with handicaps receive the benefits and services of the federally conducted program or activity.

It is our view that compliance with @ XX .150(a) would in most cases not result in undue financial and administrative burdens on the agency. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with @ XX .150(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the agency. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the agency head's decision or failure to make a decision may file a complaint

under the compliance procedures established in @ XX .170.

Paragraph (b)(1) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with handicaps. Structural changes in existing facilities are required only when there is no other feasible way to make the agency's program accessible. The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraph XX .150(a)(2) provides an additional limitation on the obligation to ensure program accessibility that is applicable only to historic preservation programs. In order to avoid a possible conflict between the congressional mandates to preserve historic properties on the one hand and to eliminate discrimination against individuals with handicaps on the other, @ XX .150(a)(2) provides that in historic preservation programs the agency is not required to take any action that would result in a substantial impairment of significant historic features of an historic property.

Nevertheless, because the primary benefit of an historic preservation program is uniquely the experience of the historic property itself, @ XX .150(b)(2) requires the agency to give priority to methods of providing program accessibility that permit individuals with handicaps to have physical access to the historic property. This priority on physical access may also be viewed as a specific application of the general requirement that the agency administer programs in the most integrated setting appropriate to the needs of qualified individuals with handicaps (@ XX .130(d)). Only when providing physical access would result in a substantial impairment of significant historic features, a fundamental alteration in the nature of the program, or in undue financial and administrative burdens, may the agency adopt alternative methods for providing program accessibility that do not ensure physical access. Examples of some alternative methods are provided in @ XX .150(b)(2).

The special limitation on program accessibility set forth in @ XX .150(a)(2) is applicable only to programs that have preservation of historic properties as a primary purpose (see supra discussion of definition of "historic preservation program," @ XX .103). Narrow application of the special limitation is justified because of the inherent flexibility of the program accessibility requirement. Where historic preservation is not a primary purpose of the program the agency is not bound to a particular facility. It can relocate all or part of its program to an accessible facility, make home visits, or use other standard methods of achieving program accessibility without making structural alterations that might impair significant historic features of the historic property.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the agency must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section @ XX .151 Program Accessibility: New Construction and Alterations.

Overlapping coverage exists with respect to new construction and alterations under section 504 and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). Section @ XX .151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by individuals with handicaps in accordance with 41 CFR 101-19.600 to 101-19.607.

This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). We believe that it is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in @ XX .150. To the extent the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of @ XX .151.

Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the agency believes the same program accessibility standard should apply to both owned and leased existing buildings.

In Rose v. United States Postal Service, 774 F.2d 1355 (9th Cir. 1985), the Ninth Circuit held that the Architectural Barriers Act requires accessibility at the time of lease. The Rose court did not address the issue of whether section 504 likewise requires accessibility as a condition of lease, and the case was remanded to the District Court for, among other things, consideration of that issue. The agency may provide more specific guidance on section 504 requirements for leased buildings after the litigation is completed.

Section XX .160 Communications.

Section XX .160 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under @ XX .160(a)(1) to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They shall also include an opportunity for individuals with handicaps to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the agency (@ XX .160(a)(1)(i)). The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under @ XX .160(d). That paragraph limits the obligation of the agency to ensure effective communication in accordance with Davis and the circuit court opinions interpreting it (see supra preamble discussion of @ XX .150(a)(3)). Unless not required by @ XX .160(d), the agency shall provide auxiliary aids at no cost to the individual with handicaps.

The discussion of @ XX .150(a), Program accessibility: Existing facilities, regarding the determination of undue financial and administrative burdens also applies to this section and should be referred to for a complete understanding of the agency's obligation to comply with @ XX .160.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (e.g., a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. In these cases, a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to inform the public of (1) the communications services it

offers to afford individuals with handicaps an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective.

The agency shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the agency. Auxiliary aids must be afforded where necessary to ensure effective communication at the proceedings. If sign language interpreters are necessary, the agency may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (@ XX .160(a)(1)(ii)). For example, the agency need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

Paragraph (b) requires the agency to provide information to individuals with handicaps concerning accessible services, activities, and facilities. Paragraph (c) requires the agency to provide signage at inaccessible facilities that directs users to locations with information about accessible facilities.

Section XX .170 Compliance procedures.

Paragraph (a) specifies that paragraphs (c) through (l) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the agency will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR Part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

Paragraph (c) is amended by each individual agency. It designates the official responsible for coordinating implementation of @ XX .170 and provides and address to which complaints may be sent.

The agency is required to accept and investigate all complete complaints (@ XX .170(d)). If it determines that it does not have jurisdiction over a complaint, it shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal Government (@ XX .170(e)).

Paragraph (f) requires the agency to notify the Architectural and Transportation Barriers Compliance Board upon receipt of a complaint alleging that a building or facility subject to the Architectural Barriers Act was designed, constructed, or altered in a manner that does not provide ready access to and use by individuals with handicaps.

Paragraph (g) requires the agency to provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal (@ XX .170(g)). One appeal within the agency shall be provided (@ XX .170(i)). The appeal will not be heard by the same person who made the initial determination of compliance or noncompliance.

Paragraph (l) permits the agency to delegate its authority for investigating complaints to other Federal agencies. However, the statutory obligation of the agency to make a final determination of compliance or noncompliance may not be delegated.

EXECUTIVE OFFICE OF THE PRESIDENT
Office of Administration
3 CFR Part 102

SUPPLEMENTARY INFORMATION: The Executive Office of the President is a designation which encompasses several different agencies, boards and commissions each with a role of providing analysis and advice and help in developing policy in certain areas, or carry out specific projects in support of the Presidency. The Office of Administration was established to provide common administrative support and services for units within the Executive Office of the President.

Because of the uniqueness of the Executive Office of the President, it is proposed that decisions which need to be made by a head of an agency would be made by a three-person board.

List of Subjects in 3 CFR Part 102

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped, Historic places, Historic preservation, Government employees.

It is proposed that Title 3 of the Code of Federal Regulations be amended as follows:

1. Part 102 is added as set forth at the end of this document.

PART 102 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE EXECUTIVE OFFICE OF THE PRESIDENT

Sec.
102.101 Purpose.
102.102 Application.
102.103 Definitions.
102.104-102.109 [Reserved].
102.110 Self-evaluation.
102.111 Notice.
102.112-102.129 [Reserved].
102.130 General prohibitions against discrimination.
102.131-102.139 [Reserved].
102.140 Employment.
102.141-102.148 [Reserved].
102.149 Program accessibility: Discrimination prohibited.
102.150 Program accessibility: Existing facilities.
102.151 Program accessibility: New construction and alterations.
102.152-102.159 [Reserved].
102.160 Communications.
102.161-102.169 Reserved].
102.170 Compliance procedures.
102.171-102.999 [Reserved].

Authority: 29 U.S.C. 794.

2. Part 102 is further amended by adding the following definitions to @ 102.103 thereof, placing them in alphabetical order among the existing definitions of that section:

@ 102.103 Definitions.

* * * * *

"Agency" means, for purposes of these regulations only, the following entities in the Executive Office of the President: the White House Office, the Office of the Vice President, the Office of Management and Budget, the Office of Policy Development, the National Security Council, the Office of Science and Technology Policy, the Office of the United States Trade Representative, the Council on Environmental Quality, the Council of Economic Advisers, the Office of Administration, the Office of Federal Procurement Policy, and any committee, board, commission, or similar group established in the Executive Office of the

President.

"Agency head" or "head of the agency", as used in @@ 102.150(a)(3), 102.160(d) and 102.170 (i) and (j), shall be a three-member board which will include the Director, Office of Administration, the head of the Executive Office of the President agency in which the issue needing resolution or decision arises and one other agency head selected by the two other board members. In the event that an issue needing resolution or decision arises within the Office of Administration, one of the board members shall be the Director of the Office of Management and Budget.

* * * * *

3. Part 102 is further amended by revising paragraph (c) in @ 102.170 to read as follows:

@ 102.170 Compliance procedures.

* * * * *

(c) The Director, Facilities Management, Office of Administration, Executive Office of the President shall be responsible for coordinating implementation of this section. Complaints may be sent to the Director at the following address: Room 486, Old Executive Office Building, 17th and Pennsylvania Ave., NW., Washington, DC 20500.

* * * * *

Charles M. Kupperman, Deputy Director, Office of Administration, Executive Office of the President.

OFFICE OF PERSONNEL MANAGEMENT
5 CFR Part 723

List of Subjects in 5 CFR Part 723

Blind, Buildings, Civil rights, Employment, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped, Historic places, Historic preservation, Government employees.

It is proposed that Title 5 of the Code of Federal Regulations be amended as follows:

1. Part 723 is added as set forth at the end of this document.

PART 723 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE OFFICE OF PERSONNEL MANAGEMENT

Sec.
723.101 Purpose.
723.102 Application.
723.103 Definitions.
723.104-723.109 [Reserved].
723.110 Self-evaluation.
723.111 Notice.
723.112-723.129 [Reserved]
723.130 General prohibitions against discrimination.
723.131-723.139 [Reserved]
723.140 Employment.
723.141-723.148 [Reserved]
723.149 Program accessibility: Discrimination prohibited.
723.150 Program accessibility: Existing facilities.
723.151 Program accessibility: New construction and alterations.
723.152-723.159 [Reserved]

723.160 Communications.
723.161-723.169 [Reserved]
723.170 Compliance procedures.
723.171-723.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 723 is further amended by revising paragraph (c) in @ 723.170 to read as follows:

@ 723.170 Compliance procedures.

* * * * *

(c) The Chief, Staffing Policy Division, Staffing Group, shall be responsible for coordinating implementation of this section. Complaints may be sent to the Staffing Policy Division, Staffing Group, Office of Personnel Management, Room 6504, 1900 E St., NW., Washington, DC 20415.

* * * * *

Constance Horner, Director.

MERIT SYSTEMS PROTECTION BOARD
5 CFR Part 1207

List of Subjects in 5 CFR Part 1207

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped, Historic places, Historic preservation, Government employees.

It is proposed that Title 5 of the Code of Federal Regulations be amended as follows:

1. Part 1207 is added as set forth at the end of this document.

PART 1207 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE MERIT SYSTEMS PROTECTION BOARD

Sec.
1207.101 Purpose.
1207.102 Application.
1207.103 Definitons.
1207.104-1207.109 [Reserved]
1207.110 Self-evaluation.
1207.111 Notice.
1207.112-1207.129 [Reserved]
1207.130 General prohibitions against discrimination.
1207.131-1207.139 [Reserved]
1207.140 Employment.
1207.141-1207.148 [Reserved]
1207.149 Program accessibility: Discrimination prohibited.
1207.150 Program accessibility: Existing facilities.
1207.151 Program accessibility: New construction and alternations.
1207.152-1207.159 [Reserved]
1207.160 Communications.
1207.161-1207.169 [Reserved]
1207.170 Compliance procedures.
1207.171-1207.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 1207 is further amended by revising paragraph (c) in @ 1207.170 to read as follows:

@ 1207.170 Compliance procedures.

* * * * *

(c) The Equal Employment Officer shall be responsible for coordinating implementation of this section. Complaints may be sent to the Equal Employment Office, Merit System Protection Board, 1120 Vermont Avenue, NW., Room 908, Washington, DC 20419.

* * * * *

Daniel R. Levinson, Chairman of the Board.

List of Subjects in 5 CFR Part 1262

Blind, Buildings, Civil rights, Employment, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped, Historic places, Historic preservation, Government employees.

It is proposed that Title 5 of the Code of Federal Regulations be amended as follows:

1. Part 1262 is added as set forth at the end of this document.

PART 1262 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE OFFICE OF THE SPECIAL COUNSEL

Sec.
1262.101 Purpose.
1262.102 Application.
1262.103 Definitons.
1262.104-1262.109 [Reserved]
1262.110 Self-evaluation.
1262.111 Notice.
1262.112-1262.129 [Reserved]
1262.130 General prohibitions against discrimination.
1262.131-1262.139 [Reserved]
1262.140 Employment.
1262.141-1262.148 [Reserved]
1262.149 Program accessibility: Discrimination prohibited.
1262.150 Program accessibility: Existing facilities.
1262.151 Program accessibility: New construction and alternations.
1262.152-1262.159 [Reserved]
1262.160 Communications.
1262.161-1262.169 [Reserved]
1262.170 Compliance procedures.
1262.171-1262.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 1262 is further amended by revising paragraph (c) in @ 1262.170 to read as follows:

@ 1262.170 Compliance procedures.

* * * * *

(c) The Managing Director for Operations shall be responsible for coordinating implementation of this section. Compliants may be sent to the Managing Director for Operations, Office of the Special Counsel, 1120 Vermont Avenue, Suite 1100, Washington, DC 20005.

* * * * *

Mary F. Wieseman, Special Counsel.

List of Subjects in 5 CFR Part 2416

Blind, Buildings, Civil rights, Employment, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped, Historic places, Historic preservation, Government employees.

It is proposed that Title 5 of the Code of Federal Regulations be amended as follows:

1. Part 2416 is added as set forth at the end of this document.

PART 2416 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE FEDERAL LABOR RELATIONS AUTHORITY

Sec.
2416.101 Purpose.
2416.101 Application.
2416.103 Definitions.
2416.104-2416.109 [Reserved]
2416.110 Self-evaluation.
2416.111 Notice.
2416.112-2416.129 [Reserved]
2416.130 General prohibitions against discrimination.
2416.131-2416.139 [Reserved]
2416.140 Employment.
2416.141-2416.148 [Reserved]
2416.149 Program accessibility: Discrimination prohibited.
2416.150 Program accessibility: Existing facilities.
2416.151 Program accessibility: New construction and alterations.
2416.152-2416.159 [Reserved]
2416.160 Communications.
2416.161-2416.169 [Reserved]
2416.170 Compliance procedures.
2416.171-2416.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 2416 is further amended by revising paragraph (c) in @ 2416.170 to read as follows:

@ 2416.170 Compliance procedures.

* * * * *

(c) The Associate Director, Equal Employment Opportunity, shall be responsible for coordinating implementation of this section. Complaints may be sent to the Associate Director, Equal Employment Opportunity, Federal Labor Relations Authority, 500 C Street, SW., Washington, DC 20424.

* * * * *

Jacqueline R. Bradley, Executive Director.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
14 CFR Part 1251

List of Subjects in 14 CFR Part 1251

Blind, Buildings, Civil rights, Employment, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped,

Historic places, Historic preservation, Government employees, Grant programs.

It is proposed that 14 CFR Part 1251 be amended as follows:

PART 1251 -- [AMENDED]

1. The authority citation for Part 1251 is revised to read as follows:

Authority: 29 U.S.C. 794.

2. Subpart 1251.5 is added to Part 1251 as set forth at the end of this document.

Subpart 1251.5 -- Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the National Aeronautics and Space Administration

Sec.
1251.501 (XX .101) Purpose.
1251.502 (XX .102) Application.
1251.503 (XX .103) Definitions.
1251.504-1251.509 (XX .104- XX .109) [Reserved]
1251.510 (XX .110) Self-evaluation.
1251.511 (XX .111) Notice.
1251.512-1251.529 (XX .112- XX .129) [Reserved]
1251.530 (XX .130) General prohibitions against discrimination.
1251.531 (XX .131) to 1251.539 (XX .139) [Reserved]
1251.540 (XX .140) Employment.
1251.541-1251.548 (XX .141- XX .148) [Reserved]
1251.549 (XX .149 Program accessibility: Discrimination prohibited.
1251.550 (XX .150) Program accessibility: Existing facilities.
1251.551 (XX .151) Program accessibility: New construction and alterations.
1251.552-1251.559 (XX .152- XX .159) [Reserved]
1251.560 (XX .160) Communications.
1251.561-1251.569 (XX .161- XX .169) [Reserved]
1251.570 (XX .170) Compliance procedures.
1251.571-1251.999 (XX .171- XX .999) [Reserved]

3. Part 1251 is further amended by revising paragraph (c) in @ 1251.570 to read as follows:

@ 1251.570 Compliance procedures.

* * * * * * *

(c) The Assistant Administrator for Equal Opportunity Programs shall be responsible for coordinating implementation of this section. Complaints may be sent to the Office of Equal Opportunity Programs, Room 6119, 400 Maryland Avenue, SW., Washington, DC 20546.

* * * * *

James C. Fletcher, Administrator.
April 24, 1987.

SECURITIES AND EXCHANGE COMMISSION
17 CFR Part 200

PART 200 -- [AMENDED]

1. The authority citation for Part 200 is revised to read as follows:

Authority: Sec. 19, 23, 48 Stat. 85, 901, as amended, sec. 20, 49 Stat. 833, sec. 319, 53 Stat. 1173, sec. 38, 211, 54 Stat. 841, 855 (15 U.S.C. 77s, 78w,

79t, 77sss, 80a-37, 80b-11), unless otherwise noted. Subpart L is also issued under 29 U.S.C. 794.

2. Subpart L is added to Part 200 as set forth at the end of this document.

Subpart L -- Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Securities and Exchange Commission

Sec.
200.601 (XX .101) Purpose.
200.602 (XX .102) Application
200.603 (XX .103) Definitions.
200.604-200.609 XX .104-.109) [Reserved]
200.610 (XX .110) Self-evaluation.
200.611 (XX .111) Notice.
200.612-200.629 (XX .112-.129) [Reserved]
200.630 (XX .130) General prohibitions against discrimination.
200.631-200.639 (XX .131-.139) [Reserved]
200.640 (XX .140) Employment.
200.641-200.648 (XX .141-.148) [Reserved]
200.649 (XX .149) Program accessibility: Discrimination prohibited.
200.650 (XX .150) Program accessibility: Existing facilities.
200.651 (XX .151) Program accessibility: New construction and alterations.
200.652-200.659 (XX .152-.159) [Reserved]
200.660 (XX .160) Communications.
200.661-200.669 (XX .161-.169) [Reserved]
200.670 (XX .170) Compliance procedures.
200.671-200.699 (XX .171-.199) [Reserved]

Authority: 29 U.S.C. 794.

3. Subpart L is further amended by revising paragraph (c) in @ 200.670 to read as follows:

@ 200.670 Compliance procedures.

* * * * *

(c) The Equal Employment Opportunity Manager shall be responsible for coordinating implementation of this section. Complaints may be sent to the EEO Manager, 450 Fifth Street, NW., Washington, DC 20549.

* * * * *

George G. Kundahl, Executive Director.

OVERSEAS PRIVATE INVESTMENT CORPORATION
22 CFR Part 711

List of Subjects in 22 CFR Part 711

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped, Historic places, Historic preservation, Government employees.

It is proposed that title 22 of the Code of Federal Regulations be amended as follows:

1. Part 711 is added as set forth at the end of this document.

PART 711 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE OVERSEAS PRIVATE INVESTMENT CORPORATION

Sec.

711.101 Purpose.
711.102 Application.
711.103 Definitions.
711.104-711.109 [Reserved]
711.110 Self-evaluation.
711.111 Notice.
711.112 711.129 [Reserved]
711.130 General prohibitions against discrimination.
711.131-711.139 [Reserved]
711.140 Employment.
711.141-711.148 [Reserved]
711.149 Program accessibility: Discrimination prohibited.
711.150 Program accessibility: Existing facilities.
711.151 Program accessibility: New construction and alterations.
711.152-711.159 [Reserved]
711.160 Communications.
711.161 711.169 [Reserved]
711.170 Compliance procedures.
711.171-711.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 711 is further amended by revising paragraph (c) in @ 711.170 to read as follows:

@ 711.170 Compliance procedures.

* * * * *

(c) The Director of Personnel shall be responsible for coordinating implementation of this section. Complaints may be sent to Overseas Private Investment Corporation, 1615 M Street, NW., Washington, DC 20527, Attention: Director of Personnel.

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Richard K. Childress, Vice President for Personnel and Administration.

AFRICAN DEVELOPMENT FOUNDATION
22 CFR Part 1510

List of Subjects in 22 CFR Part 1510

Blind, Buildings, Civil rights, Employment, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped, Historic places, Historic preservation, Government employees.

It is proposed that Title 22 of the Code of Federal Regulations be amended as follows:

1. Part 1510 is added as set forth at the end of this document.

PART 1510 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE AFRICAN DEVELOPMENT FOUNDATION

Sec.
1510.101 Purpose.
1510.102 Application.
1510.103 Definitions.
1510.104-1510.109 [Reserved]
1510.110 Self-evaluation.
1510.111 Notice.
1510.112-1510.129 [Reserved]
1510.130 General prohibitions against discrimination.

1510.131-1510.139 [Reserved]
1510.140 Employment.
1510.141-1510.148 [Reserved]
1510.149 Program accessibility: Discrimination prohibited.
1510.150 Program accessibility: Existing facilities.
1510.151 Program accessibility: New construction and alterations.
1510.152-1510.159 [Reserved]
1510.160 Communications.
1510.161-1510.169 [Reserved]
1510.170 Compliance procedures.
1510.171-1510.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 1510 is further amended by revising paragraph (c) in @ 1510.170 to read as follows:

@ 1510.170 Compliance procedures.

* * * * *

(c) The Personnel Officer, Office of Administration and Finance shall be responsible for coordinating implementation of this section. Complaints may be sent to Personnel Officer, Office of Administration and Finance, African Development Foundation, 1625 Massachusetts Avenue, NW., Suite 600, Washington, DC, 20036.

* * * * *

Leonard H. Robinson, Jr., President, African Development Foundation.

NATIONAL LABOR RELATIONS BOARD
29 CFR Part 100

SUPPLEMENTARY INFORMATION: The National Labor Relations Board is responsible for conducting hearings and elections pursuant to the National Labor Relations Act, as amended (29 U.S.C. 141-169). When determining where hearings and elections will be held, the Agency must consider both the convenience of the parties to a proceeding and the public, and the extent to which delay or expense can be minimized. While many hearings are conducted in the Agency's Regional, Subregional, and Resident Offices, a number of hearings are held in more remote locations where the employer, the union and the employee witnesses are located. Also, in order to maximize participation at Board-conducted elections to determine employee desires regarding union representation, these elections are customarily held at the employer's premises.

Hearings held in Agency offices will be subject to the program accessibility and communications requirements of this regulation and will be made accessible in accordance with this regulation. As to hearings held at non-Agency sites, the Agency will attempt to locate accessible local facilities that are both convenient and inexpensive. In these instances, the Agency will include in the notice of hearing served upon the parties a request that the parties provide the Regional, Subregional, or Resident Office with prompt notice in advance of any accessibility features they or their witnesses may require. If the Agency receives, in advance, a request for an accessible hearing site or special accommodation, it will then arrange necessary accommodations for those parties, representatives, witnesses, or members of the public requiring such accommodation. Similarly with regard to elections, the notice to employees issued in connection with an election will likewise include a request that handicapped persons inform the Agency, in advance, of any auxiliary aids, such as sign language interpreters, that may be necessary in order to facilitate their participation in the election.

Thus, the Agency will, with respect to hearings or elections at non-Agency sites, and subject to the limitations of @ 100.650(a)(3) and @ 100.660(d) of this regulation, ensure access for any handicapped person who gives reasonable advance notice, that the person will attend a hearing as a party, a party's representative, a witness, a member of the public, or will appear as a participant in an election.

List of Subjects in 29 CFR Part 200

Blind, Buildings, Civil rights, Employment, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped, Historic places, Historic preservation, Government employees.

It is proposed that Part 100 of Title 29 of the Code of Federal Regulations be amended as follows:

PART 100 -- ADMINISTRATIVE REGULATIONS

1. The part heading is revised to read as set forth above.

2. The authority citation for Part 100 is revised to read as follows:

Authority: Sec. 6 of the National Labor Relations Act, as amended, 29 U.S.C. 141, 146.

Subpart A is also issued under 5 U.S.C. 7301, 18 U.S.C. 201 et seq., E.O. 11222, 5 CFR 735.104.

Subpart B is also issued under 5 U.S.C. 201 et seq., 18 U.S.C. 202.

Subpart C is also issued under 18 U.S.C. 202, E.O. 11222, 5 CFR 735.104.

Subpart F is also issued under 29 U.S.C. 794.

3. Subparts A, B, C, and D headings are removed.

@@ 100.735-1 through 100.735-6 and @@ 100.735-11 through 100.735-22 [Redesignated as @@ 100.101 through 100.106 and @@ 100.111 through 100.122]

4. Sections 100.735-1 through 100.735-6 and @@ 100.735-11 through 100.735-22 are redesignated @@ 100.101 through 100.106 and @@ 100.111 through 100.122 respectively and designated Subpart A. The heading for Subpart A is added to read "Subpart A-Employee Responsibilities and Conduct".

@@ 100.735-31 through 100.735-34 and @@ 100.735-36 through 100.735-39 [Redesignated as @@ 100.201 through 100.204 and @@ 100.206 through 100.209]

5. Sections 100.735-31 through 100.735-34 and @@ 100.735-36 through 100.735-39 are redesignated @@ 100.201 through 100.204 and @@ 100.206 through 100.209 respectively and designated Subpart B. The heading for Subpart B is added to read "Subpart B-Employee Statements of Employment and Financial Interest".

@@ 100.735-41 through 100.735-47 [Redesignated as @@ 100.301 through 100.307]

6. Sections 100.735-41 through 100.735-47 are redesignated @@ 100.301 through 100.307 respectively and designated Subpart C. The heading for Subpart C is added to read "Subpart C-Special Government Employee Conduct and Responsibility".

7. Subparts D and E are added and reserved.

Subpart D -- Employee Personal Property Loss Claims [Reserved]

Subpart E-Claims Under the Federal Tort Claims Act [Reserved]

8. Subpart F is added as set forth at the end of this document.

Subpart F -- Enforcement of nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the National Labor Relations Board

Sec.
100.601 (XX .101) Purpose.
100.602 (XX .102) Application.
100.603 (XX .103) Definitions.
100.604-100.609 (XX .104- XX .109) [Reserved]
100.610 (XX .110) Self-evaluation.
100.611-100.629 (XX .111- XX .129) [Reserved]
100.630 (XX .130) General prohibitions against discrimination.
100.631-100.639 (XX .131- XX .139) [Reserved]
100.640 (XX .140) Employment.
100.641-100.648 (XX .141- XX .148) [Reserved]
100.649 (XX .149) Program accessibility: Discrimination prohibited.
100.650 (XX .150) Program accessibility: Existing facilities.
100.651 (XX .151) Program accessibility: New construction and alterations.
100.652-100.654 (XX .152- XX .159) [Reserved]
100.660 (XX .160) Communications
100.661-100.669 (XX .161- XX .169) [Reserved]
100.670 (XX .170) Compliance procedures.
100.671-100.699 (XX .171- XX .999) [Reserved]

4. Part 100 is further amended by revising paragraph (c) in @ 100.670 to read as follows:

@ 100.670 Compliance procedures.

* * * * *

(c) The Director of Administration shall be responsible for coordinating implementation of this section. Complaints may be sent to Director of Administration, National Labor Relations Board, 1717 Pennsylvania Avenue, NW., Washington, DC 20570.

* * * * *

John C. Truesdale, Executive Secretary.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
36 CFR Part 1208

List of Subjects in 36 CFR Part 1208

Blind, Buildings, Civil rights, Employment, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped, Historic places, Historic preservation, Government employees.

It is proposed that Title 36 of the Code of Federal Regulations be amended as follows:

1. Part 1208 is added as set forth at the end of this document.

PART 1208 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Sec.
1208.101 Purpose.
1208.102 Application.

1208.103 Definitions.
1208.104-1208.109 [Reserved]
1208.110 Self-evaluation.
1208.111 Notice.
1208.112-1208.129 [Reserved]
1208.130 General prohibitions against discrimination.
1208.131-1208.139 [Reserved]
1208.140 Employment.
1208.141-1208.148 [Reserved]
1208.149 Program accessibility: Discrimination prohibited.
1208.150 Program accessibility: Existing facilities.
1208.151 Program accessibility: New construction and alternations.
1208.152-1208.159 [Reserved]
1208.160 Communications.
1208.161-1208.169 [Reserved]
1208.170 Compliance procedures.
1208.171-1208.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 1208 is further amended by revising paragraph (c) in @ 1208.170 to read as follows:

@ 1208.170 Compliance procedures.

* * * * *

(c) The Assistant Archivist for Management and Administration shall be responsible for coordinating implementation of this section. Complaints may be sent to National Archieves and Records Administration (NA), Washington, DC 20408.

* * * * *

Frank G. Burke, Acting Archivist of the United States.

VETERANS ADMINISTRATION
38 CFR Part 15

List of Subjects in 38 CFR Part 15

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped, Historic places, Historic preservation, Government employees.

It is proposed that Title 38 of the Code of Federal Regulations be amended as follows:

1. Part 15 is added as set forth at the end of this document.

PART 15 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE CETERANS ADMINISTRATION

Sec.
15.101 Purpose.
15.102 Application.
15.103 Definitions.
15.104-15.109 [Reserved]
15.110 Self-evaluation.
15.111 Notice.
15.112-15.129 [Reserved]
15.130 General prohibitions against discrimination.
15.131-15.139 [Reserved]
15.140 Employment.

15.141-15.148 [Reserved]
15.149 Program accessibility: Discrimination prohibited.
15.150 Program accessibility: Existing facilities.
15.151 Program accessibility: New construction and alterations.
15.152-15.159 [Reserved]
15.160 Communications.
15.161-15.169 [Reserved]
15.170 Compliance procedures.
15.171-15.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 15 is further amended by revising paragraph (c) in @ 15.170 to read as follows:

@ 15.170 Compliance procedures.

* * * * *

(c) The Director, Office of Equal Opportunity, shall be responsible for coordinating implementation of this section. Complaints may be sent to the Administrator of Veterans Affairs or the Director, Office of Equal Opportunity, at the following address: Veterans Administration; 810 Vermont Avenue NW., Washington, DC 20420.

* * * * *

Thomas K. Turnage, Administrator of Veterans Affairs.

FEDERAL EMERGENCY MANAGEMENT AGENCY
44 CFR Part 16

List of Subjects in 44 CFR Part 16

Blind, Buidlings, Civil rights, Employment, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Handicapped, Historic places, Historic preservation, Government employees.

It is proposed that Title 44 of the Code of Federal Regulations be amended as follows:

1. Part 16 is added as set forth at the end of this document.

PART 16 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE FEDERAL EMERGENCY MANAGEMENT AGENCY

Sec.
16.101 Purpose.
16.102 Application.
16.103 Definitions.
16.104-16.109 [Reserved]
16.110 Self-evaluation.
16.111 Notice.
16.1112-16.129 [Reserved]
16.130 General prohibitions against discrimination.
16.131-16.139 [Reserved]
16.140 Employment.
16.141-16.148 [Reserved]
16.149 Program accessibility: Discrimination prohibited.
16.150 Program accessibility: Existing facilities.
16.151 Program accessibility: New construction and alterations.
16.152-16.159 [Reserved]
16.160 Communications.
16.161-16.169 [Reserved]

16.170 Compliance procedures.
16.171-16.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 16 is further amended by revising paragraph (c) in @ 16.170 to read as follows:

@ 16.170 Compliance procedures.

* * * * *

(c) The Director of Personnel shall be responsible for coordinating implementation of this section. Complaints may be sent to Director of Personnel, Room 810, Federal Emergency Management Agency, 500 C Street SW., Washinton, DC 20472.

* * * * *

Julius W. Becton, Jr., Director.

PART -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY:

Sec.
XX .101 Purpose.
XX .102 Application.
XX .103 Definitions.
XX .104- XX .109 [Reserved]
XX .110 Self-evaluation.
XX .111 Notice.
XX .112- XX .129 [Reserved]
XX .130 General prohibitions against discrimination.
XX .131- XX .139 [Reserved]
XX .140 Employment.
XX .141- XX .148 [Reserved]
XX .149 Program accessibility: Discrimination prohibited.
XX .150 Program accessibility: Existing facilities.
XX .151 Program accessibility: New construction and alterations.
XX .152- XX .159 [Reserved]
XX .160 Communications.
XX .161- XX .169 [Reserved]
XX .170 Compliance procedures.
XX .171- XX .999 [Reserved]

Authority: 29 U.S.C. 794.

@ XX .101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

@ XX .102 Application.

This part applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

@ XX .103 Definitions.

For purposes of this part, the term -- --

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

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. 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.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Historic preservation programs" means programs conducted by the agency that have preservation of historic properties as a primary purpose.

"Historic properties" mean those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

"Individual with handicaps" 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. As used in this definition, the phrase:

(1) "Physical or mental impairment" includes --

(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" includes 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 the agency 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 subparagraph (1) of this definition but is treated by the agency as having such an impairment.

"Qualified individual with handicaps" means --

(1) With respect to preschool, elementary, or secondary education services provided by the agency, an individual with handicaps who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency;

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of acomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) "Qualified handicapped person" as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this party by @ XX .140

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

"Substantial impairment" means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

@@ XX .104 XX .109 [Reserved]

@ XX .110 Self-evaluation.

(a) The agency shall, within one year of the effective date of this part, evaluate its current 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 policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

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

(2) A description of any modifications made.

@ XX .111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

@@ XX .112- XX .129 [Reserved]

@ XX .130 General prohibitions against discrimination.

(a) No qualified individual with handicaps 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 conducted by the agency.

(b)(1) The agency, 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 individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps 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 handicaps 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 handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

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

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

(2) The agency may not deny a qualified individual with handicaps 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) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would --

(i) Subject qualified individuals with handicpas to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would --

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

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

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

@@ XX .131 XX .139 [Reserved]

@ XX .140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

@@ XX .141- XX .148 [Reserved]

@ XX .149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in @ XX .150, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

@ XX .150 Program accessibility: Existing facilities.

(a) General. The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and unsable by individuals with handicaps. This paragraph does not --

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with @ XX .150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted 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, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) Methods --

(1) General. The agency 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 any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(2) Historic preservation programs. In meeting the requirements of @ XX .150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to individuals with handicaps. In cases where a physical alteration to an historic property is not required because of @ XX .150(a)(2) or (a)(3), 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 handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) Time period for compliance. The agency shall comply with the obligations established under this section within sixty days of the effective date of this part except that where structural changes in facilities are undertaken, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(d) Transition plan. In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency 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 agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). 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 agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(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 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

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

@ XX .151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

@ XX .152- XX .159 [Reserved]

@ XX .160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency 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.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the program action would fundamentally alter the proposed or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with @ XXX .160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted 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 section would result in such an alteration or such burdens, the agency 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 handicaps receive the benefits and services of the program or activity.

@@ XXX .161 XXX .169 [Reserved]

@ XXX .170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504

with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The head of the agency shall designate an official to be responsible for coordinating implementation of this section.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing --

(1) Findings of fact and conclusions of law;

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

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by @ XXX .170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

@@ XX .171 -- XX . 999 [Reserved]

[FR Doc. 87-14491 Filed 7-1-87; 8:45 am]

Document Separator

EXECUTIVE OFFICE OF THE PRESIDENT
Office of Administration
OFFICE OF PERSONNEL MANAGEMENT
MERIT SYSTEMS PROTECTION BOARD
Office of the Special Counsel
FEDERAL LABOR RELATIONS AUTHORITY
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
SECURITIES AND EXCHANGE COMMISSION
OVERSEAS PRIVATE INVESTMENT CORPORATION
AFRICAN DEVELOPMENT FOUNDATION
NATIONAL LABOR RELATIONS BOARD
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
VETERANS ADMINISTRATION
FEDERAL EMERGENCY MANAGEMENT AGENCY
ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN FEDERALLY CONDUCTED PROGRAMS

AGENCIES: Executive Office of the President, Office of Personnel Management, Merit Systems Protection Board, Office of the Special Counsel (MSPB), Federal Labor Relations Authority, National Aeronautics and Space Administration, Securities and Exchange Commission, Overseas Private Investment Corporation, African Development Foundation, National Labor Relations Board, National Archives and Records Administration, Veterans Administration, Federal Emergency Management Agency.
Office of Administration

3 CFR PART 102
5 CFR PART 723
5 CFR PART 1207
5 CFR PART 1262
5 CFR PART 2416
14 CFR PART 1251
17 CFR PART 200
22 CFR PART 711
22 CFR PART 1510
29 CFR PART 100
36 CFR PART 1208
38 CFR PART 15
44 CFR PART 16
3 CFR Part 102

53 FR 25872

July 8, 1988

ACTION: Final Rule.

SUMMARY: This regulation requires that the agencies listed above operate all of their programs and activities to ensure nondiscrimination against qualified individuals with handicaps. It sets forth standards for what constitutes discrimination on the basis of mental or physical handicap, provides a definition for individual with handicaps and qualified individual with handicaps, and establishes a complaint mechanism for resolving allegations of discrimination. This regulation is issued under the authority of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in programs or activities conducted by Federal Executive agencies.

EFFECTIVE DATE: September 6, 1988.

ADDRESSES: See individual agencies below. Copies of this regulation will be made available on tape for persons with impaired vision who request them. They will be provided by the Coordination and Review Section, Civil Rights Division,

Department of Justice, Washington, DC 20530, (202) 724-2222 (voice) or (202) 724-7678 (TDD).

FOR FURTHER INFORMATION CONTACT: See individual agencies below.
FOR FURTHER INFORMATION CONTACT: Arnold Intrater, (202) 456-6226 (voice) or (202) 456-6213 (TDD).

ADDITIONAL SUPPLEMENTARY INFORMATION: The Executive Office of the President is a designation which encompasses several different agencies, boards and commissions each of which provides analysis and advice and help in developing policy in certain areas, or carries out specific projects in support of the Presidency. The Office of Administration was established to provide common administrative support and services for units within the Executive Office of the President. Because of the uniqueness of the Executive Office of the President, the proposed rule provided that decisions that need to be made by a head of an agency would be made by a three-person board. No comments were received on this provision in the proposed rule, and it has not been changed.

FOR FURTHER INFORMATION CONTACT: Ms. Sharrel Keeling, (202) 632-6272 (Voice or TDD).

ADDITIONAL SUPPLEMENTARY INFORMATION: The Office of Personnel Management received comments from three organizations representing Government employees. One commenter asked that the application section (@ 723.102) be revised to indicate that Federal employees are excepted from the part unless they are "individuals with handicaps" as that term is defined in the regulation. We believe that the regulation makes clear that the rights established by the regulation apply to individuals who meet that definition, including those who are Federal employees as well as others. Obligations under the regulation, however, are those of the agency and, because the agency necessarily acts through its employees, it would be incorrect to say that the regulation does not apply to Federal employees who do not have handicaps.

This commenter also suggested that the regulation should include the statutory language requiring the agency to promulgate an implementing regulation and submit it to Congress for review prior to its effective date. The agency is carrying out its statutory responsibility to issue a regulation by participating in this joint publication and, as noted supra in the joint preamble, this regulation is being submitted for the required congressional review.

One commenter said that the treatment of employment in the proposed regulation was inadequate and that the EEOC requirements for employment should be included or summarized in this regulation, rather than merely cross-referenced. As explained in the joint preamble, responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (3 CFR, Comp. 1979, p. 206). While this rule could define terms with respect to employment and enumerate what practices are covered and what requirements apply, the agency has adopted EEOC's recommendation that to avoid duplicative, competing, or conflicting standards with respect to Federal employment, reference in these regulations to the Government-wide EEOC rules is sufficient. The class of Federal employees and applicants for employment covered by section 504 is identical to or subsumed within that covered by section 501. To apply different or lesser standards to persons alleging violations of section 504 could lead unnecessarily to confusion in the enforcement of the Rehabilitation Act with respect to Federal employment.

Another commenter suggested that the self-evaluation required by @ 723.110 should be repeated on a periodic basis, rather than being a one-time activity. We do not agree. The self-evaluation is intended as an initial examination of the agency's existing policies and practices to identify and correct any problem areas. Of course, the obligation to comply with the regulation is a continuing one, but it can best be met by maintaining a consistent awareness of the rights of individuals with handicaps, and the potential for agency policy to affect

them, so that new problems are not created as agency policies and practices change.

This commenter also asked OPM to inform agencies that a labor union at the "local activity level" should be included among the organizations representing individuals with handicaps to be consulted in the development of the self-evaluation and the transition plan required by @@ 723.110 and 723.150(d). The Department of Justice and, with respect to employment, the EEOC, are the agencies with Government-wide authority to coordinate implementation of section 504. OPM has no authority in this respect over other agencies. Of course, OPM uniformly encourages Federal agencies to maintain good relations with labor organizations representing their employees by consulting such organizations about matters that concern their members.

Finally, this commenter questioned the meaning of @ 723.130(b)(2), which provides that the agency may not exclude a qualified individual with handicaps from a program that is not separate or different, even if the agency operates (pursuant to @ 723.130(b)(1)(iv)) a separate or different program that is designed to meet the needs of individuals with handicaps. This means that, if the agency has a separate program modified to meet the needs of a particular class of individuals with handicaps, it cannot, on that basis, refuse to allow an individual with handicaps to participate in the program that is not so modified. Thus, if the agency offers several sections of a particular training course, it could provide a sign language interpreter for only one section in order to accommodate individuals with impaired hearing, but it could not refuse to allow an individual with impaired hearing to attend a section of the course for which an interpreter is not provided. In some cases, the provision of a separate program designed for individuals with handicaps may limit the obligation to accommodate individuals with handicaps in the regular program, but in other cases it might not. The provision of a sign language interpreter for one section of a training course, for example, might eliminate the obligation to provide an interpreter for other sections of the course, but it would not affect the agency's obligation to accommodate persons with impaired vision in other sections of the course.

The other comments received by OPM duplicated those received by other agencies and are discussed in the joint preamble.

FOR FURTHER INFORMATION CONTACT: Darrel L. Netherton, (202) 653-5805 (voice) or (202) 653-8896 (TDD).
FOR FURTHER INFORMATION CONTACT: John Marshall Meisburg, Jr., General Attorney, FTS 653-7307, (202) 653-7307 (voice) or (202) 724-7678 (TTD).
FOR FURTHER INFORMATION CONTACT: Orinda R. Nelson, (202) 382-0992 (voice) or (202) 724-7678 (TDD).
FOR FURTHER INFORMATION CONTACT: Ms. Lynda Sampson (202) 453-2177 (voice) or (202) 426-1436 (TDD).
FOR FURTHER INFORMATION CONTACT: Nancy A. Wolynetz, Selective Placement Coordinator, 450 Fifth Street NW., Washington, DC, (202) 272-2550 (voice) or (202) 272-2552 (TDD); or Jeanne G. Hartford, Special Counsel, Office of the Executive Director, 450 Fifth Street NW., Washington, DC, (202) 272-3808.
FOR FURTHER INFORMATION CONTACT: Jane H. Chalmers (202) 457-7200 (voice) or (202) 724-7678 (TDD).
FOR FURTHER INFORMATION CONTACT: Paul Magid, General Counsel, 1625 Massachusetts Avenue, NW., Suite 600, Washington, DC, 20036. (202) 673-3916 (voice) or (202) 724-7678 (TDD).
FOR FURTHER INFORMATION CONTACT: Ernest Russell, Director of Administration, National Labor Relations Board, 1717 Pennsylvania Avenue, NW., Washington, DC (202) 254-9200 or (202) 634-1699 (TDD).

ADDITIONAL SUPPLEMENTARY INFORMATION: The National Labor Relations Board is responsible for conducting hearings and elections pursuant to the National Labor Relations Act, as amended (29 U.S.C. sections 141-169). When determining where hearings and elections will be held, the Agency must consider both the convenience of the parties to a proceeding and the public, and the extent to

which delay or expense can be minimized. While many hearings are conducted in the Agency's Regional, Subregional, and Resident Offices, a number of hearings are held in more remote locations where the employer, the union and the employee witnesses are located. Also, in order to maximize participation at Board conducted elections to determine employee desires regarding union representation, these elections are customarily held at the employer's premises.

Hearings held in Agency offices will be subject to the program accessibility and communications requirements of this regulation and will be made accessible in accordance with this regulation. As to hearings held at non-Agency sites, the Agency will attempt to locate accessible local facilities that are both convenient and inexpensive. In these instances, the Agency will include in the notice of hearing served upon the parties a request that the parties provide the Regional, Subregional, or Resident Office with prompt notice in advance of any accessibility features they or their witnesses may require. If the Agency receives, in advance, a request for an accessible hearing site or special accommodation, it will then arrange necessary accommodations for those parties, representatives, witnesses, or members of the public requiring such accommodation. Similarly, with regard to elections, the notice to employees issued in connection with an election will likewise include a request that handicapped persons inform the Agency, in advance, of any auxiliary aids, such as sign language interpreters, that may be necessary in order to facilitate their participation in the election.

Thus, the Agency will, with respect to hearings or elections at non-Agency sites, and subject to the limitations of @ 100.650(a)(3) and @ 100.660(d) of this regulation, ensure access for any individual with handicaps who gives reasonable advance notice, that the person will attend a hearing as a party, a party's representative, a witness, a member of the public, or will appear as a participant in an election.
FOR FURTHER INFORMATION CONTACT: Adrienne C. Thomas or Nancy Y. Allard, TDD: 202/523-0774, Non-TDD: 202/523-3215, Room 409, National Archives Building, 8th &
Pennsylvania Avenue, NW., Washington, DC 20408

FOR FURTHER INFORMATION CONTACT: Mr. Rodney Cash, Office of Equal Opportunity, (202) 233-2150 or (202) 233-3710 (TDD).
FOR FURTHER INFORMATION CONTACT: Alan Clive, Equal Employment Manager, Room 815, 500 C Street, SW., Washington, DC (202) 646-3957 (voice) or 646-4117 (TDD).

TEXT: SUPPLEMENTARY INFORMATION:

Background

The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) , as it applies to programs and activities conducted by the following agencies (hereinafter "the agencies"): Executive Office of the President, Office of Personnel Management, Merit Systems Protection Board, Office of the Special Counsel (MSPB), Federal Labor Relations Authority, National Aeronautics and Space Administration, Securities and Exchange Commission, Overseas Private Investment Corporation, African Development Foundation, National Labor Relations Board, National Archives and Records Administration, Veterans Administration, Federal Emergency Management Agency. As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Sec. 119, Pub. L. 95-602, 92 Stat. 2982) and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810), section 504 of the Rehabilitation Act of 1973 states that

No otherwise qualified individual with handicaps 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may

be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(29 U.S.C. 794 (1978 amendment italicized).)

On July 2, 1987, thirteen agencies jointly published a Notice of Proposed Rulemaking (NPRM) in the Federal Register. 52 FR 25124. Each agency individually analyzed comments it received. On the basis of their analysis, the agencies participating in this publication decided to adopt this final rule. Because the rule selected is identical for all the participating agencies, they are able to publish it jointly, and are doing so in order to minimize costs and expedite its issuance. The rule adopted by each agency will be codified in that agency's portion of the Code of Federal Regulations, as indicated in the information provided for the individual agencies below.

Section 504 requires that regulations that apply to the programs and activities of Federal Executive agencies shall be submitted to the appropriate authorizing committees of Congress and that such regulations may take effect no earlier than the thirtieth day after they have been so submitted. The Department of Justice, on behalf of the agencies participating in this joint rulemaking, is submitting these regulations to the Senate Committee on Labor and Human Resources and its Subcommittee on the Handicapped and to the House Committee on Education and Labor and its Subcommittee on Select Education. Each regulation will become effective on September 6, 1988.

The substantive nondiscrimination obligations of the agency, as set forth in this rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. (See 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs).) This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) id.; 124 Cong. Rec. 13897 (remarks of Rep. Brademas); id. at 38552 (remarks of Rep. Sarasin).

A commenter objected to language differences between this rule and the Federal Government's section 504 regulations for federally assisted programs. As explained in the preamble to the proposed rule, these changes are based on the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting Davis and section 504. See Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981) (APTA); see also Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F.2d 490 (1st Cir. 1983).

These language differences are also supported by the decision of the Supreme Court in Alexander v. Choate, 469 U.S. 287 (1985), where the Court held that the regulations for federally assisted programs did not require a recipient to modify its durational limitation on Medicaid coverage of inpatient hospital care for handicapped persons. Clarifying its Davis decision, the Court explained that section 504 requires only "reasonable modifications," id. at 300, and explicitly noted that "[t]he regulations implementing section 504 [for federally assisted programs] are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." Id. at 301 n.21 (emphasis added).

Incorporation of these changes, therefore, makes this regulation implementing section 504 for federally conducted programs consistent with the Federal

Government's regulations implementing section 504 for federally assisted programs as they have been interpreted by the Supreme Court. Many of these federally assisted regulations were issued prior to the interpretations of section 504 by the Supreme Court in Davis, by lower courts interpreting Davis, and by the Supreme Court in Alexander; therefore their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence the agencies believe that there are no significant differences between this rule for federally conducted programs and the Federal Government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Department of Justice. It is an adaptation of a prototype prepared by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298) and distributed to Executive agencies. This regulation has also been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206). It is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared. This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601-612).

Section-by-Section Analysis and Response to Comments

Section XXX .101 Purpose.

Section XXX .101 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

Section XX .102 Application.

The regulation applies to all programs or activities conducted by the agencies. Under this section, a federally conducted program or activity is, in simple terms, anything a Federal agency does. Aside from employment, there are two major categories of federally conducted programs or activities covered by this regulation: those involving general public contact as part of ongoing agency operations and those directly administered by the agencies for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the agency's facilities. Activities in the second category include programs that provide Federal services or benefits. This regulation does not, however, apply to programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

Section XX .103 Definitions.

"Assistant Attorney General." "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Although auxiliary aids are required explicitly only by @ XX .160(a)(1), they may also be necessary to meet other requirements of the regulation.

A commenter suggested that the requirement for auxiliary aids in aspects of

the agency's program other than those covered by @ XX .160(a)(1) should be specifically stated in the regulation. The agency believes that such a statement is unnecessary, because the regulation makes the obligation not to discriminate clear and thus requires the provision of auxiliary aids whenever they are necessary to meet that obligation. A commenter also suggested that "attendant services" should be included in the list of examples of auxiliary aids appearing in the definition. The agency believes that attendant services are generally personal in nature and that they are therefore generally not required.

"Complete complaint." "Complete complaint" is defined to include all the information necessary to enable the agency to investigate the complaint. The definition is necessary, because the 180 day period for the agency's investigation (see @ XX .170(g)) begins when the agency receives a complete complaint.

"Facility." The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs (28 CFR 41.3(f)) except that the term "rolling stock or other conveyances" has been added and the phrase "or interest in such property" has been deleted because the term "facility," as used in this regulation, refers to structures and not to intangible property rights. It should, however, be noted that the regulation applies to all programs and activities conducted by the agency regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the agency.

"Historic preservation programs," "Historic properties," and "Substantial impairment." These terms are defined in order to aid in the interpretation of @ XX .150 (a)(2) and (b)(2), which relate to accessibility of historic preservation programs.

"Individual with handicaps. " The definition of "individual with handicaps" is identical to the definition of " handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the statutory term " handicapped individual" to "individual with handicaps, " the legislative history of this amendment indicates that no substantive change was intended. Thus, although the term has been changed in this regulation to be consistent with the statute as amended, the definition is unchanged. In particular, although the term as revised refers to " handicaps" in the plural, it does not exclude persons who have only one handicap.

"Qualified individual with handicaps. " The definition of "qualified individual with handicaps" is a revised version of the definition of "qualified handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

Paragraph (1) is an adaptation of existing definitions of "qualified handicapped person" for purposes of federally assisted preschool, elementary, and secondary education programs (see, e.g., 45 CFR 84.3(k)(2)). It provides that an individual with handicaps is qualified for preschool, elementary, or secondary education programs conducted by the agency if he or she is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive these services from the agency. In other words, an individual with handicaps is qualified if, considering all factors other than the handicapping condition, he or she is entitled to receive education services from the agency.

Paragraph (2) deviates from existing regulations for federally assisted programs because of intervening court decisions. It defines "qualified individual with handicaps" with regard to any program other than those covered by paragraph (1) under which a person is required to perform services or to achieve a level of accomplishment. In such programs a qualified individual with handicaps is one who can achieve the purpose of the program without modifications in the program that the agency can demonstrate would result in a

fundamental alteration in its nature. This definition reflects the decision of the Supreme Court in Davis. In that case, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." Id. at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," id. at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." Id. at 410.

We have incorporated the Court's language in the definition of "qualified individual with handicaps" in order to make clear that such a person must be able to participate in the program offered by the agency. The agency is required to make modifications in order to enable an applicant with handicaps to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered; not whether the applicant could benefit or obtain results from some other program that the agency does not offer. Although the revised definition allows exclusion of some individuals with handicaps from some programs, it requires that an individual with handicaps

who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

A commenter argued that this definition of "qualified individual with handicaps" was unnecessary, because Davis was an interpretation of the definition in paragraph (3), which requires only that the individual meet "the essential eligibility requirements" for participation in the program. The agency believes that Davis clarifies the meaning of "essential eligibility requirements" with respect to programs, such as the one at issue in that case, in which an individual "is required to perform services or to achieve a level of accomplishment." In such a program, the Court held in Davis, an individual is not qualified if he or she cannot achieve the purpose of the program without modifications that would fundamentally alter its nature. The agency believes that it is appropriate to reflect this clarification in the regulation.

This commenter also recommended that the agency adopt the definitions in the regulation of the Federal Election Commission, which incorporates a requirement for "reasonable accommodation." "Reasonable accommodation," in the context of nondiscrimination on the basis of handicap, is a term of art used to refer to employers' obligations to employees with handicaps. The agency believes that use of that term should be limited to employment. Also, the agency believes that the obligation to make appropriate modifications or adjustments to enable individuals with handicaps to participate in its programs is made sufficiently clear in the substantive provisions of the regulation, so that a reference to it in this definition is unnecessary.

The agency has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alternation, the agency must follow the procedures established in @ XX .150(a) and @ XX .160(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the agency head or his or her designee in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the agency head determines that an action would result in a fundamental alteration, the

agency must consider options that would enable the individual with handicaps to achieve the purpose of the program but would not result in such an alteration.

For programs or activities that do not fall under either of the first two paragraphs, paragraph (3) adopts the existing definition of "qualified handicapped person" with respect to services (28 CFR 41.32(b)) in the coordination regulation for programs receiving Federal financial assistance. Under this definition, a qualified individual with handicaps is an individual with handicaps who meets the essential eligibility requirements for participation in the program or activity.

Paragraph (4) explains that "qualified individual with handicaps" means "qualified handicapped person" as that term is defined for purposes of employment in the Equal Employment Opportunity Commission's regulation at 29 CFR 1613.702(f), which is made applicable to this regulation by @ XX .140. Nothing in this regulation changes existing regulations applicable to employment.

"Section 504. " This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the agency and not to programs or activities to which it provides Federal financial assistance.

Section XX .110 Self-evaluation.

The agency shall conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with handicaps that promotes both effective and efficient implementation of section 504.

Section XX .111 Notice.

Section XX .111 requires the agency to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

One commenter suggested that the agency add "effectively" to modify "to apprise" in stating the agency's obligation to inform persons of the requirements of this regulation. The agency considers this modification to be unnecessary and has not adopted the suggestion.

Section XX .130 General prohibitions against discrimination.

Section XX .130 is an adaptation of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51).

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in @ XX .130 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. If the agency violates a provision in any of the subsequent sections, it will also violate one of the general prohibitions found in @ XX .130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of individuals with handicaps. The agency may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from its program simply because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (e.g., epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question. It would be permissible, therefore, to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce; but it may not be permissible to automatically disqualify all those who are blind in just one eye.

In addition, section 504 prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on program accessibility (@@ XX .149 -- XX .151) and communications (@ XX .160) are specific applications of this principle.

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, paragraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids, benefits, or services when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the agency's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Paragraph (b)(1)(v) prohibits the agency from denying a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vi) prohibits the agency from limiting a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the agency from utilizing criteria or methods of administration that deny individuals with handicaps access to the agency's programs and activities. The phrase "criteria or methods of administration" refers to official written agency policies and to the actual practices of the agency. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with handicaps an effective opportunity to participate.

Paragraph (b)(4) specifically applies the prohibition enunciated in @ XX .130(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the agency. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the agency, in the selection of procurement contractors, from using criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

Paragraph (b)(6) prohibits the agency from discriminating against qualified individuals with handicaps on the basis of handicap in the granting of licenses or certification. A person is a "qualified individual with handicaps"

with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification (see @ XX .103).

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

Paragraph (b)(6) does not extend section 504 directly to the programs or activities of licensees or certified entities themselves. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities nor are they programs or activities receiving Federal financial assistance merely by virtue of the Federal license or certificate. However, as noted above, section 504 may affect the content of the rules established by the agency for the operation of the program or activity of the licensee or certified entity, and thereby indirectly affect limited aspects of their operations.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with handicaps or a given class of individuals with handicaps may be limited to those individuals with handicaps.

Paragraph (d), discussed above, provides that the agency must administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, i.e., in a setting that enables individuals with handicaps to interact with nonhandicapped persons to the fullest extent possible.

Section XX .140 Employment.

Section XX .140 prohibits discrimination on the basis of handicap in employment by the agency. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. Gardner v. Morris, 752 F.2d 1271, 1277 (8th Cir. 1985); Smith v. United States Postal Service, 742 F.2d 257, 259-260 (6th Cir. 1984); Prewitt v. United States Postal Service, 662 F.2d 292, 302-04 (5th Cir. 1981). Contra McGuiness v. United States Postal Service, 744 F.2d 1318, 1320-21 (7th Cir. 1984); Boyd v. United States Postal Service, 752 F.2d 410, 413-14 (9th Cir. 1985).

Courts uniformly have held that, in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. Morgan v. United States Postal Service, 798 F.2d 1162, 1164-65 (8th Cir. 1986); Smith, 742 F.2d at 262; Prewitt, 662 F.2d at 304. Accordingly, @ XX .140 (Employment) of this rule adopts the definitions, requirements, and procedures of section 501 as established in regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR Part 1613. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (3 CFR, 1978 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap. In addition to this section, @ XX .170(b) specifies that the agency will use the existing EEOC procedures to resolve allegations of employment discrimination.

Section XX .149 Program accessibility: Discrimination prohibited.

Section XX .149 states the general nondiscrimination principle underlying the program accessibility requirements of @@ XX .150 and XX .151.

Section XX .150 Program accessibility: Existing facilities.

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.57), with certain modifications. Thus, @ XX .150 requires that each agency program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. The regulation also makes clear that the agency is not required to make each of its existing facilities accessible (@ XX .150(a)(1)). However, @ XX .150, unlike 28 CFR 41.57, places explicit limits on the agency's obligation to ensure program accessibility (@ XX .150(a)(2), (a)(3)).

Paragraph (a)(2), which establishes a special limitation on the obligation to ensure program accessibility in historic preservation programs, is discussed below in connection with paragraph (b).

Paragraph (a)(3) generally codifies recent case law that defines the scope of the agency's obligation to ensure program accessibility. This paragraph provides that in meeting the program accessibility requirement the agency is not required to take any action that would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. A similar limitation is provided in @ XX .160(d). This provision is based on the Supreme Court's holding in Southeastern Community College v. Davis, 442 U.S. 397 (1979), that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since Davis, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. See, e.g, Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); American Public Transit Association v. Lewis, (APTA), 655 F.2d 1272 (D.C. Cir. 1981).

Paragraphs (a)(3) and @ XX .160(d) are also supported by the Supreme Court's decision in Alexander v. Choate, 469 U.S. 287 (1985). Alexander involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days per year. Plaintiffs argued that this reduction violated section 504 because it had an adverse impact on handicapped persons. The Court assumed without deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact on handicapped people, but held that the reduction was not "the sort of disparate impact" discrimination that might be prohibited by section 504 or its implementing regulation. Id. at 299.

Relying on Davis, the Court said that section 504 guarantees qualified handicapped persons "meaningful access to the benefits that the grantee offers," id. at 301, and that "reasonable adjustments in the nature of the benefit being offered must at times be made to assure meaningful access." Id. at n.21 (emphasis added). However, section 504 does not require " 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' * * * or that would constitute 'fundamental alteration[s] in the nature of a program.' " Id. at n.20 (citations omitted). Alexander supports the position, based on Davis and the earlier, lower court decisions, that in some situations, certain accommodations for a handicapped person may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. Thus failure to include such an "undue burdens" provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

This paragraph, however, does not establish an absolute defense; it does not relieve the agency of all obligations to individuals with handicaps. Although the agency is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with handicaps receive the benefits and services of the federally conducted program or activity.

It is our view that compliance with @ XX .150(a) would in most cases not result in undue financial and administrative burdens on the agency. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with @ XX .150(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the agency. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the agency head's decision or failure to make a decision may file a complaint under the compliance procedures established in @ XX .170.

One commenter argued that the decision that an action would result in undue burdens should be based on the resources of the agency as a whole. The agency believes that its entire budget is an inappropriate touchstone for making determinations as to undue financial and administrative burdens. Parts of the agency's budget may be earmarked for specific purposes and may simply not be available for use in making the agency's programs accessible to individuals with handicaps.

Paragraph (b)(1) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with handicaps. Structural changes in existing facilities are required only when there is no other feasible way to make the agency's program accessible. (It should be noted that "structural changes" include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alteration to a load-bearing structural member.) The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraph @ XX .150(a)(2) provides an additional limitation on the obligation to ensure program accessibility that is applicable only to historic preservation programs. In order to avoid possible conflict between the congressional mandates to preserve historic properties on the one hand and to eliminate discrimination against individuals with handicaps on the other, @ XX .150(a)(2) provides that in historic preservation programs the agency is not required to take any action that would result in a substantial impairment of significant historic features of an historic property.

Nevertheless, because the primary benefit of an historic preservation program is uniquely the experience of the historic property itself, @ XX .150(b)(2) requires the agency to give priority to methods of providing program accessibility that permit individuals with handicaps to have physical access to the historic property. This priority on physical access may also be viewed as a specific application of the general requirement that the agency administer programs in the most integrated setting appropriate to the needs of qualified individuals with handicaps (@ XX .130(d)). Only when providing physical access would result in a substantial impairment of significant historic features, a fundamental alteration in the nature of the program, or in undue financial and administrative burdens, may the agency adopt alternative methods for providing program accessibility that do not ensure physical access. Examples of some

alternative methods are provided in @ XX .150(b)(2).

The special limitation on program accessibility set forth in @ XX .150(a)(2) is applicable only to programs that have preservation of historic properties as a primary purpose (see supra discussion of definition of "historic preservation program," @ XX .103). Narrow application of the special limitation is justified because of the inherent flexibility of the program accessibility requirement. Where historic preservation is not a primary purpose of the program the agency is not bound to a particular facility. It can relocate all or part of its program to an accessible facility, make home visits, or use other standard methods of achieving program accessibility without making structural alterations that might impair significant historic features of the historic property.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the agency must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section XX .151 Program accessibility: New construction and alterations.

Overlapping coverage exists with respect to new construction and alterations under section 504 and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). Section XX .151 provides that those building that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by individuals with handcaps in accordance with 41 CFR 101-19.600 to 101-19.607. This standard was promulgated pursuant to the Arcthitectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). We believe that it is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in @ XX .150. To the extent the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of @ XX .151.

Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the agency believes the same program accessibility standard should apply to both owned and leased existing buildings.

In Rose v. United States Postal Service, 774 F.2d 1355 (9th Cir. 1985), the Ninth Circuit held that the Architectural Barriers Act requires accessibility at the time of lease. The Rose court did not address the issue of whether section 504 likewise requires accessibility as a condition of lease, and the case was remanded to the District Court for, among other things, consideration of that issue. The agency may provide more specific guidance on section 504 requirements for leased buildings after the litigation is completed.

Section XX .160 Communications.

Section XX .160 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under @ XX .160(a)(1) to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They shall also include an opportunity for individuals with handicaps to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the agency (@ XX .160(a)(1)(i)). The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under @ XX .160(d). That paragraph limits the obligation of the agency to ensure effective communication in accordance with Davis and the circuit court opinions interpreting it (see supra preamble discussion of @ XX .150(a)(3)). Unless not required by @ XX .160(d), the agency shall provide auxiliary aids at no cost to the individual with handicaps.

The discussion of @ XX .150(a), Program accessibility: Existing facilities, regarding the determination of undue financial and administrative burdens also applies to this section and should be referred to for a complete understanding of the agency's obligation to comply with @ XX .160.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (e.g., a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. In these cases, a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to inform the public of (1) the communications services it offers to afford individuals with handicaps an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective.

The agency shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the agency. Auxiliary aids must be afforded where necessary to ensure effective communication at the proceedings. If sign language interpreters are necessary, the agency may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the agency need for provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (@ XX .160(a)(1)(ii)). For example, the agency need not provide eyeglasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

Paragraph (b) requires the agency to provide information to individuals with handicaps concerning accessible services, activities, and facilities. Paragraph (c) requires the agency to provide signage at inaccessible facilities that directs users to locations with information about accessible facilities.

One commenter recommended that the agency add a paragraph to @ XX .160, Communications, requiring the agency to provide handicapped persons with information about their rights under section 504. Such a paragraph is unnecessary because it would duplicate @ XX .111, Notice.

Section XXX .170 Compliance procedures.

Paragraph (a) specifies that paragraphs (c) through (l) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the agency will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR Part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

Paragraph (c) is amended by each individual agency. It designates the official responsible for coordinating implementation of @ XXX .170 and provides an address to which complaints may be sent.

The agency is required to accept and investigate all complete complaints (@ XXX .170(d)). If it determines that it does not have jurisdiction over a complaint, it shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal Government (@ XXX .170(e)).

One commenter on the compliance procedures suggested that the agency should be required to refer a complaint to the appropriate agency when it does not have jurisdiction over it. The proposed rule merely required the agency to make reasonable efforts to do so. The agency has not adopted this suggestion because of several possible circumstances in which the agency might not be able to successfully refer a complaint. For example, the agency might receive a complaint that no Federal agency would have jurisdiction over or that did not contain sufficient information to identify the appropriate agency.

A commenter suggested that the regulation should include procedures for handling complaints that are incomplete. The agency believes that it is not necessary to include such detailed procedures in the text of the regulation itself. The agency will, of course, develop methods for handling situations for which procedures are not spelled out in the regulation.

Paragraph (f) requires the agency to notify the Architectural and Transportation Barriers Compliance Board upon receipt of a complaint alleging that a building or facility subject to the Architectural Barriers Act was designed, constructed, or altered in a manner that does not provide ready access to and use by individuals with handicaps.

Paragraph (g) requires the agency to provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal (@ XXX .170(g)). One appeal within the agency shall be provided (@ XXX .170(i)). The appeal will not be heard by the same person who made the initial determination of compliance or noncompliance.

Paragraph (l) permits the agency to delegate its authority for investigating complaints to other Federal agencies. However, the statutory obligation of the agency to make a final determination of compliance or noncompliance may not be delegated.

A commenter suggested that the rule should state that the provision of complaint resolution procedures does not preclude judicial relief and that a complainant is not required to exhaust these administrative remedies before bringing an action in court. It is beyond the agency's jurisdiction to specify the availability or scope of judicial review of agency actions. That issue is for the courts to decide.

EXECUTIVE OFFICE OF THE PRESIDENT
List of Subjects in 3 CFR Part 102

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Government employees,

Handicapped, Historic places, Historic preservation.

Title 3 of the Code of Federal Regulations is amended as follows:

1. Part 102 is added as set forth at the end of this document.

PART 102 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE EXECUTIVE OFFICE OF THE PRESIDENT

Sec.
102.101 Purpose.
102.102 Application.
102.103 Definitions.
102.104 -- 102.109 [Reserved]
102.110 Self-evaluation.
102.111 Notice.
102.112 -- 102.129 [Reserved]
102.130 General prohibitions against discrimination.
102.131 -- 102.139 [Reserved]
102.140 Employment.
102.141 -- 102.148 [Reserved]
102.149 Program accessibility: Discrimination prohibited.
102.150 Program accessibility: Existing facilities.
102.151 Program accessibility: New construction and alterations.
102.152 -- 102.159 [Reserved]
102.160 Communications.
102.161 -- 102.169 [Reserved]
102.170 Compliance procedures.
102.171 -- 102.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 102 is further amended by adding the following definitions to @ 102.103 thereof, placing them in alphabetical order among the existing definitions of that section:

@ 102.103 Definitions.

* * * * *

"Agency" means, for purposes of this regulation only, the following entities in the Executive Office of the President: the White House Office, the Office of the Vice President, the Office of Management and Budget, the Office of Policy Development, the National Security Council, the Office of Science and Technology Policy, the Office of the United States Trade Representative, the Council on Environmental Quality, the Council of Economic Advisers, the Office of Administration, the Office of Federal Procurement Policy, and any committee, board, commission, or similar group established in the Executive Office of the President.

* * * * *

"Agency head" or "head of the agency"; as used in @@ 102.150(a)(3), 102.160(d) and 102.170 (i) and (j), shall be a three-member board which will include the Director, Office of Administration, the head of the Executive Office of the President, agency in which the issue needing resolution or decision arises and one other agency head selected by the two other board members. In the event that an issue needing resolution or decision arises within the Office of Administration, one of the board members shall be the Director of the Office of Management and Budget.

3. Part 102 is further amended by revising paragraph (c) in @ 102.170 to read as follows:

@ 102.170 Compliance procedures.

* * * * *

(c) The Director, Facilities Management, Office of Administration, Executive Office of the President, shall be responsible for coordinating implementation of this section. Complaints may be sent to the Director at the following address: Room 486, Old Executive Office Building, 17th and Pennsylvania Ave. NW., Washington, DC 20500.

* * * * *

Gordon Riggle, Director, Office of Administration, Executive Office of the President.

OFFICE OF PERSONNEL MANAGEMENT
5 CFR Part 723
List of Subjects in 5 CFR Part 723

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped, Historic places, Historic preservation.

Title 5 of the Code of Federal Regulations is amended as follows:

1. Part 723 is added as set forth at the end of this document.

PART 723 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE OFFICE OF PERSONNEL MANAGEMENT

Sec.
723.101 Purpose.
723.102 Application.
723.103 Definitions.
723.104 -- 723.109 [Reserved]
723.110 Self-evaluation.
723.111 Notice.
723.112 -- 723.129 [Reserved]
723.130 General prohibitions against discrimination.
723.131 -- 723.139 [Reserved]
723.140 Employment.
723.141 -- 723.148 [Reserved]
723.149 Program accessibility: Discrimination prohibited.
723.150 Program accessibility: Existing facilities.
723.151 Program accessibility: New construction and alterations.
723.152 -- 723.159 [Reserved]
723.160 Communications.
723.161 -- 723.169 [Reserved]
723.170 Compliance procedures.
723.171 -- 723.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 723 is further amended by revising paragraph (c) in @ 723.170 to read as follows:

@ 723.170 Compliance procedures.

* * * * *

(c) The Assistant Director for Personnel and EEO shall be responsible for coordinating implementation of this section. Complaints may be sent to the Assistant Director for Personnel and EEO, Office of Personnel Management, Room 1479, 1900 E St., NW., Washington, DC 20415.

* * * * *

Constance Horner, Director.

MERIT SYSTEMS PROTECTION BOARD
5 CFR Part 1207
List of Subjects in 5 CFR Part 1207

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped, Historic places, Historic preservation.

Title 5 of the Code of Federal Regulations is amended as follows:

1. Part 1207 is added as set forth at the end of this document.

PART 1207 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE MERIT SYSTEMS PROTECTION BOARD

Sec.
1207.101 Purpose.
1207.102 Application.
1207.103 Definitions.
1207.104 -- 1207.109 [Reserved]
1207.110 Self-evaluation.
1207.111 Notice.
1207.112 -- 1207.129 [Reserved]
1207.130 General prohibitions against discrimination.
1207.131 -- 1207.139 [Reserved]
1207.140 Employment.
1207.141 -- 1207.148 [Reserved]
1207.149 Program accessibility: Discrimination prohibited.
1207.150 Program accessibility: Existing facilities.
1207.151 Program accessibility: New construction and alterations.
1207.152 -- 1207.159 [Reserved]
1207.160 Communications.
1207.161 -- 1207.169 [Reserved]
1207.170 Compliance procedures.
1207.171 -- 1207.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 1207 is further amended by revising paragraph (c) in @ 1207.170 to read as follows:

@ 1207.170 Compliance procedures.

* * * * *

(c) The Equal Employment Officer shall be responsible for coordinating implementation of this section. Complaints may be sent to the Equal Employment Office, Merit Systems Protection Board, 1120 Vermont Avenue, NW., Room 908, Washington, DC 20419.

* * * * *

Daniel R. Levinson, Chairman of the Board.

OFFICE OF THE SPECIAL COUNSEL
5 CFR Part 1262
List of Subjects in 5 CFR Part 1262

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped, Historic places, Historic preservation.

Title 5 of the Code of Federal Regulations is amended as follows:

1. Part 1262 is added as set forth at the end of this document.

PART 1262 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE OFFICE OF THE SPECIAL COUNSEL

Sec.
1262.101 Purpose.
1262.102 Application.
1262.103 Definitions.
1262.104 -- 1262.109 [Reserved]
1262.110 Self-evaluation.
1262.111 Notice.
1262.112 -- 1262.129 [Reserved]
1262.130 General prohibitions against discrimination.
1262.131 -- 1262.139 [Reserved]
1262.140 Employment.
1262.141 -- 1262.148 [Reserved]
1262.149 Program accessibility: Discrimination prohibited.
1262.150 Program accessibility: Existing facilities.
1262.151 Program accessibility: New construction and alterations.
1262.152 -- 1262.159 [Reserved]
1262.160 Communications.
1262.161 -- 1262.169 [Reserved]
1262.170 Compliance procedures.
1262.171 -- 1262.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 1262 is further amended by revising paragraph (c) in @ 1262.170 to read as follows:

@ 1262.170 Compliance procedures.

* * * * *

(c) The Managing Director for Operations shall be responsible for coordinating implementation of this section. Complaints may be sent to the Managing Director for Operations, Office of the Special Counsel, 1120 Vermont Avenue, Suite 1100, Washington, DC 20005.

* * * * *

Mary F. Wieseman, Special Counsel.

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2416
List of Subjects in 5 CFR Part 2416

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped, Historic places, Historic preservation.

Title 5 of the Code of Federal Regulations is amended as follows:

1. Part 2416 is added as set forth at the end of this document.

PART 2416 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE FEDERAL LABOR RELATIONS AUTHORITY

Sec.
2416.101 Purpose.
2416.102 Application.
2416.103 Definitions.
2416.104 -- 2416.109 [Reserved]
2416.110 Self-evaluation.
2416.111 Notice.
2416.112 -- 2416.129 [Reserved]
2416.130 General prohibitions against discrimination.
2416.131 -- 2416.139 [Reserved]
2416.140 Employment.
2416.141 -- 2416.148 [Reserved]
2416.149 Program accessibility: Discrimination prohibited.
2416.150 Program accessibility: Existing facilities.
2416.151 Program accessibility: New construction and alterations.
2416.152 -- 2416.159 [Reserved]
2416.160 Communications.
2416.161 -- 2416.169 [Reserved]
2416.170 Compliance procedures.
2416.171 -- 2416.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 2416 is further amended by revising paragraph (c) in @ 2416.170 to read as follows:

@ 2416.170 Compliance procedures.

* * * * *

(c) The Deputy for EEO and Affirmative Action shall be responsible for coordinating implementation of this section. Complaints may be sent to the Deputy for EEO and Affirmative Action, Federal Labor Relations Authority, 500 C St. SW., Washington, DC 20424.

* * * * *

Jacqueline R. Bradley, Executive Director.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
14 CFR Part 1251
List of Subjects in 14 CFR Part 1251.

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped, Historic places, Historic preservation.

Title 14 of the Code of Federal Regulations is amended as follows:

PART 1251 -- NONDISCRIMINATION OF THE BASIS ON HANDICAP

1. The authority citation for part 1251 is revised to read as follows:

Authority: 29 U.S.C. 794.

2. Subpart 1251.5 is added to Part 1251 as set forth at the end of this document.

Subpart 1251.5 -- Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the National Aeronautics and Space Administration

Sec.
1251.501 (XXX .101) Purpose.
1251.502 (XXX .102) Application.
1251.503 (XXX .103) Definitions.
1251.504 -- 1251.509 (XXX .104- XXX .109) [Reserved]
1251.510 (XXX .110) Self-evaluation.
1251.511 (XXX .111) Notice.
1251.512 -- 1251.529 (XXX .112- XXX .129) [Reserved]
1251.530 (XXX .130) General prohibitions against discrimination.
1251.531 -- 1251.539 (XXX .131- XXX .139) [Reserved]
1251.540 (XXX .140) Employment.
1251.541 -- 1251.548 (XXX .141- XXX .148) [Reserved]
1251.549 (XXX .149) Program accessibility: Discrimination prohibited.
1251.550 (XXX .150) Program accessibility: Existing facilities.
1251.551 (XXX .151) Program accessibility: New construction and alterations.
1251.552 -- 1251.559 (XXX .152- XXX .159) [Reserved]
1251.560 (XXX .160) Communications.
1251.561 -- 1251.569 (XXX .161- XXX .169) [Reserved]
1251.570 (XXX .170) Compliance procedures.
1251.571 -- 1251.999 (XXX .171- XXX .999) [Reserved]

3. Part 1251 is further amended by revising paragraph (c) in @ 1251.570 to read as follows:

@ 1251.570 Compliance procedures.

* * * * *

(c) The Assistant Administrator for Equal Opportunity Programs shall be responsible for coordinating implementation of this section. Complaints may be sent to the Office of Equal Opportunity Programs, Room 6119, 400 Maryland Avenue, SW., Washington, DC 20546

* * * * *

Dale D. Myers, Deputy Administrator.

SECURITIES AND EXCHANGE COMMISSION
17 CFR Part 200
List of Subjects in 17 CFR Part 200

Administrative practice and procedure, Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped, Historic places, Historic preservation.

Title 17 of the Code of Federal Regulations is amended as follows:

PART 200 -- [AMENDED]

1. The authority citation for Part 200 is revised to read as follows:

Authority: Secs. 19, 23, 48 Stat. 85, 901, as amended, sec. 20, 49 Stat. 833, sec. 319, 53 Stat. 1173, sec. 38, 211, 54 Stat. 841, 855 (15 U.S.C. 77s, 78w, 79t, 77sss, 80a-37, 80b-11), unless otherwise noted. Subpart L is also issued under 29 U.S.C. 794.

2. Subpart L is added to Part 200 as set forth at the end of this document.

Subpart L -- Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Securities and Exchange Commission

Sec.

200.601 (XXX .101) Purpose.
200.602 (XXX .102) Application.
200.603 (XXX .103) Definitions.
200.604-200.609 (XXX .104- XXX .109) [Reserved]
200.610 (XXX .110) Self-evaluation.
200.611 (XXX .111) Notice.
200.612 200.629 (XXX .112- XXX .129) [Reserved]
200.630 (XXX .130) General prohibitions against discrimination.
200.631-200-639 (XXX .131- XXX .139) [Reserved]
200.640 (XXX .140) Employment.
200.641-200.648 (XXX .141- XXX .148) [Reserved]
200.649 (XXX .149) Program accessibility: Discrimination prohibited.
200.650 (XXX .150) Program accessibility: Existing facilities.
200.651 (XXX .151) Program accessibility: New construction and alterations.
200.652-200.659 (XXX .152- XXX .159) [Reserved]
200.660 (XXX .160) Communications.
200.661-200.669 (XXX .161- XXX .169) [Reserved]
200.670 (XXX .170) Compliance procedures.
200.671-200.699 (XXX .171- XXX .199) [Reserved]

3. Subpart L is further amended by revising paragraph (c) in @ 200.670 to read as follows:

@ 200.670 Compliance procedures.

* * * * *

(c) The Equal Employment Opportunity Manager shall be responsible for coordinating implementation of this section. Complaints may be sent to the EEO Manager, 450 Fifth Street NW., Washington, DC 20549.

* * * * *

George G. Kundahl, Executive Director.

OVERSEAS PRIVATE INVESTMENT CORPORATION
22 CFR Part 711
List of Subjects in 22 CFR Part 711

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped, Historic places, Historic preservation.

Title 22 of the Code of Federal Regulations is amended as follows:

1. Part 711 is added as set forth at the end of this document.

PART 711 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE OVERSEAS PRIVATE INVESTMENT CORPORATION

Sec.
711.101 Purpose.
711.102 Application.
711.103 Definitions.
711.104 -- 711.109 [Reserved]
711.110 Self-evaluation.
711.111 Notice.
711.112 -- 711.129 [Reserved]
711.130 General prohibitions against discrimination.
711.131 -- 711.139 [Reserved]
711.140 Employment.
711.141 -- 711.148 [Reserved]
711.149 Program accessibility: Discrimination prohibited.
711.150 Program accessibility: Existing facilities.

711.151 Program accessibility: New construction and alterations.
711.152 -- 711.159 [Reserved]
711.160 Communciations.
711.161 -- 711.169 [Reserved]
711.170 Compliance procedures.
711.171 -- 711.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 711 is further amended by revising paragraph (c) in @ 711.170 to read as follows:

@ 711.170 Compliance procedures.

* * * * *

(c) The Director of Personnel shall be responsible for coordinating implementation of this section. Complaints may be sent to Overseas Private Investment Corporation, 1615 M Street, NW., Washington, DC 20527, Attention: Director of Personnel.

* * * * *

Richard K. Childress, Vice President for Personnel and Administration.

AFRICAN DEVELOPMENT FOUNDATION
22 CFR Part 1510
List of Subjects in 22 CFR Part 1510

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped, Historic places, Historic preservation.

Title 22 of the Code of Federal Regulations is amended as follows:

1. Part 1510 is added as set forth at the end of this document.

PART 1510 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE AFRICAN DEVELOPMENT FOUNDATION

Sec.
1510.101 Purpose.
1510.102 Application.
1510.103 Definitions.
1510.104 -- 1510.109 [Reserved]
1510.110 Self-evaluation.
1510.111 Notice.
1510.112 -- 1510.129 [Reserved]
1510.130 General prohibitions against discrimination.
1510.131 -- 1510.139 [Reserved]
1510.140 Employment.
1510.141 -- 1510.148 [Reserved]
1510.149 Program accessibility: Discrimination prohibited.
1510.150 Program accessibility: Existing facilities.
1510.151 Program accessibility: New construction and alterations.
1510.152 -- 1510.159 [Reserved]
1510.160 Communications.
1510.161 -- 1510.169 [Reserved]
1510.170 Compliance procedures.
1510.171 -- 1510.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 1510 is further amended by revising paragraph (c) in @ 1510.170 to read as follows:

@ 1510.170 Compliance procedures.

* * * * *

(c) The Personnel Officer, Office of Administration and Finance, shall be responsible for coordinating implementation of this section. Complaints may be sent to Personnel Officer, Office of Administration and Finance, African Development Foundation, 1625 Massachusetts Avenue, NW., Suite 600, Washington, DC, 20036.

* * * * *

Leonard H. Robinson, Jr., President, African Development Foundation.

NATIONAL LABOR RELATIONS BOARD
29 CFR Part 100
List of Subjects in 29 CFR Part 100

Blind, Buildings, Civil rights, Employment, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped, Historic places, Historic preservation.

Part 100 of Title 29 of the Code of Federal Regulations is amended as follows:

PART 100 -- ADMINISTRATIVE REGULATIONS

1. The part heading is revised to read as set forth above.

2. The authority citation for Part 100 is revised to read as follows:

Authority: Sec. 6 of the National Labor Relations Act, as amended, 29 U.S.C. 141, 146.

Subpart A is also issued under U.S.C. 7301, 18 U.S.C. 201 et seq., E.O. 11222, 5 CFR 735.104.

Subpart B is also issued under 5 U.S.C. 201 et seq., 18 U.S.C. 202.

Subpart C is also issued under 18 U.S.C. 202, E.O. 11222, 5 CFR 735.104.

Subpart F is also issued under 29 U.S.C. 794.

3. Subparts A, B, C, and D headings are removed.

@@ 100.735-1 through 100.735-6 and @@ 100.735-11 through 100.735-22 [Redesignated as @@ 100.101 through 100.106 and @@ 100.111 through 100.122]

4. Sections 100.735-1 through 100.735-6 and @@ 100.735-11 through 100.735-22 are redesignated @@ 100.101 through 100.106 and @@ 100.111 through 100.122 respectively and designated Subpart A. The heading for Subpart A is added to read "Subpart A -- Employee Responsibilities and Conduct".

@@ 100.735-31 through 100.735-34 and @@ 100.735-36 through 100.735-39 [Redesignated as @@ 100.201 through 100.204 and @@ 100.206 through 100.209]

5. Sections 100.735-31 through 100.735-34 and @@ 100.735-36 through 100.735-39 are redesignated @@ 100.201 through 100.204 and @@ 100.206 through 100.209 respectively and designated Subpart B. The heading for Subpart B is added to read "Subpart B -- Employee Statements of Employment and Financial Interest".

@@ 100.735-41 through 100.735-47 [Redesignated as @@ 100.301 through 100.307]

6. Sections 100.735-41 through 100.735-47 are redesignated @@ 100.301 through 100.307 respectively and designated Subpart C. The heading for Subpart C is added to read "Subpart C -- Special Government Employee Conduct and Responsibility".

7. Subparts D and E are added and reserved.

Subpart D -- Employee Personal Property Loss Claims [Reserved]

Subpart E -- Claims Under the Federal Tort Claims Act [Reserved]

8. Subpart F is added as set forth at the end of this document.

Subpart F -- Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the National Labor Relations Board

Sec.
100.601 (XX .101) Purpose.
100.602 (XX .102) Application.
100.603 (XX .103) Definitions.
100.604-100.609 (XX .104- XX .129) [Reserved]
100.610 (XX .110) Self-evaluation.
100.611 (XX .111) Notice.
100.612-100.629 (XX .112- XX .129) [Reserved]
100.630 (XX .130) General prohibitions against discrimination.
100.631-100.639 (XX .131- XX .139) [Reserved]
100.640 (XX .140) Employment.
100.641-100.648 (XX .141- XX .148) [Reserved]
100.649 (XX .149) Program accessibility: Discrimination prohibited.
100.650 (XX .150) Program accessibility: Existing facilities.
100.650 (XX .151) Program accessibility: New construction and alterations.
100.652.100.654 (XX .152- XX .159) [Reserved]
100.660 (XX .160) Communications.
100.661-100.669 (XX .161- XX .169) [Reserved]
100.670 (XX .170) Compliance procedures.
100.671-100.699 (XX .171- XX .999) [Reserved]

9. Part 100 is further amended by revising paragraph (c) in @ 100.670 to read as follows:

@ 100.670 Compliance procedures.

* * * * *

(c) The Director of Administration shall be responsible for coordinating implementation of this section. Complaints may be sent to Director of Administration, National Labor Relations Board, 171 Pennsylvania Avenue NW., Washington, DC 20570.

* * * * *

John C. Truesdale, Executive Secretary.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
36 CFR Part 1208
List of Subjects in 36 CFR Part 1208.

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped, Historic places, Historic preservation.

Title 36 of the Code of Federal Regulations is amended as follows:

1. Part 1208 is added as set forth at the end of this document.

PART 1208 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Sec.
1208.101 Purpose.
1208.102 Application.
1208.103 Definitions.
1208.104 -- 1208.109 [Reserved]
1208.110 Self-evaluation.
1208.111 Notice.
1208.112 -- 1208.129 [Reserved]
1208.130 General prohibitions against discrimination.
1208.131 -- 1208.139 [Reserved]
1208.140 Employment.
1208.141 -- 1208.148 [Reserved]
1208.149 Program accessibility: Discrimination prohibited.
1208.150 Program accessibility: Existing facilities.
1208.151 Program accessibility: New construction and alterations.
1208.152 -- 1208.159 [Reserved]
1208.160 Communications.
1208.161 -- 1208.169 [Reserved]
1208.170 Compliance procedures.
1208.171 -- 1208.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 1208 is further amended by revising paragraph (c) in @ 1208.170 to read as follows:

1208.170 Compliance procedures.

* * * * *

(c) The Assistant Archivist for Management and Administration shall be responsible for coordinating implementation of this section. Compliants may be sent to National Archives and Records Administration (NA), Washington, DC 20408.

* * * * *

Claudine J. Weiher, Acting Archivist.

VETERANS ADMINISTRATION
38 CFR Part 15
List of Subjects in 38 CFR Part 15

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped, Historic places, Historic preservation.

Title 38 of the Code of Federal Regulations is amended as follows:

1. Part 15 is added as set forth at the end of this document.

PART 15 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE VETERANS ADMINISTRATION

Sec.
15.101 Purpose.
15.102 Application.

15.103 Definitions.
15.104 -- 15.109 [Reserved]
15.110 Self-evaluation.
15.111 Notice.
15.112 -- 15.129 [Reserved]
15.130 General prohibitions against discrimination.
15.131 -- 15.139 [Reserved]
15.140 Employment.
15.141 -- 15.148 [Reserved]
15.149 Program accessibility: Discrimination prohibited.
15.150 Program accessibility: Existing facilities.
15.151 Program accessibility: New construction and alterations.
15.152 -- 15.159 [Reserved]
15.160 Communications.
15.161 -- 15.169 [Reserved]
15.170 Compliance procedures.
15.171 -- 15.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 15 is further amended by revising paragraph (c) in @ 15.170 to read as follows:

@ 15.170 Compliance procedures.

* * * * *

(c) The Director, Office of Equal Opportunity, shall be responsible for coordinating implementation of this section. Complaints may be sent to the Administrator of Veterans Affairs or the Director, Office of Equal Opportunity, at the following address: Veterans Administration, 810 Vermont Avenue NW., Washington, DC 20420.

* * * * *

Thomas K. Turnage, Administrator of Veterans Affairs.

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 16
List of Subjects in 44 CFR Part 16

Blind, Buildings, Civil rights, Equal educational opportunity, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped, Historic places, Historic preservation.

Title 44 of the Code of Federal Regulations is amended as follows:

1. Part 16 is added as set forth at the end of this document.

PART 16 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE FEDERAL EMERGENCY MANAGEMENT AGENCY

Sec.
16.101 Purpose.
16.102 Application.
16.103 Definitions.
16.104 -- 16.109 [Reserved]
16.110 Self-evaluation.
16.111 Notice.
16.112 -- 16.129 [Reserved]
16.130 General prohibitions against discrimination.
16.131 -- 16.139 [Reserved]
16.140 Employment.

16.141 -- 16.148 [Reserved]
16.149 Program accessibility: Discrimination prohibited.
16.150 Program accessibility: Existing facilities.
16.151 Program accessibility: New construction and alterations.
16.152 -- 16.159 [Reserved]
16.160 Communications.
16.161 -- 16.169 [Reserved]
16.170 Compliance procedures.
16.171 -- 16.999 [Reserved]

Authority: 29 U.S.C. 794.

2. Part 16 is further amended by revising paragraph (c) in @ 16.170 to read as follows:

@ 16.170 Compliance procedures.

* * * * *

(c) The Director of Personnel shall be responsible for coordinating implementation of this section. Complaints may be sent to Director of Personnel, Room 810, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

* * * * *

Dated: April 25, 1988.

Julius W. Becton, Jr., Director.

Text of the Common Rule

The text of the common rule as adopted by the agencies in this document appears below.

PART -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY

Sec.
XX .101 Purpose.
XX .102 Application.
XX .103 Definitions.
XX .104- XX .109 [Reserved]
XX .110 Self-evaluation.
XX .111 Notice.
XX .112- XX .129 [Reserved]
XX .130 General prohibitions against discrimination.
XX .131- XX .139 [Reserved]
XX .140 Employment.
XX .141- XX .148 [Reserved]
XX .149 Program accessibility: Discrimination prohibited.
XX .150 Program accessibility: Existing facilities.
XX .151 Program accessibility: New construction and alterations.
XX .152- XX .159 [Reserved]
XX .160 Communications.
XX .161- XX .169 [Reserved]
XX .170 Compliance procedures.
XX .171- XX .999 [Reserved]

Authority: 29 U.S.C. 794.

@ XX .101 Purpose.

The purpose of this regulation is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

@ XX .102 Application.

This regulation (@@ XX .101- XX .170) applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

@ XX .103 Definitions.

For purposes of this regulation, the term --

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

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. 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.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Historic preservation programs" means programs conducted by the agency that have preservation of historic properties as a primary purpose.

"Historic properties" means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

"Individual with handicaps" 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.

As used in this definition, the phrase:

(1) "Physical or mental impairment" includes --

(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" includes 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 the agency 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 the agency as having such an impairment.

"Qualified individual with handicaps" means --

(1) With respect to preschool, elementary, or secondary education services provided by the agency, an individual with handicaps who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency;

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) "Qualified handicapped person" as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this regulation by @ XX .140.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this regulation, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

"Substantial impairment" means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

@@ XX .104 -- XX .109 [Reserved]

@ XX .110 Self-evaluation.

(a) The agency shall, by September 6, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this regulation and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

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

(2) A description of any modifications made.

@ XX .111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

@@ XX .112 -- XX .129 [Reserved]

@ XX .130 General prohibitions against discrimination.

(a) No qualified individual with handicaps 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 conducted by the agency.

(b)(1) The agency, 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 individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps 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 handicaps 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 handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

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

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

(2) The agency may not deny a qualified individual with handicaps 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) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would --

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would --

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a
program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this regulation.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this regulation.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

@@ XX .131 -- XX .139 [Reserved]

@ XX .140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subject to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply

to employment in federally conducted programs or activities.

@ XX .141 -- XX .148 [Reserved]

@ XX .149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in @ XX .150, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

@ XX .150 Program accessibility: Existing facilities.

(a) General. The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not --

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with @ XXX .150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted 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, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) Methods -- (1) General. The agency 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 any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(2) Historic preservation programs. In meeting the requirements of @ XXX .150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to individuals with handicaps. In cases where a physical alteration to an historic property is not required because of

@ XXX .150(a) (2) or (3), 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 handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) Time period for compliance. The agency shall comply with the obligations established under this section by November 7, 1988, except that where structural changes in facilities are undertaken, such changes shall be made by September 6, 1991, but in any event as expeditiously as possible.

(d) Transition plan. In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by March 6, 1989, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). 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 agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(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 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

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

@ XXX .151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

@@ XXX .152 -- XXX .159 [Reserved]

@ XXX .160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for

personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency 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.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with @ XXX .160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted 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 section would result in such an alteration or such burdens, the agency 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 handicaps receive the benefits and services of the program or activity.

@@ XXX .161 -- XXX .169 [Reserved]

@ XXX .170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The head of the agency shall designate an official to be responsible for coordinating implementation of this section.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing --

(1) Findings of fact and conclusions of law;

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

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by @ XXX .170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

@@ XXX .171 -- XXX .999 [Reserved]

[FR Doc. 88-15293 Filed 7-7-88; 8:45 am]

Document Separator

LOUISE K. NOLLEY, Plaintiff, v. COUNTY OF ERIE; THOMAS HIGGINS, Sheriff; JOHN DRAY, Superintendent; and JANE O'MALLEY, Nurse; Defendants

No. CIV-88-1170C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

776 F. Supp. 715; 1991 U.S. Dist. LEXIS 15771

October 31, 1991

COUNSEL: [**1]

DAMON & MOREY, JENNIFER A. COLEMAN, ESQ., of Counsel, Buffalo, New York, for
Plaintiff.

PATRICK H. NeMOYER, ESQ., ERIE COUNTY ATTORNEY, JAMES L. TUPPEN, ESQ.,
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JUDGES: John T. Curtin, United States District Judge.

OPINIONBY: CURTIN

OPINION: [*717] DECISION and ORDER

FINDINGS OF FACT

JOHN T. CURTIN, UNITED STATES DISTRICT JUDGE

I. Background

Evidence in this non-jury case is now closed. The parties have submitted proposed findings of fact and conclusions of law, and the court has considered summation. The following constitutes the court's findings of fact and conclusions of law.

Plaintiff Louise K. Nolley, a former inmate at the Erie County Holding Center ("ECHC"), has brought this suit against the ECHC and various administrators of the facility alleging that their treatment of her during her confinements in 1988, 1989, and 1989/90 violated her constitutional and statutory rights. Ms. Nolley was confined at the ECHC on three separate occasions:

(1) June 14, 1988, through November 9, 1988 ("1988 confinement");

(2) February 15, 1989, through May 31, 1989 ("1989 confinement");

(3) December 18, 1989, through February 13, 1990 ("1989/90 confinement").

Prior to her first incarceration, [**2] Ms. Nolley tested positive for the human immuno-deficiency virus ("HIV+"), the virus associated with Acquired Immune Deficiency Syndrome ("AIDS"). This fact was known by the ECHC's Medical Department throughout Nolley's three confinements. Based on this information, defendants placed on Ms. Nolley's inmate records, medical records, and transportation documents a red sticker to indicate to those who came in contact with her that she was infected with a contagious disease.

Defendants also chose to segregate Ms. Nolley from the general population because of her HIV status. She was placed in an area of the Holding Center known as Female Delta Medical Pod ("Female Delta"). Female Delta is a pod for female inmates who are mentally disturbed, suicidal, or dangerous to themselves. Ms. Nolley was also deprived of access to the ECHC's law library and, for most of her three confinements, to the ECHC's regularly scheduled Catholic services. Other inmates housed in Female Delta were, at the same time, permitted to attend religious services and the law library.

Four defendants remain in the case: Erie County, Sheriff Thomas Higgins, Superintendent John Dray, and Nurse Jane O'Malley. Sheriff [**3] Higgins is the policy-making official responsible for the operation of the ECHC and the Erie County Sheriff's Department. John Dray is the acting Superintendent of the ECHC. He is responsible for promulgating policies for the Holding Center and supervising its day-to-day operations. Jane O'Malley is the Nursing Supervisor/Administrator at the ECHC. A fifth defendant, Willie Brown, has been dropped from the case.

Plaintiff Nolley seeks damages and injunctive relief. She alleges that ECHC's policy of placing red stickers on various documents and other items violated article 27-F of New York State's Public Health Law, N.Y. Pub. Health Law @ 2780 et seq. (McKinney 1991 Supp.), State Commission of Correction regulations adopted in accordance with that law, and her constitutional right to privacy. Plaintiff also argues that her segregation in Female Delta violated her state rights under article 27-F and her constitutional rights of privacy, due process, and equal protection. Further, Ms. Nolley alleges that the conditions [*718] of her confinement violated her Eighth Amendment rights. She also brings constitutional claims for ECHC's denial of access to the law library and religious services. [**4] Finally, Ms. Nolley argues that defendants discriminated against her in violation of the Rehabilitation Act, 29 U.S.C. @ 794.

II. HIV and AIDS

Dr. Ross Hewitt was called by plaintiff as an expert in the diagnosis and treatment of AIDS and research regarding HIV and AIDS. Defendants accepted his qualifications by also using Dr. Hewitt as their expert. Dr. Hewitt has been Director of AIDS Services at the Erie County Medical Center ("ECHC") since 1988.

Dr. Hewitt testified that AIDS is a syndrome characterized by complications indicative of an underlying immune deficiency. The viral agent identified with AIDS is known as HIV. It was identified in late 1983 and was confirmed in 1984. The virus invades the T4 cell, which is a key cell in the human body's immune system. Over time, the number and function of these cells decline as the virus progresses. Serious complications can occur when an infected individual's T-cell count drops below 200. The most common complications are: pneumocystis pneumonia (non-contagious but potentially fatal), chronic viral infections, bacterial infections, tuberculosis ("TB"), meningitis, lymphoma, and kaposi sarcoma. Technically, an HIV+ person is not [**5] diagnosed or described as having AIDS until she is experiencing one or more of these complications.

Louise Nolley's T-cell count never dropped below 300 during her three confinements at the ECHC. Nor did Ms. Nolley develop the complications that would lead her to being diagnosed as having AIDS. Nurse O'Malley was aware that HIV+ inmates are only at risk in the general population when their T-cell count drops below 200. She could have obtained Nolley's T-cell count from Dr. Hewitt at any time during Nolley's confinements but did not do so.

An infected person may be HIV+ for as long as ten years before developing the full-blown complications of AIDS. Even persons with AIDS generally do not require hospitalization unless some acute complication of AIDS develops. Unfortunately, there is no known cure for the disease.

There are only five known ways of transmitting the HIV virus: (1) sharing needles with an infected person; (2) having intimate sexual contact with an infected person; (3) carrying a developing fetus or breast-feeding a newborn; (4) receiving a transfusion of tainted blood or blood products; and (5) in rare circumstances, by blood-to-blood contact initiated through percutaneous [**6] cuts. AIDS cannot be transmitted by books, casual contact, being present in the same room as an infected person, toilet seats, door knobs, air conditioning, coughing, sneezing, urine, feces, sputum, nasal secretions, saliva, sweat, tears, or vomit. It certainly cannot be transmitted by attending church with an infected person or by sharing books with him or her.

Sometime in the fall of 1986 or 1987, Dr. Hewitt gave a presentation on AIDS at ECHC to some of the administrative staff of the facility. This presentation was attended by O'Malley and Dray. During that presentation, Dr. Hewitt

explained the five known means of transmitting HIV and AIDS, and presented an overview of the disease which consisted of the same information provided in his trial testimony. This testimony is consistent with the findings of the National Center for Disease Control ("CDC"). The knowledge concerning the transmission of HIV and AIDS has not changed since the time of his presentation.

Defendant O'Malley knew of the CDC's findings about the transmission of HIV in 1986 and 1987 and discussed these findings with Dray and with Deputy Judith Lips. Dray received publications about the transmission of HIV, which [**7] he made available to his staff. Sheriff Higgins also sent a memo to Dray in late 1987, which emphasized that AIDS could not be spread by casual contact. That memo contained a 1987 publication of the U.S. Department of [*719] Justice entitled "AIDS and the Law Enforcement Officer: Concerns and Policy Responses." This publication was also received by O'Malley. As a result, both defendants Dray and O'Malley knew by 1987 that AIDS could not be transmitted by casual contact. Nevertheless, Dray, in his testimony, said that he did not believe the information he had received about the limited way in which HIV could be transmitted. n1 He believed that HIV could be transmitted through saliva, tears, spit, mucus, urine and feces, by casual contact, by plaintiff using the typewriter in the law library, and even by coming into contact with plaintiff's personal items but not plaintiff.

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n1 The following exchange between the court and Mr. Dray is very telling in this regard:

Court: Well now, you are familiar with the material, you've gone over the material that we've discussed here in court about the way--the limited way in which this virus can be transmitted?

Dray: I am aware as anybody can be. And reading it.

Court: But in listening to your testimony, at least that I had the understanding that you believe in spite of that, that you are still suspicious that there may be some untoward incident, and that the facility could be liable?

Dray: I am, your Honor. I am, and I've begun watching it closely for five or six years, and just recently a poor dentist is accused of giving his clients--infecting them with HIV. We were--

Court: Well, I mean, the--the prisoners in the general population are not doing dental work and/or [do] not have similar tools?

Dray: Right, but we have no control over them sharing a plate, sharing a meal, drinking out of the same cups.

[Court:] But see you just--have you read the material about that, and we had a doctor here that told us that the disease cannot be transmitted that way?

Dray: I read it, I've heard it.

Court: So that as I understand it, what you're telling me, is that you're substituting your laymen's [sic] judgment for that of the best medical information you can get, is that right?

Dray: I hate to admit that, but I guess I am.

Dray, Oct. 16, 1990 at 110-11.

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[**8]

Dr. Hewitt testified that a drug known as AZT, which first became available in September, 1987, is used to combat HIV. AZT works by slowing down the process of HIV replication. It is necessary to take AZT every four hours because, by then, it is effectively gone from the bloodstream. Missing an entire day's dose of AZT can lead to uncontrollable replication of the virus, which could have long-term, serious consequences for an HIV+ person.

After his one presentation to ECHC administrators in 1986 or 1987, the defendants did not again solicit Dr. Hewitt's assistance, even though he was available to train ECHC staff. Therefore, the only training of staff at ECHC about AIDS was in-service training provided by Deputy Lips for newly hired employees.

III. Universal Precautions

Since 1987, the CDC has recommended that universal precautions replace a policy of special precautions in dealing with HIV+ inmates. Universal precautions are a system of infection-control that assumes that you cannot identify all persons who are potential carriers of blood-borne diseases. Staff are urged to take appropriate precautions with all inmates, rather than inmates identified as HIV+, to prevent [**9] blood-to-blood contact. The population in the ECHC facility changes frequently, and it is impossible for the staff to know which inmates are infected with HIV. Nurse O'Malley admitted that at any given time, in addition to the inmates identified as being HIV+, there are inmates in the general population who are HIV+ or have AIDS. Thus, ECHC's policy of using special precautions with inmates known to be HIV+ is less effective than universal precautions in protecting staff from potential infection by HIV+ inmates because it fails to cover inmates in the general population who may be HIV+ or have AIDS.

Other correctional facilities have for some time practiced a system of universal precautions. Since December, 1988, for example, the New York State Department of Correctional Services ("DOCS") has followed the policy of universal precautions in New York State correctional facilities. DOCS stopped isolating HIV+ inmates from the general population in 1987. Defendant O'Malley recommended to defendant Dray that the ECHC follow universal [*720] precautions. n2

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n2 As of today, ECHC has instituted some training for staff in the use of universal precautions.

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[**10]
IV. The Red Sticker Policy

During Louise Nolley's three confinements, she was subject to a written ECHC policy and procedure, promulgated as a general order by Sheriff Higgins, known as the "red sticker alert." See Trial Exhs. 1-4. This alert was developed by defendants O'Malley and Dray in 1986. Tr. Exh. 1. It was reissued in revised form on November 25, 1987. Tr. Exh. 4. This revised order is still in effect today.

The purpose of the red sticker alert is to ensure the safety of staff by identifying inmates known to be or suspected of suffering from contagious or infectious diseases.

The use of the RED STICKER will alert the Clerks, Search/Change Area Deputy, Housing Area Deputy, Medical Department, Transportation Division and other personnel who might come in contact with the [contagious] inmate, to exercise additional precautions.

Tr. Exh. 4 at 2. A red sticker was affixed on intake to plaintiff's paperwork, clothing bag, court papers, cell card, and other items. It was even affixed to plaintiff's cash record index card, which was seen by civilian personnel assigned to handle the personal property of plaintiff--her wallet, belt, change, keys, etc.--but who never came [**11] in physical contact with Ms. Nolley. Thus, the red sticker was seen by dozens of persons, many of whom may never have had any close contact with plaintiff.

The red sticker policy was not always in effect. It was developed in 1986 "when AIDS became the epidemic that was terrorizing everybody in the business, that we had to get and sit down and [write] policy and procedure." Dray, Oct. 16, 1990, at 19. See also Higgins, Oct. 17, 1990, at 115-16. Prior to the red sticker policy, ECHC simply isolated inmates with infectious diseases. The

deputies would be told that a particular inmate was isolated and precautions should be taken, but they would not be told what disease the inmate was carrying.

On its face, the red sticker does not identify any particular disease and is used whenever an inmate is suspected or known to be carrying an infectious or contagious disease, including HIV+, AIDS, TB, hepatitis, chicken pox, measles, or syphilis. See Tr. Exh. 4. In practice, however, plaintiff argues that the red dot revealed to staff and other persons who saw it that Louise Nolley was HIV+ or had AIDS. This is a central contention in the case and must be carefully evaluated.

There is no [**12] question that the red sticker policy was developed, not in response to contagious diseases in general, but specifically in response to the hysteria over HIV and AIDS. Sheriff Higgins, when testifying about the development of the general order requiring red stickers, stated:

Higgins: But when this came out -- when the AIDS came out and the fear and the excitement and suspicions and -- of all the officers both in the holding center and in the street and everybody that is handling these people, we had to address this specifically.

Coleman: So it's fair to say, sir, that although these orders speak generally of contagious diseases, the principle [sic] focus of this was AIDS, right?

Higgins: I would say that's a fair evaluation.

Coleman: It's fair to say also that it was understood as such by your staff, isn't it?

Higgins: Yes, ma'am.

Higgins, Oct. 17, 1990, at 116. See also Dray, Oct. 16, 1990 at 19; O'Malley, Oct. 15, 1990, at 35-36.

It also appears that staff people and others who saw the red dot either knew or strongly suspected that Ms. Nolley was HIV+. Ms. Nolley testified that an inmate trustee named Leroy who worked in the clothing room, after seeing the red dot, asked [**13] her if she had AIDS or something contagious. Nolley, Aug. 21, 1990, at 47. On a trip to court in Cheektowaga a matron named Vi saw the red dot and told Nolley that meant she had AIDS. When [*721] Nolley complained of this statement to the judge, on her next visit the matron informed Nolley's transporting officer, Deputy Lonnie Williams, that Nolley had AIDS. Plaintiff testified that Deputy Williams told plaintiff's cousin, Layna Williams, that plaintiff had AIDS. Deputy Williams denied this. Nevertheless, Nolley testified, Layna Williams subsequently asked plaintiff if she was okay. Id. at 48-51.

Deputy Williams later admitted, with respect to a different red-dotted inmate he was transporting, that he pressed Undersheriff Payne to confirm whether that inmate had AIDS. He did so because he was fearful of AIDS. Williams, Oct. 16, 1990 at 146-48. On yet another occasion, plaintiff was being transported with another inmate who asked her for a cigarette. One of the transporting deputies denied the inmate's request, stating that plaintiff had AIDS. Nolley, Aug. 21, 1990 at 53-59, 144.

Plaintiff has made a compelling case that the red stickers placed on her documents and other items revealed her [**14] HIV status to non-medical ECHC staff and others. This falls short of proving that a red dot reveals to every person who sees it that a particular inmate is HIV+. Indeed, plaintiff cannot deny that many non-HIV inmates were red-dotted. This fact, however, may not be critical for this case. Based on all the evidence, the court finds that the red stickers placed on Ms. Nolley's items disclosed to non-medical ECHC staff and others that Ms. Nolley was HIV+.

V. Segregation

During each of the confinements at issue in this case, plaintiff was segregated from the general inmate population in the five-cell ward known as Female Delta. Three of the cells in the ward are used principally for confinement and observation of inmates who are suicidal or who have demonstrated severe psychiatric problems or mental illness. The other two cells are used for inmates with infectious or contagious diseases who, in the judgment of the medical department, do not require solitary isolation. Inmates with highly infectious airborne diseases such as TB, chicken pox, or measles are also segregated from the general population, but in single cells in a different part of the jail than Female Delta. All [**15] five inmates in Female Delta eat together and share a lounge/television area and shower facilities. They have frequent contact with each other. Their movements are monitored from a control area adjacent to the pod.

Louise Nolley was assigned to Female Delta upon intake during each of her three confinements and remained there for the duration of her stays. The decision to segregate her from the general population was made by the medical department. This decision was made solely on the basis of her HIV status. Once plaintiff was so assigned, her segregation was never reviewed by the medical department nor by any other administrator at the ECHC. It was automatically renewed during Ms. Nolley's 1989 and 1989/90 confinements. Plaintiff was never afforded an opportunity to contest her segregation. Other administrative or disciplinary segregation decisions are appealable. Dray, Oct. 17, 1990, at 9; Lips, Oct. 15, 1990, at 161. See also Tr. Exhs. 20, 21 (inmate handbooks).

The decision to segregate HIV+ inmates is made pursuant to General Order 87-14, Tr. Exh. 4, promulgated by Sheriff Higgins in revised form on November

25, 1987, and still in effect today. This same order was discussed [**16] above as the "red sticker alert." Sheriff Higgins drafted General Order 87-14 on the recommendations of a staff committee which included Nurse O'Malley. Before recommending segregation, O'Malley spoke with Dr. Maddi, the ECHC Chief Physician at that time, who recommended that inmates suspected or known to be HIV+ be isolated from the general population. When the 1986 version of this order was issued, the ECHC had only one or two known AIDS cases but had already begun isolating such inmates on the recommendation of Dr. Pietrak, who was Dr. Maddi's predecessor. For some time, the ECHC had a practice of isolating inmates known or suspected of having other infectious or contagious diseases such as TB, hepatitis, herpes, syphilis, measles, and chicken pox.

[*722] General Order 87-14, to the extent it calls for automatic segregation of HIV+ inmates, cannot be reconciled with ECHC Medical Policy and Procedure HCM 23.00.00, issued in December, 1989, which states:

Housing decisions, in the Erie County Holding Center, will not be made solely on the basis of the protected individual's HIV status. Special housing decisions can be made, however, for medical reasons or for the safety and security [**17] of the facility and the persons therein, in the same manner as any inmate housed in general population.

Tr. Exh. 30J at 3 (emphasis in original). HCM 23.00.00 does allow for segregation of HIV+ inmates, but only after a determination that "the medical condition of the protected individual is 'at risk' in general population housing or if medical needs or treatment indicate" or "if a protected individual is behaviorally disruptive and making threatening statements/gestures due to his [or her] HIV status . . . ." Tr. Exh. 30J at 3. n3 None of these findings was made in Louise Nolley's case.

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n3 HCM 23.00.00 was developed by Deputy Lips with the approval of defendant Dray, and after consultation with the New York State Commission of Correction's ("CoC") attorney. See Tr. Exhs. 17H, 17F; Lips, Oct. 15, 1990, at 132-37; Dray, Oct. 16, 1990, at 77.

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Defendants have offered several reasons to support their isolation policy for HIV+ inmates. The first reason ECHC isolates HIV+ inmates is to protect the non-HIV general [**18] inmate population from the possibility of exposure to the virus. This purpose is undercut by ECHC's policy of housing HIV+ inmates with non-HIV inmates in Female Delta. In the court's view, it would appear that the prospects for accidental transmission of HIV to non-HIV inmates are greater in Female Delta than in the general population, given the volatility of the

inmates housed there. See infra (discussing conditions in Female Delta). Louise Nolley testified to instances where an inmate with whom she was housed tried to commit suicide by cutting herself with her dentures. ECHC staff subsequently asked Ms. Nolley to take the inmate's dentures from her should she contemplate another attempt at suicide. Ms. Nolley also was approached by a Female Delta inmate to engage in homosexual activity. n4

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n4 The court is not expressing the opinion that transmission of the HIV virus was likely to occur as a result of these instances. The court merely notes them to indicate that blood-to-blood contacts between inmates may have been more likely to occur in Female Delta than in the general population.

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[**19]

Defendants also argue that Louise Nolley was isolated to protect her from contracting opportunistic viruses from the general inmate population. The court finds this argument unsupported by the record for two reasons. First, if defendants' purpose was to protect Ms. Nolley, the decision to house her in close proximity with inmates known to carry communicable diseases was peculiar indeed. Second, the court heard expert testimony that an HIV+ inmate is not at risk until their T-cell count drops to a level below 200. Louise Nolley's T-cell count never dropped below 300--a safe level--during any of her three confinements. Nurse O'Malley was aware of these facts, yet never inquired as to Ms. Nolley's T-cell count to determine if she, in fact, would be at risk in the general population. In other words, there was never a finding pursuant to HCM 23.00.00 that "the medical condition of the protected individual was 'at risk' in general population housing or [that] medical needs or treatment indicate[d]" segregation for Ms. Nolley.

Finally, defendants argue that HIV+ inmates are isolated because of their concern that inmates might react violently to the presence of such an inmate in their [**20] midst. Defendant Dray admitted that this was merely a concern; he testified that there had never been such an incident at ECHC. He knew of no such incidents in other correctional facilities. The court finds that this concern, even if valid and not wholly speculative, does not support ECHC's practice of automatically isolating HIV+ inmates. Since, according to defendants' theory, it is the other inmates' knowledge of an HIV+ inmate in their midst that would trigger a violent response, if an inmate is [*723] not known to be HIV+ by the general population, there would be no risk of violence. Defendants admit that there are HIV+ inmates in the general population that neither ECHC nor the general population inmates know about. There is no difference in terms of security between this type of inmate and an inmate known by ECHC but unknown by the general population to be HIV+.

The court also finds that defendants' alleged concern with violence is undercut by the fact that Ms. Nolley was intentionally housed with inmates known to be psychologically unstable and often violent, although Mr. Dray testified that those housed in Female Delta were only violent toward themselves. Inmates known to [**21] be violent toward others are isolated completely, he stated.

Plaintiff argues that the ECHC, by segregating Louise Nolley in Female Delta, revealed to staff and other inmates that plaintiff was HIV+ or had AIDS. There is little question that Female Delta was known by staff and at least some of the ECHC inmate population to house HIV+ inmates. One inmate, for example, testified that several sheriff's deputies told her that Louise Nolley had AIDS. It is also clear that ECHC inmates going to sick call in the Medical Department must pass by Female Delta. They can see into the unit and communicate with inmates housed there. These factors might lead all those who passed Female Delta to assume that each inmate therein had AIDS. This assumption would be wrong because Female Delta also housed non-HIV inmates, but it would not be significantly off the mark given the small number of inmates confined there. Thus, although the court finds that segregation in Female Delta did not conclusively reveal plaintiff's HIV status to ECHC inmates, it did strongly suggest to these persons that she was HIV+. The question whether Ms. Nolley's isolation in Female Delta revealed her HIV status to ECHC staff [**22] will be discussed more fully below. See infra @ II(A).

VI. Conditions of Confinement

Plaintiff also complains that her confinements amounted to cruel and unusual punishment. As noted, plaintiff was segregated for the duration of each of her confinements in the Female Delta Medical Pod. Medical treatment was not provided in Female Delta, however, but only in the Medical Department. Plaintiff testified that at times she did not get her medicine, especially her AZT, or received it late.

The overall conditions in Female Delta were extremely stressful. Three of the five cells in the unit were used to confine inmates who were suicidal or who demonstrated severe psychiatric problems. Louise Nolley was under constant pressure from these inmates. As plaintiff testified, "it was a lot of pressure. It was hectic and it was crazy. It was depressing." Nolley, Aug. 21, 1990, at 59-60.

People were attempting to commit suicide. It was just never quiet. Somebody was always crying or trying to hurt theirselves [sic] and they didn't shut their doors, you know, they couldn't lock in their rooms because the officers had to be able to get right into their cells if anything happened, so they were [**23] always running around, even at night when I could lock in they could come out of their cells and be running around and asking for cigarettes and trying to kill theirself [sic], and officers always had to come up there to

rescue one of them and it would take a while. It was a mental ward.

Id. at 59-60.

During her 1988 and 1989 confinements, plaintiff was housed with an inmate who was accused of murdering her four children. This inmate attempted suicide on a number of occasions, including at least one instance where she used her dentures to attempt to cut her wrists. After that, sheriff's deputies asked plaintiff to take her dentures away from her if she spoke of suicide. The inmate frequently described the murder of her children in gruesome detail, even while plaintiff was eating. Often the staff asked the plaintiff to give her medicine, to take spoons away from her (which she attempted to swallow), or to do [*724] other things which plaintiff claims the staff was afraid to do.

During her 1989 confinement, plaintiff was housed with another inmate who was accused of murdering her child. This inmate also spoke frequently about the murder. Plaintiff testified that staff asked her to give this [**24] inmate medication too. In the 1989 and 1989/90 confinements, plaintiff was housed with an inmate accused of helping her boyfriend commit murder. This inmate also spoke graphically of her crime. Another inmate housed with plaintiff was homosexual and approached plaintiff for sex on several occasions. Still another inmate repeatedly ate out of the garbage. Plaintiff had to get her out of the garbage and place it outside the door where she could not get to it.

Defendant Dray was fully aware of the distressing conditions in Female Delta. He acknowledged that inmates should not be subjected to such behavior.

VII. Law Library and Religious Services

Throughout her 1988 and 1989 confinements, plaintiff was not permitted direct access to the ECHC law library, despite her repeated requests. The library is available to female general population inmates once each week on Friday mornings. During her 1989/90 confinement, plaintiff was allowed in the law library on four occasions after she requested to use a typewriter, but was required to wear plastic gloves while typing and was not permitted to touch the law library's books. In June, 1988, plaintiff sent a letter to defendant Dray asking [**25] for use of the law library. Dray sent an official to explain to plaintiff that she would not be allowed to go the law library but could request the staff librarians to copy specific cases to be delivered to her in Female Delta. Plaintiff was also denied face-to-face contact with inmate law clerks. Although plaintiff was able to correspond with inmate clerks and staff librarians, the process of being forced to request specific materials without being able to conduct general research caused undue delay. Many times the materia
she needed would not be delivered because the librarians did not understand what she wanted. Other non-HIV inmates who were housed in Female

Delta, even those with red stickers, were permitted to use the law library on the same basis as those in the general population.

During her 1988 and 1989 and most of her 1989/90 confinements, plaintiff was not permitted to attend Catholic mass with inmates from the general population, even though she identified herself as a Catholic and frequently asked for permission to attend. She was finally granted permission to attend communal services during the last weeks of her 1989-90 confinement. The Catholic chaplain was permitted [**26] to meet with plaintiff in Female Delta during each of her confinements to distribute communion and hear her confessions, albeit not in a private place. He testified, however, that it was also very important for a Catholic to attend church. Other inmates from Female Delta were permitted to attend mass.

During her confinements, plaintiff was not permitted access to the general library maintained at the ECHC. Instead of being permitted to borrow any book from the library, plaintiff was brought books which were torn, outdated, and marked with an "X" on the cover. After she was finished with them, the books were thrown away.

ECHC policy and procedure HCM 10.09.01, effective December 10, 1987, provides that the decision to deny an inmate housed in Female Delta access to the law library or other ECHC programs is to be made by the Medical Department. Tr. Exh. 25. HCM 23.00.00, adopted in December, 1989, states unequivocally that:

No inmate housed in the Erie County Holding Center will be denied access to programs based solely on HIV status. Protected individuals will have access to programs in the same manner as the general population except as required by the individual's medical condition [**27] or for the protection of the safety and security of the inmate or facility.

Tr. Exh. 30J at 3. Dray testified that he discussed plaintiff's access to programs with defendant O'Malley, and claimed that [*725] she made the decision to deny plaintiff access to ECHC programs. O'Malley denied this. It was her opinion that plaintiff did not pose a medical threat to anyone at ECHC. Sheriff Higgins testified that it was not his intention to deny HIV+ inmates access to the law library or church services.

The court finds that the decision to deny plaintiff access to the law library and other ECHC programs was the result of an ad hoc policy implemented by defendant Dray. Dray testified that the fact plaintiff was isolated in Female Delta, to his mind, meant that she could not go to programs with the general population. He said that he denied plaintiff access to the law library and other facilities based solely on the fact that plaintiff was HIV+. ECHC policy and procedures were not followed in plaintiff's case.

VIII. Rehabilitation Act

Plaintiff contends that she was denied access to services and activities at the holding center in violation of the Rehabilitation Act, 29 U.S.C. @ 794. Defendants [**28] have admitted that in the years 1988, 1989, and 1990, the County of Erie received approximately $ 779,060.00 in federal funds for the detention of federal prisoners at the ECHC.

DISCUSSION

I. THE RED STICKER POLICY

A. Article 27-F of the Public Health Law and CoC Regulations

Plaintiff complains that by placing red stickers on Louise Nolley's intake card, cash record index card, clothing bag, court papers, cell card, and other items, defendants violated article 27-F of New York State's Public Health Law, N.Y. Pub. Health Law @ 2780 et seq. (McKinney's 1991 Supp.), State Commission of Correction ("CoC") regulations adopted pursuant that law, and ECHC policy and procedure. Her complaint, however, is limited to her 1989/90 incarceration and her request for injunctive relief because article 27-F only became effective February 1, 1989.

Article 27-F, entitled "HIV and AIDS Related Information," "requires that HIV related information be kept confidential and permits disclosure only in narrowly defined need-to-know circumstances . . . ." V. v. State, 150 Misc. 2d 156, 566 N.Y.S.2d 987, 988 (Ct. Cl. 1991). Pursuant to article 27-F, the CoC issued regulations applicable to [**29] all local correctional facilities, defining the circumstances under which confidential HIV-related information can be revealed. 9 N.Y.C.R.R. @ 7064 (1991). The regulations became effective October 24, 1989. To comport with these regulations, the ECHC issued policy and procedure HCM 23.00.00 in December, 1989, after consulting with the CoC.

Before the court can address the merits of plaintiff's claims, the court must first determine whether article 27-F provides a private cause of action for plaintiff. There has been one decision to date addressing this precise question. V. v. State, 150 Misc. 2d 156, 566 N.Y.S.2d 987. In that case, Judge Corbett, after reviewing the legislative history of the act and applying the test set forth in Sheehy v. Big Flats Community Day, Inc., 73 N.Y.2d 629, 543 N.Y.S.2d 18, 20, 541 N.E.2d 18 (1989) and Burns, Jackson, Miller, Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 464 N.Y.S.2d 712, 716, 451 N.E.2d 459 (1983), held that claimant, an inmate housed at Attica Correctional Facility whose HIV confidentiality had allegedly been breached,

qualified as one of the class for whose benefit Article 27-F was enacted, that recognition of his right to pursue this [**30] action would promote the

legislative purpose of confidentiality, particularly as articulated by the legislative sponsors and the Governor, and, in further harmony therewith, this right is consistent with the statutory scheme given the reference to Section 12 of the Public Health Law in Section 2783(1)(b).

V. v. State, 566 N.Y.S.2d at 989. The court concurs in Judge Corbett's analysis and finds that plaintiff has a private cause of action under article 27-F.

Defendants offer two arguments in support of the red sticker policy. First, [*726] defendants point out that because inmates afflicted with infectious diseases--such as TB, hepatitis, herpes, chicken pox, measles, or syphilis--who are not HIV+ are also subject to being red-stickered, the red sticker policy does not disclose "confidential HIV-related information" about any particular inmate to ECHC staff and others. CoC regulations specifically restrict disclosure of "confidential HIV-related information." 9 N.Y.C.R.R. @ 7064.8. That phrase is defined in @ 7064.2(g) as follows:

"Confidential HIV-related information" means any information, in the possession of a person who provides health or social services or who [**31] obtains the information pursuant to a release of confidential HIV-related information, concerning whether an individual has been the subject of an HIV-related test, or has HIV infection, HIV-related illness or AIDS, or information which identifies or reasonably could identify an individual as having one or more of such conditions, including information pertaining to such individual's contacts.

Id. (emphasis added). Thus, pursuant to CoC regulations, if the placement of a red sticker on an inmate's documents and other items identified or "reasonably could [have] identified an individual" as being HIV+, their HIV confidentiality would have been breached.

As the court found above, the red sticker policy was developed, not in response to infectious diseases in general, but directly in response to the hysteria at ECHC over HIV and AIDS. This was understood by ECHC staff. Accordingly, the presence of a red sticker on an inmate's documents first and foremost suggested (and still no doubt suggests) that the inmate is HIV+. It is also clear to the court that staff people and others who saw the red dot on Ms. Nolley's documents either knew or strongly suspected that she was HIV+. The incidents [**32] with inmate trustee Leroy and court matron Vi, as well as the incident where transporting deputies denied the request of another inmate to borrow a cigarette from plaintiff because she had AIDS, indicate to this court that the red sticker revealed plaintiff's HIV status to them. Therefore, the court finds, based on the testimony of plaintiff and others, that the red stickers placed on Louise Nolley's intake card, clothing bag, court papers, cell card, and other items disclosed her confidential HIV-related information to ECHC staff and inmates who were exposed to the stickers.

As noted, CoC regulations require confidential HIV-related information to remain confidential. The section entitled "Confidentiality and disclosure," states:

(a) No person who obtains confidential HIV-related information in the course of providing any health or social service or pursuant to a release of confidential HIV-related information may disclose or be compelled to disclose such information, except to the following: . . . .

9 N.Y.C.R.R. @ 7064.8(a). n5 Defendants' second argument is that, even if a red sticker reveals confidential HIV-related information, it does so only to personnel authorized under [**33] @ 7064.8 to receive it. Defendants rely on @ 7064.8(15), which states that confidential HIV-related information can be disclosed to:

(15) an employee or agent of a provider of health or social services, including but not limited to the Department of Correctional Services and local correctional facilities, when reasonably necessary to provide supervision, monitoring or administration of services and when these employees or agents have access in the ordinary course of business to records relating to the care, treatment, or provision of a health or social service, and in accordance with such provider's regulations promulgated in accordance with article 27-F of the Public Health Law. Disclosure to an employee or agent of a local correctional facility pursuant to this paragraph shall be consistent with section 601 of the Correction

[*727] Law and Part 7033 of this Chapter and shall be authorized only when such disclosure is necessary to:

(i) enable the chief administrative officer to appropriately maintain custody and supervision of the protected person or provide for the safety and protection of the protected person or provide for the safety and protection of staff, [**34] other inmates, or the facility; and

(ii) the medical director reasonably believes that without disclosure circumstances will exist creating a significant risk of contracting or transmitting HIV infection.

9 N.Y.C.R.R. @ 7064.8(a)(15) (emphasis added). Plaintiff contends that the red stickers reveal confidential HIV-related information to persons who are not employees or agents of ECHC. Plaintiff further contends that even if disclosure of her HIV status were limited to transportation deputies, guards, and other non-medical ECHC staff, such disclosure is not permitted under this section. The court agrees.

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n5 The ECHC and its staff provides a "health or social service" under these regulations. See id., @ 7064.2(h).

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As an initial matter, defendants do not contend that inmates who saw Louise Nolley's red stickers and concluded she was HIV+ are authorized to receive this information under article 27-F. The court heard testimony that at least one inmate, upon seeing the red stickers, concluded that plaintiff [**35] had AIDS. Defendants' second argument must fail on this ground alone.

The court also concludes, based on a plain reading of the statute and regulations, that transportation deputies, change guards, and other non-medical ECHC staff were not intended, as a general policy, to be privy to confidential HIV-related information under @ 7064. See V. v. State, 566 N.Y.S.2d at 989. Section 7064 has been promulgated by the CoC pursuant to @ 45(6) of the New York Correction Law and @ 2786 of the Public Health Law, which is part of article 27-F. Section 2786(2)(a) directs the chairperson of the CoC to issue regulations pursuant to @@ 2782(1)(n) and (o), determining which employees of local correction facilities, @ 2782(1)(n), and the Commission of Correction, @ 2782(1)(o), "may, in the ordinary course of business of the agency or provider, be authorized to access confidential HIV related information . . . ." N.Y. Pub. Health Law @ 2786(2)(a). Section 2782 of the Public Health Law states that "no person who obtains confidential HIV related information in the course of providing any health or social service . . . may disclose or be compelled to disclose such information, except [**36] to the following," and then includes a list of sixteen categories of persons who may be disclosed such information. N.Y. Pub. Health Law @ 2782(1). The only section applicable to employees of local correctional facilities is found at @ 2782(1)(n), which permits disclosure to:

a medical director of a local correctional facility as defined in [@ 40] of the correction law, in accordance with [@ 2786(2)(a)], to the extent the medical director is authorized to access records containing such information in order to carry out his or her functions, powers and duties with respect to the protected individual . . . .

N.Y. Pub. Health Law @ 2782(1)(n) (emphasis added). Thus, there is no mention in article 27-F authorizing disclosure of HIV-related information to non-medical correctional facility personnel. Indeed, one of the lead sponsors of article 27-F in the legislature stated in a letter to the Governor,

Beyond disclosure of HIV-related information to medical personnel, it is the intent of this legislation to only allow disclosures of such information within correctional facilities to those employees who normally have access to such

medical information in the course of carrying out [**37] their work-related responsibilities. Broader provisions were considered and rejected.

See V. v. State, 566 N.Y.S.2d at 989. Therefore, the court does not read @ 7064.8(a)(15) as permitting blanket disclosure of confidential HIV-related information to transportation deputies, change guards, and other non-medical ECHC staff.

[*728] There is also no provision in the local regulations authorizing non-medical ECHC staff to receive HIV-related information. ECHC policy and procedure HCM 23.00.00, Tr. Exh. 30J, adopted pursuant to article 27-F, reaffirms the CoC's policy of ensuring the maximum confidentiality of information related to an inmate's HIV status. For example, under section (A)(1), the regulations state: "The medical records and/or condition of any inmate housed in the Erie County Holding Center is strictly confidential." HCM 23.00.00(A)(1), Tr. Exh. 30J at 2.

In addition to the court's previous finding that the red stickers on Louise Nolley's items disclosed her HIV status to non-medical ECHC staff, see supra, the court now finds that such disclosure was not authorized under @ 7064.8(a)(15). The sole purpose behind disclosure of confidential HIV-related information [**38] to these staff people is to enable them to take precautions against exposure to the virus. This purpose seems to have been contemplated in @ 7064.8(a)(15)(i) upon a finding that "disclosure is necessary to . . . enable the chief administrative officer to . . . provide for the safety and protection of staff . . . ." 9 N.Y.C.R.R. @ 7064.8(a)(15)(i). The regulations, however, also require a finding by the medical director that "without disclosure circumstances will exist creating a significant risk of contracting or transmitting HIV infection." 9 N.Y.C.R.R. @ 7064.8(a)(15)(ii). There is no evidence that such a finding was ever made. Moreover, given the efficacy of universal precautions in protecting ECHC staff from the legitimate danger of being exposed to the HIV virus, a fact that was uncontroverted at trial, the court finds there is no need to disclose to transportation deputies and other non-medical ECHC staff which inmates are HIV+ in order to protect them from exposure. Because there are likely to be several unidentified HIV+ inmates at ECHC at any given time, a fact admitted by Nurse O'Malley, handling all inmates as if they were HIV+ is more protective of Holding Center staff [**39] than informing them of known HIV+ inmates. Further, defendants have admitted that, even where the HIV status of an inmate is known, no protections greater than advised by universal precautions are taken in handling that inmate. Thus, disclosure of confidential HIV-related information is not necessary to provide for the safety and protection of these ECHC staff members, 9 N.Y.C.R.R. @ 7064.8(a)(15)(i); similarly, failure to disclose the HIV status of known HIV+ inmates to them cannot, as a general matter, create a "significant risk of contracting or transmitting HIV infection." 9 N.Y.C.R.R. @ 7064.8(a)(15)(ii). Therefore, disclosure of confidential HIV-related information to transportation

deputies, change guards, and other non-medical ECHC staff is a violation of article 27-F.

Accordingly, the placement of red stickers on plaintiff's documents and other items during her 1989/90 confinement violated article 27-F of the New York State Public Health Law. N.Y. Pub. Health Law @ 2780 et seq.

B. Constitutional Right to Privacy

Plaintiff also challenges ECHC's practice of placing red stickers on Louise Nolley's documents and other items as violative of her constitutional right to [**40] privacy. The right plaintiff asserts is the right to be protected against unwarranted disclosure of her medical condition; namely, her HIV status. Determining whether this right exists is our first task. If there is such a right, the court must then determine if ECHC violated this right. Finally, even if the answer to this latter question is yes, the court must then decide whether the red sticker policy is nevertheless "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987).

The starting point for our analysis must be the Supreme Court's unanimous decision in Whalen v. Roe, 429 U.S. 589, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977). In Whalen, plaintiffs challenged a New York statute that directed the establishment of a centralized database of names and addresses of individuals who obtained drugs by prescription for which both a legal and illegal market existed. Plaintiffs argued that the accumulation of this data, and its potential [*729] release to the public, violated their constitutional right to privacy. Id. at 600. After noting that the right to privacy discussed in prior Supreme Court decisions is based on "the Fourteenth [**41] Amendment's concept of personal liberty and restrictions upon state action," id. at 598 n. 23 (quoting Roe v. Wade, 410 U.S. 113, 153, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973)), n6 the Court identified two interests protected by this right. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Id. at 599-600 (footnotes omitted). The Court found, however, that given the confidentiality protections embraced in the law, the New York statute did not infringe upon these interests sufficiently to establish a constitutional violation. Id. at 603-04.

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n6 See also Carey v. Population Serv. Int'l, 431 U.S. 678, 684, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977).

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Whalen's holding that privacy embraces the "individual interest in avoiding disclosure of private matters" was affirmed by the Court in Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 457, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977), decided the same term. Nixon involved a suit [**42] by the former President to strike down a congressional statute authorizing archival review of a mountain of Presidential materials. Balancing interests, the Court held that given the important public interest in preservation of the President's papers, the appellant's status as a public figure, and the limited intrusion of the archival screening, n7 the President's constitutional right to privacy was not abridged. Id. at 465.

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n7 The Court noted that the President's materials were to be screened by archivists with an unblemished record for discretion, and truly private materials were to be returned to the President. Id. at 460, 462.

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The Court has continued to affirm the privacy interest in non-disclosure of personal matters. In New York v. Ferber, 458 U.S. 747, 774, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982), the Court found constitutional a New York criminal statute which prohibited distribution of child pornography. The Court supported its holding that States "are entitled to greater leeway in the regulation [**43] of pornographic depictions of children," id. at 756, by noting the harm caused to children exposed in photographs and films depicting them engaged in sexual activity. Id. at 759. Distribution of this material violates the child's interest in avoiding the disclosure of personal matters, the Court held. Id. at 759 n. 10 (citing Whalen v. Roe, 429 U.S. at 599). In United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 769-70, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989), the Court again cited Whalen with approval.

Numerous courts since Whalen have held that the constitutional right to privacy includes protection against unwarranted disclosure of one's medical records or condition. See Schaill ex rel. Kross v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1322 n. 19 (7th Cir. 1988); In re Search Warrant (Sealed), 810 F.2d 67, 71 (3d Cir.), cert. denied sub nom., Rochman v. United States, 483 U.S. 1007, 97 L. Ed. 2d 739, 107 S. Ct. 3233 (1987); Trade Waste Management Ass'n, Inc. v. Hughey, 780 F.2d 221, 233-34 (3d Cir. 1985); Doe v. Borough of Barrington, 729 F. Supp. 376, 382 (D.N.J. 1990). [**44] Other courts have recognized that the right protects non-disclosure of analogous personal information. See, e.g., Pesce v. J. Sterling Morton High Sch. Dist. 201, 830 F.2d 789, 795-97 (7th Cir. 1987); Fajdo v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981). One court, reviewing the law for qualified-immunity purposes, stated that "as of June 1983 a majority of courts considering the question had concluded

that a constitutional right of confidentiality is implicated by disclosure of a broad range of personal information . . . ." Borucki v. Ryan, 827 F.2d 836, 846 (1st Cir. 1987). n8

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n8 In Borucki, the court concluded that the constitutional right of confidentiality, as of the time defendant acted, was not "clearly established" for purposes of qualified immunity analysis. Borucki, 827 F.2d at 839-47. See also Pueblo Neighborhood Health Ctrs. v. Losavio, 847 F.2d 642, 647-48 (10th Cir. 1988); Plowman v. United States Dep't of the Army, 698 F. Supp. 627, 633-34 (E.D. Va. 1988). This court must at some point take up the question of qualified immunity for defendants, but declines to do so now.

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[*730] Precisely on point with this case, several courts have held that prison inmates are constitutionally protected from the unwarranted disclosure of their HIV status. Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991); Inmates of New York State With Human Immune Deficiency Virus v. Cuomo, No. 90-CV-252 (N.D.N.Y. 1991); Rodriguez v. Coughlin, No. 88 Civ. 1030 (W.D.N.Y. 1989); Doe v. Coughlin, 697 F. Supp. 1234, 1238 (N.D.N.Y. 1988); Woods v. White, 689 F. Supp. 874, 876 (W.D. Wis. 1988), aff'd without opinion, 899 F.2d 17 (7th Cir. 1990). In Harris, HIV+ inmates in Alabama's State prisons brought a class action challenging Alabama's practice of testing all inmates and segregating those who tested positive for HIV. The district court had sweepingly concluded that prisoners were completely without privacy rights. Harris v. Thigpen, 727 F. Supp. 1564, 1571 (M.D. Ala. 1990), aff'd in part and rev'd in part, 941 F.2d 1495 (11th Cir. 1991). The Eleventh Circuit rejected this conclusion and held that "prison inmates, in spite of their incarceration, [**46] 'retain certain fundamental rights of privacy.'" Harris, 941 F.2d at 1513 (quoting Houchins v. KQED, Inc., 438 U.S. 1, 5 n. 2, 57 L. Ed. 2d 553, 98 S. Ct. 2588 (1978)). Although the court found this right to be ill-defined, it stated:

We nevertheless believe and assume arguendo that seropositive [HIV+] prisoners enjoy some significant constitutionally-protected privacy interest in preventing the non-consensual disclosure of their HIV-positive diagnoses to other inmates, as well as to their families and other outside visitors to the facilities in question.

Id. n9

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n9 The court, applying the Supreme Court's Turner v. Safley test (discussed below), ultimately found that the Alabama prison system did not unconstitutionally impinge upon these privacy rights, given the countervailing interests of the prison authorities. Harris, 941 F.2d at 1521.

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In Cuomo, inmates infected with HIV in New York State prisons filed a class action claiming that the prisons' lack of medical [**47] and other services was violative of their rights under the Constitution. Within the context of a discovery dispute over plaintiffs' request for the names or identification numbers of inmates who were known by defendants to be HIV+, the court accepted as uncontested "the proposition that the federal Constitution protects against the unwarranted and indiscriminate disclosure of the identity of HIV-infected individuals and of their medical records . . . ." Cuomo, No. 90-CV-252. The court concluded that the identity of HIV+ inmates need not be disclosed for plaintiffs to litigate their case. Id. The court also directed authorities to maintain even general information about such inmates (with specific identities redacted) under the tightest confidentiality. Id.

In Rodriguez, No. 88 Civ. 1030, an inmate transported in a "hygiene suit" enveloping his entire body, brought suit claiming the outfit revealed his HIV status to fellow inmates, who in turn threatened him with bodily harm. Judge Elfvin denied defendants' motion to dismiss, holding that the pleading stated a valid constitutional claim on right to privacy grounds. "Such right precluded New York's corrections officers from disclosing [**48] to other inmates that he suffers from AIDS." Id.

In Doe v. Coughlin, 697 F. Supp. at 1243, the court granted preliminary injunctive relief to HIV+ inmates who complained, inter alia, that their transfer to a separate dormitory reserved for HIV+ inmates would reveal their HIV status to other inmates and, subsequently, to the world outside prison. The court based its decision on both prongs of Whalen v. Roe.

In the court's view there are few matters of a more personal nature, and there are few decisions over which a person could have a greater desire to exercise control, than the manner in which he reveals [his HIV] diagnosis to others.

[*731] Doe v. Coughlin, 697 F. Supp. at 1237. The court was especially sensitive to the emotional implications and potential ostracism entailed in notifying others of one's HIV status. "Within the confines of the prison the infected prisoner is likely to suffer from harassment and psychological pressures. Beyond the prison walls the person suffering from AIDS is often subject to discrimination." Id. The court concluded that "the prisoners subject

to this program must be afforded at least some protection [**49] against the non-consensual disclosure of their diagnosis." Id. at 1238.

Finally, in Woods v. White, 689 F. Supp. at 876, the court denied defendants' motion for judgment on the pleadings where plaintiff had alleged that medical personnel at the Waupun Correctional Institution's Health Service Unit revealed to non-medical staff and other inmates the fact that plaintiff had tested positive for HIV. The court upheld plaintiff's right to privacy, stating:

Given the most publicized aspect of the AIDS disease, namely that it is related more closely than most diseases to sexual activity and intravenous drug use, it is difficult to argue that information about this disease is not information of the most personal kind, or that an individual would not have an interest in protecting against the dissemination of such information.

Id. The court added that it was not necessary to balance plaintiff's right to nondisclosure against a contrary state interest because no such state interest was suggested by defendants. Id.

This court is persuaded by the reasoning of the above-cited cases and expressly holds that prison inmates are protected by a constitutional [**50] right to privacy from the unwarranted disclosure of their HIV status. The cases that have rejected this conclusion are not compelling. See Baez v. Rapping, 680 F. Supp. 112, 115 (S.D.N.Y. 1988); Cordero v. Coughlin, 607 F. Supp. 9, 11 (S.D.N.Y. 1984). Both Baez and Cordero rejected inmates' claims on the grounds that prisoners enjoy only limited privacy rights. Baez, 680 F. Supp. at 115; Cordero, 607 F. Supp. at 11. The cases cited in support of this hold, however, that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." Bell v. Wolfish, 441 U.S. 520, 545, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979) (citing Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 129, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977); Pell v. Procunier, 417 U.S. 817, 822, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974), and other cases). Prison inmates retain some right to privacy. Harris v. Thigpen, 941 F.2d at 1512-13; Kimberlin v. United States Dep't of Justice, 788 F.2d 434, 439 n. 6 (7th Cir.), cert. denied, 478 U.S. 1009, 92 L. Ed. 2d 719, 106 S. Ct. 3306 (1986). [**51] The question is: how much?

The Supreme Court's analysis under Whalen and subsequent cases has always balanced the state's interest in assembling, Whalen, 429 U.S. at 600, or reviewing, Nixon, 433 U.S. at 451-52, personal information against the individual's interest in non-disclosure to determine if a constitutional violation of privacy has occurred. Where constitutional violations are alleged by prisoners, however, the Court has struck this balance differently, given its policy of judicial restraint toward review of prison regulations. See, e.g., Block v. Rutherford, 468 U.S. 576, 586-89, 82 L. Ed. 2d 438, 104 S. Ct. 3227 (1984); Bell v. Wolfish, 441 U.S. at 550-51; Jones v. North Carolina Prisoners'

Union, 433 U.S. at 129-30; Pell v. Procunier, 417 U.S. at 827. To balance the policy of judicial restraint for prisoners' complaints against the need to protect constitutional rights, the Court has set forth the following test:

when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.

Turner v. Safley, 482 U.S. at 89. [**52] See also Thornburgh v. Abbott, 490 U.S. 401, 404, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349, [*732] 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987). Thus, the privacy rights of an inmate must be weighed against the strong deference due prison administrator's judgments in the operation of their prisons. See Harris v. Thigpen, 941 F.2d at 1515; Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990). Our analysis under Turner is therefore necessary to answer the question whether Louise Nolley's constitutional right to privacy was violated in this case.

The court reaffirms the finding made in section I(A) that ECHC's practice of placing red stickers on plaintiff's documents and other items disclosed her HIV status to staff and inmates who were exposed to the stickers. The question under Turner v. Safley is whether the regulation which led to these disclosures was nevertheless reasonably related to legitimate penological interests.

Turner v. Safley identified four factors to consider to make this determination:

First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest [**53] put forward to justify it. . . . Moreover, the governmental interest must be a legitimate and neutral one. . .

A second factor . . . is whether there are alternative means of exercising the right that remain open to prison inmates. . . .

A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. . . .

Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. . . . By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable . . . . Turner, 482 U.S. at 89-90 (quoting Block v. Rutherford, 468 U.S. at 586).

Courts interpreting the first of these factors have held that, although prison officials are due substantial deference, "prison officials must 'put

forward' a legitimate governmental interest to justify their regulation . . . and must provide evidence that the interest proffered is the reason why the regulation was adopted or enforced." Walker v. Sumner, 917 F.2d at 385. See Swift v. Lewis, 901 F.2d 730, 732 (9th Cir. 1990); [**54] Caldwell v. Miller, 790 F.2d 589, 598 (7th Cir. 1986). The Walker court added:

Prison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary showing is required as to each point.

Walker, 917 F.2d at 386.

Defendants introduced evidence that the purpose for the red stickers is to ensure the safety of staff against the danger of infection from inmates with contagious diseases. This is certainly a legitimate interest, and there is no dispute about that. The question here is whether ECHC's red sticker policy is rationally related to that purpose. The red sticker policy identifies inmates known to be or suspected of suffering from contagious or infectious diseases so that ECHC staff will be alerted to take additional precautions when handling those inmates. One problem with the red sticker policy, however, is that it alerts staff to take [**55] precautions only with inmates known by ECHC to be carrying infectious diseases, including HIV. The policy does nothing to protect staff from inmates who, unbeknownst to ECHC, are carrying the same diseases. Defendants have admitted that numerous such inmates exist at the holding center. To protect staff against these unknown inmates, ECHC has started to institute a system of universal precautions, whereby staff are directed to take precautions against infection by blood-borne diseases with all inmates, not just those bearing the red dot. Thus, the red sticker policy is underinclusive in that it protects staff less effectively than universal precautions.

[*733] More importantly, the red sticker unnecessarily identifies inmates with blood-borne diseases n10 because the precautions urged under universal precautions are exactly the same precautions urged for inmates bearing the red dot. Thus, the presence of a red dot on an inmate's documents or other items does not rationally further the protection of ECHC staff from the legitimate danger of infection from inmates with contagious diseases.

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n10 Staff are urged to take additional precautions for inmates bearing red dots who carry airborne diseases, but this information is conveyed separately by the medical staff and is unrelated to the red dot.

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[**56]

This conclusion is underscored by jumping to step four of the Turner test, which evaluates whether the prison's regulation is an "exaggerated response" to prison concerns. Turner, 482 U.S. at 90.

If an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Id. at 91. See also Abbott, 490 U.S. at 418; Harris v. Thigpen, 941 F.2d at 1519. Given the efficacy of universal precautions as a ready and, according to uncontroverted testimony, notably superior alternative, see supra, the court concludes that the red sticker policy is an "exaggerated response" and is not reasonably related to the protection of ECHC staff.

The court also finds that, under the second Turner factor, there is no alternative means for inmates to exercise their right to privacy. Once it is lost, it is lost forever. Under the third Turner factor, since universal precautions are in the process of being implemented at ECHC, [**57] there would be minimal, if any, impact on guards and others to accommodate inmates' constitutional rights by doing away with the red stickers.

Accordingly, as the red sticker policy is not reasonably related to legitimate penological interests, Louise Nolley's constitutional right to privacy was violated by defendants' practice of placing red stickers on her documents and personal items, thereby revealing her HIV status to non-medical ECHC staff and fellow inmates.

II. SEGREGATION

A. Article 27-F of the Public Health Law and CoC Regulations

Plaintiff complains that her confinement in Female Delta revealed her HIV status to unauthorized persons in violation of article 27-F of New York's Public Health Law, and the CoC regulations adopted pursuant to that law. The court has already reviewed this law in some detail in the context of ECHC's red sticker policy. See supra @ I(A). Under CoC regulations, if the segregation of Louise Nolley released information which identified, or reasonably could have identified, her as HIV+, her HIV confidentiality would have been breached. 9 N.Y.C.R.R. @ 7064.2(g). This is the question for the court. n11

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n11 This question is limited to plaintiff's 1989/90 confinement, which postdated the effective date of New York's Public Health Law.

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[**58]

Female Delta is a five-cell ward segregated from the general inmate population. Generally, three of the cells are used to house inmates who are suicidal or have severe psychiatric problems. The other two cells are used for inmates with blood-borne infectious diseases, such as hepatitis or HIV. ECHC staff and at least some inmates from the general population were aware during Nolley's 1989/90 confinement that Female Delta housed HIV+ inmates. Inmates going to the Medical Department on sick call passed by Female Delta. They could see into the unit and communicate with inmates housed there.

As I indicated in my findings of fact, this information, while it did not conclusively reveal plaintiff's HIV status to persons observing her in Female Delta, strongly suggested that she was HIV+. Is this enough, by itself, to have breached plaintiff's HIV confidentiality? This is a difficult [*734] question to answer. Plaintiff's case is different from numerous other cases challenging HIV segregation wards in other prisons, see, e.g., Harris v. Thigpen, 941 F.2d at 1499; Doe v. Coughlin, 697 F. Supp. at 1240 & n. 15, in that Female Delta is an isolation ward not [**59] limited to HIV+ inmates. It can therefore not be assumed, as it was in Harris and Doe, that housing plaintiff in Female Delta automatically breached her HIV confidentiality. Further complicating the question is the fact that ECHC used red stickers to identify plaintiff. As the court has already found, the presence of these stickers alone revealed plaintiff's HIV status to guards and inmates at the Holding Center. Once this information was revealed through the red sticker, disclosure by segregation would have been redundant. It is therefore nearly impossible for the court to assess whether segregation alone revealed plaintiff's HIV status.

Given these difficulties, I have reviewed the record very carefully. There was no direct testimony showing that anyone had deduced plaintiff's HIV status solely from observing her in segregation. With respect to fellow inmates who may have passed by Female Delta only occasionally, this leads me to conclude that there is insufficient evidence to find a violation of the Public Health Law. Guards, on the other hand, had the advantage of observing Female Delta on a regular basis. They were aware of which inmates were psychotic, and which [**60] were carrying blood-borne infectious diseases. n12 Over time, this additional information must have permitted guards to deduce which inmates were HIV+. Thus, by isolating plaintiff in Female Delta, defendants provided ECHC staff with "information which identified or reasonably could [have] identified"

plaintiff as being infected with HIV. N.Y. Pub. Health Law @ 2780(7). As it has already been determined that non-medical ECHC staff, except under limited circumstances which did not exist in plaintiff's case, n13 were not privy to this information, the court concludes that plaintiff's segregation in Female Delta during her 1989/90 confinement disclosed confidential HIV-related information about her to non-medical ECHC staff in violation of article 27-F of the Public Health Law and the CoC's regulations adopted pursuant thereto.

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n12 Plaintiff gave extensive testimony describing the bizarre behavior of her fellow inmates. She also testified that guards trusted her to help them control these inmates, thus setting her apart from them.

n13 On some limited occasions it would appear that revealing an inmate's HIV status by segregating them may be authorized by the regulations. Under the Holding Center's medical policy HCM 23.00.00, although housing decisions should not be made solely on the basis of an inmate's HIV status, such decisions can be made if the inmate is "at risk" in the general population, or if medical treatment indicates that medical housing would be best. These determinations would follow for an inmate in an advanced stage of the disease, when he or she is susceptible to opportunistic viruses. Special housing can also be instituted when an inmate engages in high-risk behavior, such as needle-sharing or homosexual activity, to protect other inmates from infection. See Tr. Exh. 30J. Sections 7064.8(a)(15)(i) and (ii) also appear designed to permit disclosure under these circumstances. The difference between those circumstances and this case, however, is that no such findings were ever made for Louise Nolley. [**61]

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B. Constitutional Right to Privacy

Having determined that plaintiff's segregation in Female Delta disclosed confidential HIV-related information about her to non-medical ECHC staff at the Holding Center in violation of article 27-F, the court must now examine whether this disclosure also violated plaintiff's constitutional rights. I held above that prison inmates are protected by a constitutional right to privacy from the unwarranted disclosure of their HIV status. See supra @ I(B). Thus, it would appear that defendants' decision to segregate plaintiff impinged on her constitutional right to privacy. This does not end our inquiry, however, as we must determine whether ECHC's segregation policy is "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. at 89.

The elements of this test have already been spelled out. See supra @ I(B). The first step is to decide whether there is a [*735] valid, rational connection between the challenged policy and a legitimate governmental interest

offered to justify it. Defendants have offered three justifications [**62] for their isolation of HIV+ inmates. The court has found factual support for only one of these reasons, viz., protection of the general inmate population from accidental exposure to the virus. See supra (Findings of Fact @ V). This reason is certainly legitimate. The question is whether a policy of segregating all HIV+ inmates in Female Delta is rationally related to this legitimate purpose. n14

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n14 Plaintiff does not challenge that HIV+ inmates who engage in actions which place other inmates at risk of infection, such as needle sharing, or, in the case of male inmates, homosexual activity, should be isolated.

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In Harris v. Thigpen, 941 F.2d at 1515-21, a case challenging the blanket HIV-testing and segregation policies of the Alabama prison system, the Eleventh Circuit engaged in an extensive analysis under Turner. Although the court noted that "the logical connection between the stated goal[] of reducing HIV transmission . . . and the DOC's policy of uniformly segregating seropositive [**63] prisoners, might be questioned," id. at 1516, it ultimately concluded that such an approach was not "irrational." Id. at 1517 (citing Turner, 482 U.S. at 89-90).

The Harris court acknowledged that Alabama's decision to segregate all HIV+ inmates was now a minority position among correctional facilities nationwide. A recent preliminary draft of a National Institute of Justice report states that only four state systems--Alabama, California, Colorado, and Mississippi--currently segregate all known HIV-infected prisoners. See T. Hammett & A. Daugherty, AIDS in Correctional Facilities: Issues and Options, ch. 7 at 1, National Inst. of Justice (DRAFT 1990 Update, January, 1991). Of these states, both California and Colorado appear to be moving away from automatic segregation. Id. Moreover, the report states that "only two responding U.S. city/county jail systems segregate all known HIV-infected prisoners." Id. New York State Department of Correctional Services stopped isolating HIV+ inmates from the general population in 1987. This strong trend away from automatic segregation of HIV+ inmates is echoed even within ECHC's own [**64] policies. HCM 23.00.00, adopted in December, 1989, states that "housing decisions, in the Erie County Holding Center, will not be made solely on the basis of the protected individual's HIV status." Tr. Exh. 30J at 3 (emphasis in original).

A strong trend toward integration of HIV+ inmates into the general population does not by itself, however, render a decision counter to that trend unconstitutional. Rather, ECHC's policy of segregating HIV+ inmates must be "so remotely connected to the legitimate goal[] of reducing HIV transmission . . .

within the [correctional facility] 'as to render the policy arbitrary or irrational.'" Harris, 941 F.2d at 1517 (quoting Turner, 482 U.S. at 89-90). Although this is a very high threshold, the court believes that ECHC's segregation policy crossed this threshold. As I pointed out in my findings of fact, if ECHC's purpose behind segregating plaintiff was to reduce the possibility of transmitting HIV to non-HIV inmates, housing her in Female Delta with extraordinarily volatile non-HIV inmates was a strange choice. Louise Nolley graphically spoke of the chaotic and violent conditions in Female Delta. See supra [**65] (Findings of Fact @ VI) (quoting Nolley, Aug. 21, 1990, at 59-60). One of the inmates housed with plaintiff repeatedly tried to cut herself. Another inmate approached plaintiff for homosexual relations. Given these dangerous conditions, the prospects for accidental transmission of the HIV virus to non-HIV inmates through blood-to-blood contact was increased, not decreased, by placing plaintiff in Female Delta.

More importantly, defendants' policy has done very little to protect the general inmate population from the risk of HIV transmission. Only known HIV carriers have been segregated. Nurse O'Malley admitted, however, that many unknown HIV [*736] carriers are likely to be integrated into the general population at any given time. As ECHC's more recent policy attests, an inmate's HIV status alone does not make it likely that the inmate will transmit their HIV virus to another. See Tr. Exh. 30J at 3 (HCM 23.00.00). Rather, it is an HIV+ inmate's behavior toward non-HIV inmates which carries the risk of HIV transmission. Thus, ECHC's decision to segregate only on the basis of an inmate's HIV status, without regard to their behavior, while it may slightly reduce the possibility of [**66] accidental HIV transmission, does not seriously further that goal. Furthermore, it does not comport with ECHC's own policy, HCM 23.00.00, which calls for segregation only after a finding that an inmate is "behaviorally disruptive." Id. There was no such finding in plaintiff's case. Accordingly, the court finds that ECHC's policy of automatically segregating plaintiff in Female Delta based solely on her HIV status was not rationally related to the goal of reducing the risk of HIV transmission at the Holding Center.

The court also finds that ECHC's automatic segregation policy is an "exaggerated response" to its concerns. The policy alternative is found in ECHC's own regulation HCM 23.00.00, which the court has cited to repeatedly. "Housing decisions . . . will not be made solely on the basis of the protected individual's HIV status." Id. Segregation of HIV+ inmates is permitted, however, after a finding that "the medical condition of the protected individual is 'at risk' in general population housing or if medical needs or treatment indicate" or "if a protective individual is behaviorally disruptive and making threatening statements/gestures due to his [or her] HIV status . [**67] . . ." Id. This policy could be instituted with minimal disruption. Thus, the fourth step of Turner is satisfied.

The second Turner factor also favors plaintiff, as there is no alternative means for inmates to exercise their right to privacy once it is lost. The third factor--the effect on guards, other inmates, and prison resources--may favor defendants, but not enough to sustain the policy. It should not matter to guards whether HIV+ inmates are segregated, as under universal precautions they are trained to treat all inmates as if they might be HIV+. Nor can the court discern any significant impact on prison resources. The only potential impact is on other inmates who now may encounter a few more HIV+ inmates than they presently do. Given the fact defendants have admitted that HIV+ inmates already roam within the general inmate population, however, the court finds this incremental impact to be insignificant.

Accordingly, ECHC's policy of automatically segregating known HIV+ inmates in Female Delta is not reasonably related to legitimate penological interests. n15 Plaintiff's constitutional right to privacy was violated.

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n15 As the court has several times emphasized, see supra notes 13 and 14 and accompanying text, this holding does not implicate case-by-case decisions to segregate HIV+ inmates based on the findings contemplated in HCM 23.00.00.

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[**68]

C. Due Process

Plaintiff also complains that her segregation in Female Delta violated her constitutional right of due process under the Fourteenth Amendment.

The first question to answer in a due process claim is whether plaintiff has been deprived of a "life, liberty, or property" interest. The only interest at stake here was plaintiff's liberty. "Liberty interests protected by the Fourteenth Amendment may arise from two sources--the Due Process Clause itself and the laws of the States." Hewitt v. Helms, 459 U.S. 460, 466, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983) (citing Meachum v. Fano, 427 U.S. 215, 223-227, 49 L. Ed. 2d 451, 96 S. Ct. 2532 (1976)). I will address plaintiff's argument that the due process clause itself created a liberty interest first.

In Hewitt v. Helms, inmate Helms, who was suspected of participating in a violent prison riot, was removed from his cell and placed in administrative segregation while authorities investigated his role in the riot. Id. at 463. Various reports [*737] and charges were filed during the time Helms remained in segregation. He was ultimately found guilty by a prison disciplinary committee of assaulting an officer and was sentenced to six months of disciplinary confinement. [**69] Id. at 465. Helms sued, claiming that he

was denied due process because he should have been granted a hearing prior to being confined in administrative segregation. The Court of Appeals agreed, but the Supreme Court reversed, holding that under the due process clause inmates have no general liberty interest in remaining in the general population of a prison. Id. at 467-68. The Court reasoned:

"as long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is otherwise not violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." Montanye v. Haymes, 427 U.S. 236, 242, 49 L. Ed. 2d 466, 96 S. Ct. 2543 (1976). See also Vitek v. Jones, 445 U.S. 480, 493, 63 L. Ed. 2d 552, 100 S. Ct. 1254 (1980).

It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence. The phrase "administrative segregation," as used by the state authorities here, appears to be something of a catchall: it may be used to protect the prisoner's safety, [**70] to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer. . . . Accordingly, administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration.

Hewitt, 459 U.S. at 468. The critical inquiry in this analysis is whether "'the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him [or her] . . . .'" Id. (quoting Montanye v. Haymes, 427 U.S. at 242).

In Vitek v. Jones, 445 U.S. 480, 63 L. Ed. 2d 552, 100 S. Ct. 1254 (1980), the Court held that the transfer of a Nebraska state prisoner to a mental hospital was not within the range of confinement justified by a prison sentence. The Court cited two reasons. First, the transfer stigmatized the inmate as being mentally ill. Second, the inmate would be subjected involuntarily to institutional care in a mental hospital. These conditions were found by the Court to be qualitatively different from the punishment normally suffered by a person convicted of a crime. Id. at 493. [**71] Accordingly, the inmate was entitled to due process prior to his transfer.

Defendants argue, based on Hewitt, that plaintiff's liberty interests were not implicated by her segregation in Female Delta. Indeed, several courts, citing Hewitt, have rejected due process claims brought by inmates segregated because of their HIV status. See, e.g., Muhammad v. Carlson, 845 F.2d 175, 177 (8th Cir. 1988), cert. denied sub nom., Muhammad v. Quinlan, 489 U.S. 1068, 103 L. Ed. 2d 814, 109 S. Ct. 1346 (1989); Powell v. Department of Corrections, State of Okla., 647 F. Supp. 968, 970 (N.D. Okla. 1986); Cordero v. Coughlin,

607 F. Supp. at 10. Plaintiff counters that her detention in Female Delta, the "mental ward" at ECHC, was analogous to the involuntary transfer of the prisoner in Vitek v. Jones to the state mental hospital.

The court finds that the facts of this case are much closer to the conditions in Vitek than those in Hewitt. The inmate in Hewitt was confined in administrative segregation in the aftermath of a prison riot, during which time the prison authorities were legitimately concerned that further outbreaks could [**72] occur. Inmate Helms was suspected of participating in the riot and was therefore secluded until the authorities could determine exactly what had transpired. The authorities then conducted an investigation, brought charges against Helms and, on a finding of guilt, moved him from administrative to disciplinary segregation. In this case, there was no prison disturbance, nor even the threat of one. No reports were ever issued; no charges [*738] were ever filed. Plaintiff was placed in administrative segregation from the moment she entered ECHC during each of her three confinements, and she remained there, with no administrative review, for the duration of those confinements.

In Vitek, an inmate was involuntarily transferred from prison to the state mental hospital. The stigma of being assigned to the mental hospital in Vitek was not dramatically different from the stigma associated with being involuntarily placed in Female Delta, a ward known to house inmates who were suicidal and psychologically unstable, or who were HIV+. Whether plaintiff was thought by outsiders to need psychiatric help, or to be HIV+, both of these classifications could have engendered serious adverse consequences [**73] for her. See Vitek, 445 U.S. at 492. Similarly, although Louise Nolley was not subject to mandatory behavioral modification as the inmate in Vitek was, she was subject to the kinds of pressures an inmate would face in a mental hospital. The inmates in Female Delta repeatedly tried to kill themselves, spoke often and in gruesome detail about the murders they had committed, ate out of the garbage, and so forth. See supra. Defendant Dray acknowledged that inmates should not be subjected to such conditions. This evidence indicates that confinement in Female Delta was qualitatively different from the punishment normally suffered by a person convicted of a crime. See Vitek, 445 U.S. at 493. For these reasons, I find that plaintiff was constitutionally entitled to due process. I do not rest on these points alone, however.

There is an additional factor that leads me to conclude that due process was violated here. In Hewitt, the Court concluded that an inmate's liberty was not constrained by administrative segregation because this was the "sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." [**74] Hewitt, 459 U.S. at 468 (emphasis added). The Court later added in a footnote, that:

Of course, administrative segregation may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in some sort

of periodic review of the confinement of such inmates.

Id. at 477 n. 9. This language indicates that indefinite administrative confinement of an inmate without review by prison officials is outside "the terms of confinement ordinarily contemplated by a prison sentence." Id. at 468. Louise Nolley was segregated in Female Delta under just those conditions. She was placed there upon admission during each of her three confinements and remained there throughout. Her segregation was never reviewed by defendants. Such confinement, based solely as it was on her HIV status, could not have been contemplated as part of a normal prison sentence. Accordingly, for the reasons cited above, the court finds that plaintiff's due process rights were violated.

This conclusion is underscored by the second prong of Hewitt, in which the Court held that even if no liberty interest was created by the United States [**75] Constitution, an inmate could be protected by a state-created liberty interest. Hewitt held that - procedural "guidelines" are insufficient to create such an interest; state or local regulations must be of an "unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed" before a liberty interest may be created. Hewitt, 459 U.S. at 471. See also Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 461-63, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989); Muhammad v. Carlson, 845 F.2d at 177. Plaintiff argues that the inmate handbooks for ECHC, Tr. Exhs. 20, 21, and ECHC policy and procedures created a protected liberty interest.

Two inmate handbooks were introduced into the record. One is dated May, 1987, Tr. Exh. 21; the other is dated March, 1989, Tr. Exh. 20. The first handbook contains a confusing discussion of administrative segregation, see 9 N.Y.C.R.R. @ 7006.1(b)(1), but does not limit the discretion of prison officials to segregate inmates. See Tr. Exh. 21 at 20. The latter handbook, under the [*739] heading "Administrative Segregation," states that

The status of any inmate placed in Administrative Segregation [**76] will be reviewed every seven days to determine whether the reasons for initial placement in the unit still exist and a decision will be rendered at that time as to whether the inmate will remain in Administrative Segregation or moved to general population.

Tr. Exh. 20 at 28 (emphasis added and in original). This provision appears analogous to those found in Pennsylvania under which a state-created liberty interest was found in Hewitt. See Hewitt, 459 U.S. at 470 n. 6. Stronger language is found in ECHC medical policy and procedure HCM 23.00.00, effective as of December, 1989, which has been quoted in full above. See supra (Findings of Fact @ V). It states that housing decisions "will not be made solely on the basis of the protected individual's HIV status. Special housing decisions can be made, however, . . . in the same manner as any inmate housed in general population." Id. (emphasis in original). Neither the handbook nor HCM 23.00.00

prohibits defendants from segregating HIV+ inmates. Both, however, like the provisions in Hewitt, require particular administrative findings before initiating, and while continuing, such segregation. [**77]

Based on these ECHC regulations, I find that, as of their effective dates, the Holding Center created a liberty interest for plaintiff to be placed in the general inmate population absent a proper finding that she needed to be segregated. No such finding was ever made. There was never a medical determination made that she was "at risk" in the general population nor that her medical needs or treatment required segregation. No review of the decision to segregate her was ever undertaken. She was segregated upon entry during her 1988 confinement solely because she was HIV+. The decision to segregate her was automatically renewed for her 1989 and 1989/90 confinements. Accordingly, plaintiff's state-created liberty interests, and thus her constitutional due process rights, were violated during her 1989/90 confinement.

Finally, defendants argue that their actions are protected under the Turner v. Safley test discussed above. That analysis, however, does not apply here. This is not a situation where an otherwise valid regulation impinges on plaintiff's constitutional rights, but where the defendants failed to follow even their own regulations. Thus, Turner does not apply. Even if [**78] it did, for the reasons stated in @ II(B), the court finds that plaintiff's segregation in Female Delta was not reasonably related to legitimate penological interests.

D. Equal Protection

Plaintiff also challenges her segregation on equal protection grounds. Similar equal protection challenges to administrative segregation by HIV+ inmates have been universally rejected. See, e.g., Judd v. Packard, 669 F. Supp. 741, 743 (D. Md. 1987); Powell v. Department of Corrections, 647 F. Supp. at 971; Cordero v. Coughlin, 607 F. Supp. at 10; Brickus v. Frame, 1989 U.S. Dist. LEXIS 8510 (E.D. Pa. July 24, 1989). For plaintiff to invoke the equal protection clause, she must show that she was similarly situated with other inmates. Plyler v. Doe, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982). As an HIV+ inmate carrying a contagious disease, she has not made this showing. Accordingly, plaintiff's equal protection claims are denied. Judd, 669 F. Supp. at 743; Cordero, 607 F. Supp. at 10.

III. CONDITIONS OF CONFINEMENT

Plaintiff argues that the conditions of her confinement [**79] were cruel and unusual punishment in violation of the Eighth Amendment. There is no question that the conditions in Female Delta were extremely stressful. Louise Nolley was housed with inmates who graphically described their horrible crimes, who were suicidal, who demonstrated severe psychiatric problems, and who were in

a state of perpetual trauma. Plaintiff was asked on many occasions to assist ECHC staff in controlling [*740] these inmates. Plaintiff also complains that at times she did not get the medicine she needed, especially AZT, a critical drug for combatting AIDS, or received it late.

Just this last term, the Supreme Court held that for conditions of confinement to violate the Eighth Amendment, prison officials creating those conditions must have possessed a culpable state of mind. Wilson v. Seiter, 115 L. Ed. 2d 271, 111 S. Ct. 2321, 2323-26 (1991). "The offending conduct must be wanton." Id. at 2326 (emphasis in original). "Whether [the offending conduct] can be characterized as 'wanton' depends upon the constraints facing the official." Id. (emphasis in original). Drawing on the holding of Estelle v. Gamble, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976), which [**80] held that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment, id. at 104, the Court found "no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement.'" Wilson, 111 S. Ct. at 2326. Therefore,

"Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in Estelle."

Id. at 2327 (quoting LaFaut v. Smith, 834 F.2d 389, 391-92 (4th Cir. 1987)).

Aside from announcing a subjective component for Eighth Amendment jurisprudence, Wilson reaffirmed the long-standing objective requirement. "The Constitution, we said, 'does not mandate comfortable prisons,' [Rhodes v. Chapman, 452 U.S. 337, 349, 69 L. Ed. 2d 59, 101 S. Ct. 2392 (1981),] and only those deprivations denying 'the minimal civilized measure of life's necessities,' id., at 347, are sufficiently grave to form the basis of an Eighth Amendment violation." [**81] Wilson, 111 S. Ct. at 2324. See also Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 266 (S.D.N.Y. 1990), aff'd without opinion, 930 F.2d 909 (2d Cir. 1991); Cordero v. Coughlin, 607 F. Supp. at 11. Applying this objective standard to the stressful environment in Female Delta, the court finds that the overall conditions in the pod, although severe, were not sufficiently traumatic to violate the Eighth Amendment. See Griffin v. Coughlin, 743 F. Supp. 1006, 1018 (N.D.N.Y. 1990) (finding noise level and stress of environment insufficient for Eighth Amendment violation); Cordero, 607 F. Supp. at 11. Plaintiff does not complain that the stress of being incarcerated in Female Delta caused her any physical harm. Nor is there any evidence that ECHC failed to clothe her, or feed her, or provide her with sufficient warmth. Moreover, plaintiff was able to escape some of the stress of her environment by entering her cell and closing the door.

The several instances where plaintiff's AZT was either not delivered or was delivered late, did, however, deprive plaintiff of [**82] a necessity of life under the Eighth Amendment. See Roe v. Fauver, No. 88-1225, slip. op. at 9 (D.N.J. Oct. 7, 1988). AZT is an absolutely vital medication for HIV+ persons because it is the only medication known to slow the advance of the disease. Id. With the objective component of an Eighth Amendment violation thus proven, the question is whether defendants' late delivery or non-delivery of AZT amounted to "deliberate indifference." The court finds that it did not. The most that plaintiff has proven is that the Holding Center was negligent in its delivery of medications. Although this was deplorable conduct in the care of an HIV+ inmate, there is not enough evidence that defendants possessed the culpable state of mind necessary to be found guilty of an Eighth Amendment violation. See Wilson, 111 S. Ct. at 2328. Accordingly, plaintiff's Eighth Amendment claims must be denied.

IV. LAW LIBRARY and RELIGIOUS SERVICES

Plaintiff alleges that defendants' decision to deny her access to ECHC's law library and to communal religious services violated [*741] her constitutional rights. I will take up each argument in turn.

During each of her three confinements, plaintiff [**83] was denied direct access to the ECHC law library. The only time she was even allowed in the library was on four occasions during her 1989/90 confinement, but this was only to use the typewriter. Plaintiff was not permitted to touch the law library's books. To receive materials from the library, she was required to submit written requests for specific cases to staff librarians who, in turn, would copy those cases for her. The process was tedious, time-consuming, and not productive. The court has been informed that ECHC no longer denies HIV+ inmates direct access to the law library.

"It is now established beyond doubt that prisoners have a constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817, 821, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977).

We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.

Id. at 828. See also Griffin v. Coughlin, 743 F. Supp. at 1019-25 (discussing elements of constitutional [**84] violation in great detail); Harris v. Thigpen, 941 F.2d at 1527.

This constitutional right was denied. Plaintiff was never permitted direct access to any of the volumes in the law library. Plaintiff was also denied

face-to-face contact with inmate law clerks. See Griffin, 743 F. Supp. at 1022-24. The system whereby plaintiff was required to request copies of specific materials without being able to conduct general research or work with inmates who could help with that research was woefully inadequate. Thus, plaintiff was not given adequate access to a law library nor adequate assistance from a person trained in the law. By now choosing to alter these practices, defendants have essentially admitted that the prior practice was misguided. Current ECHC policy is that no inmate will be denied access to programs based solely on their HIV status. See Tr. Exh. 30J at 3 (HCM 23.00.00).

The denial of access to the law library is also not justified under the Turner v. Safley test. As I discussed in my findings of fact, plaintiff was denied access to the law library as a result of an ad hoc policy implemented by defendant Dray. ECHC policies [**85] and procedures were not followed. Thus, there can be no argument that she was denied access pursuant to a regulation reasonably related to legitimate penological interests. See Turner, 482 U.S. at 89. Moreover, defendant Dray apparently believed in the face of overwhelming evidence to the contrary, see supra note 1 and accompanying text (quoting Dray's testimony), that plaintiff could transmit the HIV virus to others by using the law books in the library or by using the typewriter found there. He required plaintiff to wear plastic gloves on the four occasions she was permitted to use the library typewriter. The evidence at trial established that plaintiff could not infect other inmates in this way. Therefore, there was no rational connection between the legitimate goal of limiting the possibility of HIV transmission and denying plaintiff access to the library. Accordingly, plaintiff's constitutional right of access to the courts was denied.

Plaintiff also claims that defendants abridged her First Amendment right to free exercise of religion by denying her access to congregate religious services.

The right to attend congregate religious services is not absolute. [**86] The Supreme Court has held that where denial of access to such services is reasonably related to legitimate penological objectives, it is valid. O'Lone v. Estate of Shabazz, 482 U.S. at 353. See also Matiyn v. Henderson, 841 F.2d 31, 37 (2d Cir.), cert. denied, 487 U.S. 1220, 101 L. Ed. 2d 911, 108 S. Ct. 2876 (1988); Griffin v. Coughlin, 743 F. Supp. at 1025 & n. 17; Aliym v. Miles, 679 F. Supp. 1, 2 (W.D.N.Y. 1988) (Curtin, J.). These cases [*742] have upheld denial of access to communal services based in part on the serious security concerns of the prison. O'Lone, 482 U.S. at 351; Griffin, 743 F. Supp. at 1025 n. 17; Aliym, 679 F. Supp. at 2. Those are not the reasons advanced here, however.

As with the denial of access to the law library, plaintiff was not permitted to attend Catholic services as a result of an ad hoc policy implemented by defendant Dray. Current ECHC policy and procedure, which was also in effect

during plaintiff's 1989/90 confinement, would have permitted plaintiff to attend communal services. Dray did not follow this policy, apparently because [**87] he feared that plaintiff might infect other inmates with HIV during church services. As Dray admitted at trial, however, he substituted his own layman's understanding of how the HIV virus can be transmitted for expert medical opinions on the subject. See supra note 1. Mr. Dray's opinions in this regard were completely contradicted by Dr. Hewitt, who testified on the limited way in which the HIV virus can be passed. Accordingly, although preventing the spread of HIV infection is certainly a legitimate penological objective, there was no evidence introduced by defendants which would show that the decision to deny plaintiff access to church services was reasonably related to that purpose. See Walker, 917 F.2d at 386. This conclusion is reinforced by the fact that ECHC now permits HIV inmates (and Louise Nolley during the last segment of her 1989/90 confinement) to attend communal services. The court finds that plaintiff's First Amendment rights were abridged. n16 Her denial of rights was mitigated significantly, however, by the fact that throughout her three confinements, plaintiff was permitted one-on-one meetings in Female Delta with a Catholic priest. Cf. Griffin, 743 F. Supp. at 1026-27. [**88]

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n16 The court does not find, however, that ECHC must always permit HIV+ inmates to access congregate services. An individual's medical condition or the security of the facility may require denial of access in particular cases. See Tr. Exh. 30J at 3 (HCM 23.00.00). These findings were not made in plaintiff's case.

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V. REHABILITATION ACT

Plaintiff's last claim is that defendants denied her access to programs at the Holding Center in violation of the Rehabilitation Act, 29 U.S.C. @ 794. Section 794 states:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his or her 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 . . . .

29 U.S.C. @ 794(a) (emphasis added). The statute goes on to define "program or activity" as "all of the operations of--(1)(A) a department, agency, special purpose district, [**89] or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance." 29 U.S.C. @ 794(b). Defendants have admitted that in each of the three years

plaintiff was confined, Erie County received approximately $ 779,060.00 in federal funds for the detention of federal prisoners at the ECHC. Defendants argue, however, that the Act does not apply to them because the federal funds received by Erie County were a payment, at fair market value, for detention services at the ECHC, and thus did not constitute " Federal financial assistance" under the Act. 29 U.S.C. @ 794.

The phrase " Federal financial assistance" is not defined in the Rehabilitation Act. Nevertheless, several courts have held that "an entity receives financial assistance when it receives a subsidy." DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1382 (10th Cir. 1990), cert. denied, 112 L. Ed. 2d 860, 111 S. Ct. 799 (1991). See also Hingson v. Pacific Southwest Airlines, 743 F.2d 1408, 1414 (9th Cir. 1984); Jacobsen v. Delta Airlines, Inc., 742 F.2d 1202, 1208-09 (9th Cir. 1984), cert. dismissed, [**90] 471 U.S. 1062 (1985); Bachman v. American Soc'y of Clinical [*743] Pathologists, 577 F. Supp. 1257, 1264 (D.N.J. 1983); Cook v. Budget Rent-A-Car Corp., 502 F. Supp. 494, 496 (S.D.N.Y. 1980). Cf. 34 C.F.R. @ 104.3(h) (1990) (Department of Education regulations defining "Federal financial assistance"). Payment of fair market value for services rendered does not constitute a subsidy. Jacobsen, 742 F.2d at 1210; n17 Cook, 502 F. Supp. at 498. There is no evidence that the federal funds received by Erie County in 1988, 1989, and 1990 to detain federal prisoners in the ECHC exceeded the fair market value for this service. Thus, ECHC did not receive " Federal financial assistance" during the years plaintiff was confined. Accordingly, plaintiff's claim under the Rehabilitation Act is denied.

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n17 The Jacobsen court, as well the Tenth Circuit in DeVargas, 911 F.2d at 1382, hold that the test for whether federal funds amount to financial assistance does not turn on an accounting of "fair market value," but on the intention of the government to grant or not to grant a subsidy. My conclusion below does not depend on this distinction, for I find that under either the "fair market value" or the "intention" test, there was no evidence of a subsidy here.

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[**91]

VI. RELIEF

With this long opinion, the court has drawn the following conclusions, here reiterated in abbreviated form:

I. Red Sticker Policy

A. Defendants' red sticker policy violated plaintiff's privacy rights under article 27-F of New York's Public Health Law and CoC regulations.

B. Defendants' red sticker policy also violated plaintiff's constitutional right to privacy. The policy was not reasonably related to legitimate penological interests.

II. Segregation

A. Defendants' policy under which plaintiff was automatically segregated in Female Delta violated plaintiff's privacy rights under article 27-F of the Public Health Law and CoC regulations.

B. This policy decision also violated plaintiff's constitutional right to privacy. The policy was not reasonably related to legitimate penological interests.

C. This policy also violated plaintiff's rights under the due process clause.

D. Defendants' segregation policy did not violate plaintiff's equal protection rights.

III. Conditions of Confinement

The conditions of confinement which plaintiff was subjected to in Female Delta, although deplorable, did not violate plaintiff's Eighth Amendment rights.

IV. [**92] Law Library and Religious Services

Plaintiff was deprived of her constitutional right of access to courts. This deprivation was based on an ad hoc policy implemented by Superintendent Dray and was not reasonably related to legitimate penological interests.

Plaintiff was also deprived of her First Amendment right to access congregate religious services. This deprivation was also based on an ad hoc policy implemented by Superintendent Dray and was not reasonably related to legitimate penological interests.

V. Rehabilitation Act

There was no violation of the Rehabilitation Act because ECHC did not receive " Federal financial assistance" under the Act.

These conclusions, by themselves, do not answer the difficult question of what relief should be afforded plaintiff as a result of the statutory and constitutional violations found above. Plaintiff seeks both injunctive and monetary relief. With respect to injunctive relief, the court has significant doubts whether Ms. Nolley still has standing to seek this relief, given the fact that she is no longer incarcerated in the Holding Center and has no prospects of returning there. See, e.g., Los Angeles v. Lyons, 461 U.S. 95, 105-07, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983). [**93] This relief may, however, be appropriate for other HIV+ inmates currently housed at ECHC. The court will defer ruling on this request until such time as it can meet with the parties.

[*744] With respect to monetary relief, the court also chooses at this time not to render a final judgment as to the liability of the four remaining defendants. Questions remain, for example, as to whether any of the defendants are entitled to qualified immunity, and the appropriate measure for damages, should any be awarded. The court may require additional briefing on these issues, but will again defer making a decision until a meeting with the parties can be held. There may also be other issues the parties will want to bring to the court's attention.

The parties are directed to meet with the court on November 6, 1991, at 9 a.m.

So ordered.

* REC'D FED'L FINANCIAL ASST

UNITED STATES DEPARTMENT OF TRANSPORTATION ET AL. v. PARALYZED VETERANS OF AMERICA ET AL.

No. 85-289

SUPREME COURT OF THE UNITED STATES

477 U.S. 597; 106 S. Ct. 2705; 1986 U.S. LEXIS 70; 91 L. Ed. 2d 494; 54 U.S.L.W. 4854; 40 Empl. Prac. Dec. (CCH) P36,194

March 26, 1986, Argued
June 27, 1986, Decided

PRIOR HISTORY: [***1]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT.

DISPOSITION: 243 U. S. App. D. C. 237, 752 F.2d 694, reversed and remanded.

SYLLABUS: Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against handicapped persons in "any program or activity receiving Federal financial assistance." The United States provides financial assistance to airport operators through grants from a Trust Fund under the Airport and Airway Development Act of 1970 and its successor statute, the Airport and Airway Improvement Act of 1982 (Trust Fund Acts). The Government also operates a nationwide air traffic control system. Respondent organizations representing handicapped individuals brought an action in the Court of Appeals challenging, inter alia, the conclusion of the Civil Aeronautics Board (CAB) that its regulatory authority under @ 504 was limited to those few airlines that receive subsidies under the Federal Aviation Act. The Court of Appeals held that @ 504 gave CAB jurisdiction over all air carriers by virtue of the extensive program of federal financial assistance to airports under the Trust Fund Acts, and that the air traffic control [***2] system was an additional source of financial assistance to airlines. The court then vacated the regulations to the extent that their application was limited to carriers receiving funds under the Federal Aviation Act, and instructed the Department of Transportation, CAB's successor, to issue new regulations that would apply to all commercial airlines.

Held: Section 504 is not applicable to commercial airlines. Pp. 603-612.

(a) Section 504's scope is limited to those who actually "receive" federal financial assistance. Congress sought to impose @ 504 coverage as a condition

or obligation tied to the recipient's agreement to accept the federal funds. By so limiting coverage to recipients, Congress imposed @ 504's obligations upon those who are in a position to accept or reject those obligations as part of the decision whether or not to "receive" federal funds. In this case, the only parties in that position are the airport operators who are the recipients of federal funds under the Trust Fund Acts. Pp. 603-606.

(b) To assert that the economic benefit to airlines from the aid to airports is a form of federal financial assistance ignores the distinction that Congress made in [***3] @ 504 that the statute covers only those who receive the aid and does not extend to those who benefit from it. Pp. 606-607.

(c) To tie @ 504's scope to economic benefit derived from the Trust Fund expenditures in question here would give @ 504 almost limitless coverage. Congress recognized a need to improve airports in order to benefit a wide variety of persons and entities, all of them classified together as beneficiaries, and did not set up a system whereby passengers are the primary or direct beneficiaries and all others, including airlines, benefited by the Trust Fund Acts are indirect recipients of the financial assistance to airports. Pp. 608-610.

(d) The Court of Appeals' attempt to fuse airports and airlines into a single program or activity for purposes of @ 504 is unavailing. Regulatory coverage tied to the scope of the intended beneficiaries of the Trust Fund Acts is inconsistent with congressional intent in passing @ 504. Pp. 610-611.

(e) Since the air traffic control system is "owned and operated" by the United States, it is not "Federal financial assistance" within the meaning of @ 504. Rather, it is a federally conducted program that has many beneficiaries but [***4] no recipients. Pp. 611-612.

COUNSEL: Solicitor General Fried argued the cause for petitioners. With him on the briefs were Assistant Attorney General Reynolds, Deputy Solicitor General Kuhl, Deputy Assistant Attorney General Disler, Kathryn A. Oberly, and Miriam R. Eisenstein.

Douglas L. Parker argued the cause for respondents. With him on the brief were Arlene Battis and Karen Peltz Strauss. *

* Briefs of amici curiae urging reversal were filed for the Air Transport Association of America by James E. Landry; for the Equal Employment Advisory Council by Robert E. Williams, Douglas S. McDowell, and William S. Franklin; and for the International Air Transport Association by Gordon Dean Booth, Jr., and Robert Glasser.

William C. Gleisner III filed a brief for the National Federation of the Blind as amicus curiae urging affirmance.

JUDGES: POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a
dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, post, p. 613.

OPINIONBY: POWELL

OPINION: [*599] [**2707] JUSTICE POWELL delivered the opinion of the Court.

Section 504 of the Rehabilitation Act of [***5] 1973 prohibits discrimination against handicapped persons in any program or activity receiving federal financial assistance. The United States provides financial assistance to airport operators through grants from a Trust Fund created by the Airport and Airway Development Act of 1970. The Government also operates a nationwide air traffic control system. This case presents the question whether, by virtue of such [**2708] federal assistance, @ 504 is applicable to commercial airlines. n1

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n1 As used herein, the term "airport operator" refers to the various entities that own or manage airports and that have authority to apply for planning or development grants from the Trust Fund. "Commercial airlines" refers to all passenger carriers formerly certificated by the Civil Aeronautics Board.

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I

Respondents successfully challenged regulations promulgated by the Civil Aeronautics Board (CAB) to implement @ 504 of the Rehabilitation Act of 1973, 87 Stat. 390, as amended; 29 U. S. C. @ 790 et seq. (1982 ed. and Supp. [***6] II). To understand respondents' arguments, it is necessary to review the process by which the regulations were promulgated.

A. The Rulemaking Process

Section 504 provides:

"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. . . ." 29 U. S. C. @ 794.

The statute did not specifically provide for administrative implementation. In 1976, however, the President issued Executive Order No. 11914, 3 CFR 117 (1976-1980), calling on the [*600] Secretary of Health, Education, and Welfare n2 to coordinate rulemaking under @ 504 by all federal agencies. At that time two federal agencies were principally concerned with aviation: the Federal Aviation Administration (FAA), which is primarily concerned with the Air Traffic Control System and the safety of airline operations, including airports, and CAB, which was primarily concerned with economic regulation of the airline industry. n3 Because @ 504 had been modeled after Title VI of the Civil Rights Act [***7] of 1964, 42 U. S. C. @ 2000d et seq., n4 both FAA and CAB patterned their proposed rules after the regulations issued to implement Title VI.

1. The Notice of Proposed Rulemaking Under @ 504

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n2 This responsibility later was transferred to the Secretary of Health and Human Services when the Department of Health, Education and Welfare was divided into the Department of Education and the Department of Health and Human Services. See The Department of Education Organization Act, Pub. L. 96-88, 93 Stat. 669, codified at 20 U. S. C. @ 3401 et seq.

n3 The FAA became part of the Department of Transportation (DOT) in 1966. CAB later was disbanded and its functions largely transferred to DOT under the Civil Aeronautics Board Sunset Act of 1984, Pub. L. 98-443, 98 Stat. 1703 et seq.

n4 Title VI is the congressional model for subsequently enacted statutes prohibiting discrimination in federally assisted programs or activities. We have relied on case law interpreting Title VI as generally applicable to later statutes. See Grove City College v. Bell, 465 U.S. 555, 566 (1984); see also S. Rep. No. 93-1297, p. 39 (1974).

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[***8]

CAB issued a Notice of Proposed Rulemaking on June 6, 1979. n5 CAB concluded that its authority under @ 504 was limited to those few airlines that receive a subsidy under @ 406(b) or @ 419 of the Federal Aviation Act. n6 CAB announced [*601] its intention, [**2709] however, to go beyond its @ 504 jurisdiction in order to regulate the activities of all commercial airlines. CAB relied on its authority under @ 404 of the Federal Aviation Act of 1958, 49 U. S. C. App. @ 1374.

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n5 Notice of Proposed Rulemaking, Part 382, Nondiscrimination on the Basis of Handicap, 44 Fed. Reg. 32 401 (1979).

n6 49 U. S. C. App. @@ 1376(b) and 1389 (1982 ed. and Supp. II). Section 406 created a program designed to guarantee the air service necessary to transport mail to small communities. That program was terminated in 1982. In 1978, CAB began operating the "section 419 program" in order to subsidize small community and other essential air service that would not otherwise be provided. See Airline Deregulation Act of 1978, Pub. L. 95-504, @ 33, 92 Stat. 1732. This program will operate through 1988.

CAB's decision not to regulate the on-board activities of commercial airlines was consistent with administrative practice under Title VI, which prohibits racial discrimination in any program or activity receiving federal financial assistance. None of the agencies concerned with aviation attempted to regulate the on-board activities of commercial airlines under Title VI. Thus, the consistent administrative interpretation of the program-specific language of Title VI and @ 504 has been that it does not cover commercial airlines, unless the airline itself received subsidies from CAB. See 14 CFR @ 379.2 (1965), 29 Fed. Reg. 19287 (1964) (CAB); 14 CFR @ 15.5(c) (1965), 29 Fed. Reg. 19283 (1964) (FAA). That interpretation of the statutes by the agencies charged with their enforcement in the area of aviation is entitled to deference. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980).

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[***9]

Section 404 contains two provisions relevant here: @ 404(a)(1), requiring all air carriers to "provide safe and adequate service, equipment, and facilities," and @ 404(b), prohibiting carriers from "subjecting any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." CAB explained that "the proposed rules would emphasize that the handicapped are protected by the adequacy of service and antidiscrimination provisions of Section 404 . . . which are applicable to all air carriers, whether or not receiving Federal financial assistance." 44 Fed. Reg. 32401-32402 (1979). Somewhat inexplicably, CAB relied on both provisions of @ 404 taken together to support its regulatory authority over the on-board activities of air carriers, even though it was aware that, under the Airline Deregulation Act of 1978, n7 the antidiscrimination provision of @ 404(b) would lapse as of January [*602] 1, 1983, and only @ 404(a)(1), requiring "safe and adequate service," would remain in effect.

2. The Final Regulations

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n7 Pub. L. 95-504, @ 40(a), 92 Stat. 1705, 1744 (codified at 49 U. S. C. App. @ 1551 (a)(2)(B)).

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[***10]

CAB received public comment on the proposed regulations. Several airlines and the Air Transport Association challenged CAB's regulatory jurisdiction over the airlines. In the interim, Executive Order No. 12250, 3 CFR 298 (1981), transferred responsibility for coordinating the administration of various civil rights statutes, including @ 504, from the Secretary of Health and Human Services to the Attorney General. After public comment and consultation with the Attorney General, CAB issued final regulations. 14 CFR pt. 382 (1986), 47 Fed. Reg. 25948 et seq. (1982).

The regulations have three subparts. Subpart A prohibits discrimination in air transportation against qualified handicapped persons. Subpart B contains specific, detailed requirements that must be followed by all air carriers in providing service to the handicapped. Subpart C sets forth compliance and enforcement mechanisms. As to all three subparts, CAB adhered to its original position that @ 504 supported regulatory jurisdiction only over those carriers that receive funds under @ 406 or @ 419. CAB concluded, however, that the surviving portion of @ 404 -- the "safe and adequate service" [***11] clause of @ 404(a)(1) -- did not support imposition of the specific provisions of subparts B and C on nonsubsidized carriers. Thus, those subparts would apply only to the extent authorized by @ 504, that is, to carriers receiving subsidies under @ 406 or @ 419. CAB concluded, however, that it had authority to extend the reach of subpart A to all air carriers by virtue of @ 404(a)(1)'s "safe and adequate service" clause. The Attorney General approved these regulations.

B. The Court of Appeals Decision

Respondents Paralyzed Veterans of America and two other organizations representing handicapped individuals [*603] (collectively PVA) n8 brought this action in the Court of Appeals for the District of Columbia Circuit. PVA challenged the substance of some of the regulations, as well as CAB's conclusion regarding its rulemaking authority under @ 504. Only the latter claim is before us. On that issue, PVA [**2710] contended that CAB's interpretation of the scope of its rulemaking authority under @ 504 was inconsistent with congressional intent and controlling legal precedent.

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n8 The other respondents are the American Council of the Blind and the American Coalition of Citizens with Disabilities.

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[***12]

The Court of Appeals agreed with PVA's position. Paralyzed Veterans of America v. CAB, 243 U. S. App. D. C. 237, 752 F.2d 694 (1985). In the court's view, @ 504 gave CAB jurisdiction over all air carriers by virtue of the extensive program of federal financial assistance to airports under the Airport and Airway Development Act of 1970, 49 U. S. C. @ 1714, as amended (1976 ed., Supp. V). n9 The Court of Appeals found an additional source of financial assistance to airlines in the form of the air traffic control system in place at all major airports. The court vacated the regulations to the extent that their application was limited to carriers receiving funds under @ 406 or @ 419. It instructed DOT -- CAB's successor agency after CAB was disbanded n10 -- to issue new regulations that would apply to all commercial airlines.

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n9 The 1970 Act has been replaced with the Airport and Airway Improvement Act of 1982, 49 U. S. C. App. @ 2201 et seq.

n10 See n. 3, supra.

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We granted [***13] certiorari to resolve the question of the scope of DOT's regulatory jurisdiction under @ 504. 474 U.S. 918 (1985). We now reverse.

II

It may be helpful briefly to explain the limited nature of the question before us. This case does not present any challenge to CAB's interpretation of the scope of its regulatory jurisdiction under @ 504. Nor is there any challenge to the application [*604] of subpart A -- the general antidiscrimination regulation -- to all commercial airlines. The only issue before us is the Court of Appeals' conclusion that @ 504 applies to commercial airlines as recipients of federal financial assistance.

Section 504 prohibits discrimination against any qualified handicapped individual under "any program or activity receiving Federal financial assistance." We examine first the grants of federal funds to airport operators, which clearly are federal financial assistance, to determine whether it fairly

can be said that commercial airlines "receive" these grants.

A

The starting point of any inquiry into the application of a statute is the language of the statute itself. Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979). [***14] By its terms @ 504 limits its coverage to the " program or activity" that "[receives]" federal financial assistance. At the outset, therefore, @ 504 requires us to identify the recipient of the federal assistance. We look to the terms of the underlying grant statute.

The grant statutes relied on by the Court of Appeals are the Airport and Airway Improvement Act of 1982 (1982 Act), 49 U. S. C. App. @ 2201 et seq., and its predecessor statutes, particularly the Airport and Airway Development Act of 1970 (1970 Act), Pub. L. 91-258, 84 Stat. 219 et seq. (formerly codified at 49 U. S. C. @ 1701 et seq. (1976 ed.)). The 1970 Act established the Airport and Airway Trust Fund, appropriations from which are used to fund airport development. The purpose of disbursements from the Trust Fund is to establish "a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics." 84 Stat. 224. Congress directed the Secretary of Transportation to prepare a national airport system plan, id., at 221, and required airport project applications to be consistent with that plan. Id., at 226. In the 1982 Act Congress authorized disbursements [***15] from the Trust Fund for the Airport Improvement Program (AIP). Under AIP airport operators [*605] submit project grant applications for "airport development or airport planning." 49 U. S. C. App. @ 2201(a). Funds are disbursed for a variety of airport construction projects: e. g., land acquisition, 14 CFR @ 151.73 (1986); runway [**2711] paving, @ 151.77; and buildings, sidewalks, and parking, @ 151.93. The use of the Trust Fund is strictly limited to projects that concern airports. See, e. g., @ 151.89 (authorizing road construction) ("Only those airport entrance roads that are definitely needed and are intended only as a way in and out of the airport are eligible").

It is not difficult to identify the recipient of federal financial assistance under these Acts: Congress has made it explicitly clear that these funds are to go to airport operators. Not a single penny of the money is given to the airlines. Thus, the recipient for purposes of @ 504 is the operator of the airport and not its users.

Congress limited the scope of @ 504 to those who actually "receive" federal financial assistance because it sought to impose @ 504 coverage as a form of contractual [***16] cost of the recipient's agreement to accept the federal funds. "Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a quid pro quo for the receipt of federal funds." Consolidated Rail Corporation v. Darrone, 465 U.S. 624, 633, n. 13 (1984). We relied on this same rationale in

bed finance cost.

Grove City College v. Bell, 465 U.S. 555 (1984), where we noted that the recipient of the federal assistance -- the college -- was free to terminate its participation in the federal grant program and thus avoid the requirements of Title IX. Id., at 565, n. 13. Under the program-specific statutes, Title VI, Title IX, and @ 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision. See Soberal-Perez v. Heckler, 717 F.2d 36, 41 (CA2 1983) ("This emphasis upon the contractual nature of the receipt of federal moneys in exchange [*606] for a promise not to discriminate is still another [***17] reason to conclude that Title VI does not cover direct benefit programs since these programs do not entail any such contractual relationship"), cert. denied, 466 U.S. 929 (1984). By limiting coverage to recipients, Congress imposes the obligations of @ 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to "receive" federal funds. In this case, the only parties in that position are the airport operators.

B

Respondents attempt to avoid the straightforward conclusion that airlines are not recipients within the meaning of @ 504 by arguing that airlines are "indirect recipients" of the aid to airports. They contend that the money given to airports is simply converted by the airports into nonmoney grants to airlines. Under this reasoning, federal assistance is disbursed to airport operators in the form of cash. The airport operators convert the cash into runways and give the federal assistance -- now in the form of a runway -- to the airlines. In support of this position, respondents point to the fact that many of the structures constructed at airports with aid from the Trust Fund are particularly beneficial [***18] to airlines, e. g., runways, taxiways, and ramps. They also find support for their position in Grove City's recognition that federal financial assistance could be either direct or indirect. This argument confuses intended beneficiaries with intended recipients. While we observed in Grove City that there is no "distinction between direct and indirect aid" and that "[there is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the Federal Government are subject to regulation," we made these statements in the context of determining whom Congress intended to receive the federal money, and thereby be covered by Title IX. 465 U.S., at 564. It was clear in Grove City that Congress' intended recipient was [*607] the college, not the individual students to whom the checks were sent from the [**2712] Government. It was this unusual disbursement pattern of money from the Government through an intermediary (the students) to the intended recipient that caused us to recognize that federal financial assistance could be received indirectly. While Grove City [***19] stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal

coverage follows the aid past the recipient to those who merely benefit from the aid. In this case, it is clear that the airlines do not actually receive the aid; they only benefit from the airports' use of the aid.

Respondents do not contend that airlines actually receive or are intended to receive money from the Trust Fund. Nor can they argue that the airport operators are, like the students in Grove City, mere conduits of the aid to its intended recipient, since, unlike the students, the airports are the intended recipients of the funds. Rather, respondents assert that the economic benefit to airlines from the aid to airports is a form of federal financial assistance. This position ignores the very distinction made by Congress in @ 504, and recognized in Grove City: The statute covers those who receive the aid, but does not extend as far as those who benefit from it. In Grove City we recognized that most federal assistance has "economic ripple effects." We rejected the argument [***20] that those indirect economic benefits can trigger statutory coverage. Id., at 572. Congress tied the regulatory authority to those programs or activities that receive federal financial assistance; the key is to identify the recipient of that assistance. In this case, it is clear that the recipients of the financial assistance extended by Congress under the Trust Fund are the airport operators. n11

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n11 This is not to say that Congress could not give federal financial assistance in the form of property improvements, such as a runway. Although the word "financial" usually indicates "money," federal financial assistance may take nonmoney form. Cf. Grove City, 465 U.S., at 564-565. Again, the relevant starting point is the grant statute. If it extends money, then the recipient for the purposes of @ 504 is the entity that receives the money. If the grant statute extends something other than money, then the recipient is the entity that receives whatever thing of value is extended by the grant statute.

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[***21]

[*608] C

By tying the scope of @ 504 to economic benefit derived from Trust Fund expenditures, respondents would give @ 504 almost limitless coverage. Congress' purpose in passing the Acts and establishing the Trust Fund was to confer economic benefits on a large number of persons and businesses. As the House Committee on Interstate and Foreign Commerce explained:

"In addition to the actual users of the airport and airway system -- such as airline passengers, general aviation, including private and business aviation operations, air freight forwarders, individual corporate and private shippers,

etc. -- there are others who benefit substantially from aviation; primarily, perhaps, the military should be considered. From a civilian standpoint those who benefit indirectly include the aircraft manufacturers and all of those whose employment is directly or indirectly related to aviation. To illustrate, an aircraft or aircraft component manufacturer may employ thousands of persons who never fly, yet those persons' economic lives depend entirely on aviation. More indirectly, but still to be considered, are those who make their livelihood by providing services for the [***22] manufacturers' employees. The employees of such corporations indirectly support such nonaviation interests such as real estate brokers and builders, doctors, dentists, school teachers, etc. This is brought forth here to establish the fact that air transportation in a true sense touches every American home, whether those in the home ever fly or not." H. R. Rep. No. 91-601, p. 6 (1969).

[*609] Even if the reach of @ 504 were limited to those whom Congress specifically intended to benefit, the scope of the statute [**2713] would be broad indeed, covering whole classes of persons and businesses with only an indirect relation to aviation. The statutory "limitation" on @ 504's coverage would virtually disappear, a result Congress surely did not intend.

Respondents contend that distinctions can be drawn among classes of beneficiaries under the 1982 and 1970 Acts. In particular, they assert that the ultimate beneficiaries under the Acts are the passengers, while the economic benefit derived by the airlines is intended to aid the airlines in benefiting the passengers. Section 504 provides no basis for this distinction. Nor can we find a basis in the Trust Fund Acts for preferring [***23] passengers over other beneficiaries. Nowhere has Congress expressed a special intent to benefit passengers. Nor has it indicated that the economic benefit to airlines, either because it was more direct or for any other reason, makes them a recipient of federal financial assistance. Rather, Congress recognized a need to improve airports in order to benefit a wide variety of persons and entities, all of them classified together as beneficiaries. n12 Congress did not set up a system where passengers were the primary or direct beneficiaries, and all others benefited by the Acts are indirect recipients of the financial assistance to airports.

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n12 For example, Congress recognized that improved airports would not only satisfy the growing needs of commercial aviation, but also would help foster the significant growth that other areas of civil aviation were experiencing, including air carriers and passengers, air cargo carriers, air taxis, private business flying, and private recreational flying. H. R. Rep. No. 91-601, p. 5 (1969). In short, Congress intended to benefit interstate commerce in general through the means of aiding airports. In the 1970 Act, for example, Congress justified the expenditure because "substantial expansion and improvement of the airport and airway system is [sic] required to meet the demands of interstate

commerce, the postal service, and the national defense." 84 Stat. 219. The 1982 Act contains a similar statement of purpose. 49 U. S. C. App. @ 2201(a)(2).

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[***24]

In almost any major federal program, Congress may intend to benefit a large class of persons, yet it may do so by funding [*610] -- that is, extending federal financial assistance to -- a limited class of recipients. Section 504, like Title IX in Grove City, draws the line of federal regulatory coverage between the recipient and the beneficiary.

III

The Court of Appeals found that airports and airlines are "inextricably intertwined" and that the "indissoluble nexus between them is the provision of commercial air transportation." 243 U. S. App. D. C., at 257, 752 F.2d, at 714. For these reasons, the Court of Appeals concluded that commercial airlines are part of a federally assisted program of "commercial air transportation" because they make use of airports that accept federal funds, and because airports are "indispensable" to air travel.

We find this reasoning overbroad and unpersuasive. The Court of Appeals defined "program or activity" in part by reference to who is benefited by the financial assistance to airports. See id., at 257-258, 752 F.2d, at 714-715. As shown above, regulatory coverage tied [***25] to the scope of the intended benefits of the Trust Fund Acts is inconsistent with congressional intent in passing @ 504. We recognized in Alexander v. Choate, 469 U.S. 287, 299 (1985), that "[any] interpretation of @ 504 must . . . be responsive to two powerful but countervailing considerations -- the need to give effect to the statutory objectives and the desire to keep @ 504 within manageable bounds." The Court of Appeals' reasoning extends @ 504 beyond its bounds. Under the Court of Appeals' view various industries and institutions would become part of a federally assisted program or activity, not because they had received federal financial assistance, but because they are "inextricably intertwined" with an institution that has. For example, Congress, with the assistance of the States, has engaged in a mammoth program of interstate highway construction and maintenance. See the Federal-Aid [**2714] Highway Act of 1956, Pub. L. 627, 70 Stat. 374. Congress in this program [*611] used a Trust Fund approach similar to the Airport and Airway Development Act of 1970. If we accepted the Court of Appeals' construction of " program or activity, " we would [***26] also be compelled to conclude that industries that depend on the federally funded highways for their existence, such as trucking firms and delivery services, are part of a program or activity of national highway transportation. The same could be said of federally supported port facilities. This interpretation of @ 504 would give it a scope broader than its language

implies, and one never intended by Congress.

The Court of Appeals' reliance on Grove City in support of its definition of the relevant program or activity is misplaced. In Grove City, despite the arguably "indissoluble nexus" among the various departments of a small college, we concluded that only the financial aid program could be subjected to Title IX. In any analogy between Grove City and this case, airport operators would be placed in the position of the college. It is readily apparent that our conclusion in Grove City that only a portion of the college was covered by Title IX cannot support the conclusion that commercial air transportation -- a concept much larger than the airports -- is the program or activity covered by @ 504. The Court of Appeals' attempt to fuse airports and airlines into [***27] a single program or activity is unavailing. It is by reference to the grant statute, and not to hypothetical collective concepts like commercial aviation or interstate highway transportation, that the relevant program or activity is determined.

IV

The Court of Appeals also held that the federally provided air traffic control system is a form of federal financial assistance to airlines. n13 The Federal Government spends some [*612] $ 2 billion annually to run this system 24 hours a day nationwide and in various spots around the world. The air traffic controllers are federal employees, and the Federal Government finances operation of the terminal control facilities. In short, the air traffic control system is "owned and operated" by the United States. For that reason, the air traffic control system is not "federal financial assistance" at all. Rather, it is a federally conducted program that has many beneficiaries but no recipients. The legislative history of Title VI makes clear that such programs do not constitute federal financial assistance to anyone. As then-Deputy Attorney General Katzenbach explained:

"Activities wholly carried out by the United States [***28] with Federal funds, such as river and harbor improvements and other public works, defense installations, veterans' hospitals, mail service, etc., are not included in the list [of federally assisted programs]. Such activities, being wholly owned by, and operated by or for, the United States, cannot fairly be described as receiving Federal 'assistance.' While they may result in general economic benefit to neighboring communities, such benefit is not considered to be financial assistance to a program or activity within the meaning of title VI." 110 Cong. Rec. 13380 (1964).

That reasoning, of course, applies with equal force to @ 504. The federal air traffic control system is a public program that does not involve "financial assistance" to anyone. n14

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n13 The Court of Appeals concluded that the air traffic control system constituted federal financial assistance, without specifically concluding that the on-board activities of commercial airlines are a program or activity receiving that assistance. Respondents have suggested that we do not need to reach the question whether the air traffic control system is federal financial assistance. We disagree. If we did not reach the issue, then on remand DOT would be required to formulate its policies in accordance with the conclusion of the Court of Appeals. [***29]

n14 The Court of Appeals reasoned that the air traffic control system constitutes federal financial assistance because the Federal Government is providing the airlines the services of federal personnel. That reasoning is inconsistent with the longstanding and consistent interpretation of the relevant agencies. FAA, like other agencies, originally promulgated regulations implementing Title VI that defined federal financial assistance in a way that allowed for nonmoney assistance. In its definition section, FAA included among possible forms of federal assistance the "detail of Federal personnel." 14 CFR @ 15.23(3) (1965), 29 Fed. Reg. 19286 (1964). DOT's current Title VI regulations use the same phrase. 49 CFR @ 21.23(c)(3) (1985). The air traffic control system does not involve the "detail" of federal personnel; there is, in fact, no other air traffic control entity to which federal personnel can be "detailed" -- the system is self-contained. In 1978, pursuant to its responsibility to coordinate the implementation of regulations under @ 504 by federal agencies, the Department of Health, Education, and Welfare (HEW) published guidelines that substituted the word "services" for "detail." 43 Fed. Reg. 2137. But at the same time HEW explained that it did not intend any substantive change in the definitions:

"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." Id., at 2132.

Later, the Department of Justice was given the task of coordinating the regulations under various civil rights laws, including @ 504. Exec. Order No. 12250, 3 CFR 298 (1980). It retained the HEW definition of federal financial assistance that included "[services] of Federal personnel." 28 CFR @ 41.3(e)(2) (1985). Since the first regulations under Title VI, the interpretation of federal financial assistance has been that the detail, or loan, of federal personnel can constitute federal assistance. "Services" in this context means "detail." No such selection of federal personnel for a particular duty is involved here. The Court of Appeals erred in ignoring this longstanding administrative interpretation. Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). We note that any other interpretation would give almost limitless meaning to the term "federal

financial assistance."

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[***30]

[*613] [**2715] V

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

DISSENTBY: MARSHALL

DISSENT: JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

The Court starts from the proposition that no federal funds under the Airport and Airway Improvement Act of 1982, 49 U. S. C. App. @ 2201 et seq., are disbursed directly to commercial [*614] airlines. It infers that commercial airlines therefore do not "receive" federal financial assistance. And it concludes that @ 504 of the Rehabilitation Act of 1973 is therefore wholly inapplicable to those airlines. That reasoning misperceives the proper inquiry under @ 504.

Section 504 provides that "[no] otherwise qualified handicapped individual . . . 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 or under any program or activity conducted by any Executive agency . . . ." 29 U. S. C. @ 794. The appropriate question is thus not whether commercial [***31] airlines "receive" federal financial assistance. Rather, it is whether commercial airlines are in a position to "[exclude handicapped persons] from the participation in, . . . [deny them] the benefits of, or . . . [subject them] to discrimination under" a program or activity receiving federal financial assistance or conducted by an Executive agency. I believe that they are, and I therefore dissent.

I

The Court begins its analysis at the proper place: the underlying grant statute. See Note, 83 Colum. L. Rev. 1210, 1227-1232 (1983). The Airport and Airway Improvement Act of 1982 (Act), which replaced the Airport and Airway Development Act of 1970, Pub. L. 91-258, 84 Stat. 219 et seq., is designed to ensure "the safe operation of the airport and airway system" and to ensure that system's more effective management and utilization. 49 U. S. C. App. @@

2201(a)(1), (2). To that end, the Act authorizes the Secretary of Transportation to make grants to owners of public-use airports and to certain governmental units for airport development and airport planning. [**2716] @@ 2204(a), 2208(a). It provides for certain other disbursements to airport owners [***32] and to States for the same purposes. @@ 2206, 2207. It authorizes the Secretary to expend other funds for the purposes of acquiring, establishing, [*615] and improving air navigation facilities, @ 2205(a), and operating and maintaining those facilities, @ 2205(c), for associated research and demonstration projects, @ 2205(b), and for certain weather reporting services, @ 2205(d). The Act finally directs the Secretary to fund the Explosive Detection K-9 Team Training Program for the purpose of detecting explosives at airports and aboard aircraft. @ 2225.

The majority never explains the scope of the " program or activity receiving Federal financial assistance or . . . conducted by any Executive agency" that it believes the Act creates. In light of the Court's treatment of the " program or activity" issue in Grove City College v. Bell, 465 U.S. 555 (1984), I believe that the Act is most naturally viewed as creating " programs" or "activities" relating to the construction and maintenance of safe and efficient airports, and the creation of safe airways. That, however, is not the end of the inquiry.

The next question is whether the Department of Transportation [***33] (DOT) has jurisdiction under @ 504 to regulate commercial airlines in order to ensure that handicapped individuals are not "excluded from the participation in, . . . denied the benefits of, or . . . subjected to discrimination under" those programs or activities. n1 In my view, the nature of airline transportation demands that DOT have such authority. If commercial airline companies barred the handicapped from traveling on their airlines at all, then that conduct would deny the handicapped the benefits of federally funded and conducted programs and activities relating to the airport and airway system. When commercial airlines allow the handicapped to travel on airlines, but, unreasonably and solely because [*616] of their handicap, force them to do so under conditions not substantially equal to those enjoyed by persons who are not handicapped, I believe that there too the airlines discriminatorily deny the handicapped the benefits of federally funded programs or activities supporting the airport and airway system.

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n1 The original rulemaking proceedings in this case were undertaken by the Civil Aeronautics Board (CAB). As the Court explains, ante, at 600, n. 3, however, the relevant functions of the CAB were transferred to DOT under the Civil Aeronautics Board Sunset Act of 1984, Pub. L. 98-443, 98 Stat. 1703 et seq. See also Paralyzed Veterans of America v. CAB, 243 U. S. App. D. C. 237, 267, 752 F.2d 694, 724 (1985).

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[***34]

This result derives from the fact that commercial airlines are in a unique position to deny public access to federally funded airport and airway services. It is true, as the Court points out, that the airport and airway system benefits a wide variety of persons and entities, including some who never fly. See ante, at 608-610. At the same time, however, a critical and obvious benefit of the airport and airway system, for members of the general public, is that it allows them to purchase tickets on airlines and to travel from city to city. The vast majority of members of the general public can enjoy that benefit only to the extent allowed, and under conditions set, by commercial airlines. Commercial airlines thus necessarily act as gatekeepers controlling who shall enjoy, and under what conditions, important benefits under federally funded and conducted programs. The airlines' position, as a result, is quite different from that of the trucking firms and delivery services referred to by the majority, ante, at 611. n2

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n2 The majority ignores this aspect of the question presented by the parties by relying unwaveringly on the fact that, as a general matter, no federal funds are disbursed directly to commercial airlines. The Court, however, has never held that fact dispositive. In Grove City College v. Bell, 465 U.S. 555 (1984), indeed, on which the majority heavily relies, the federal funds triggering Title IX coverage were not disbursed to Grove City College at all, but to some of its students. We nonetheless found part of the college subject to Title IX. Cf. Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center, 765 F.2d 1278, 1290 (CA5 1985).

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[***35]

[**2717] The Civil Aeronautics Board (CAB), in promulgating the rules at issue in this case, apparently relied on an understanding that @ 504 gave it no authority whatsoever to regulate [*617] the activities of commercial airlines not receiving direct subsidies under @@ 406 or 419 of the Federal Aviation Act, 49 U. S. C. App. @@ 1376, 1389 (1982 ed. and Supp. II). See App. 88a-89a. For the reasons stated above, I believe that that conclusion was in error. I therefore agree with the Court of Appeals that the regulations should be remanded to DOT to be reconsidered in the light of a proper understanding of the agency's authority under @ 504.

II

Were this case to be remanded, it would be appropriate for DOT to proceed upon an additional premise not available to the CAB in its original rulemaking proceeding: that DOT has power, through regulation of airport operators, to ensure that commercial airlines do not discriminatorily deprive handicapped persons of the benefits of federal programs supporting the airport and airway system. n3 In order to serve an airport, an air carrier must enter into a lease with the airport operator for the use of airport facilities. DOT has power [***36] to direct each federally assisted airport, as part of that lease, to secure from all air carriers serving the airport an assurance of compliance with regulatory standards for service to handicapped persons. n4

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n3 At the time of the original rulemaking proceeding, the involved federal agencies had apparently agreed that regulation of airlines would be in the hands of the CAB, but that regulation of airport operators would be left to DOT. See 44 Fed. Reg. 31451 (1979). DOT, in fact, postponed its inquiry into whether it should require airport operators, "through their leasing agreements with the airlines," to require the airlines to provide service to the handicapped on a nondiscriminatory basis, because the CAB was considering imposing such regulation on the airlines directly. Ibid. At present, DOT exercises jurisdiction over both airlines and airport operators.

n4 DOT officials, at least in the past, have shared this view. See Review of Airline Deregulation and Sunset of the Civil Aeronautics Board (Legislative Proposals Relating to Airline Deregulation and CAB Sunset): Hearings before the Subcommittee on Aviation of the House Committee on Public Works and Transportation, 98th Cong., 2d Sess., 16 (1984) (statement of James Burnley, Deputy Secretary of Transportation) ("I don't think there is any question that we would have the authority to require a federally assisted airport in its contracts with carriers, who are given the right to use the facilities at those airports, that they provide that there will be no discrimination against the handicapped"); see also 44 Fed. Reg. 31451 (1979).

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[***37]

[*618] Such a requirement would be a proper exercise of authority under @ 504. For the reasons stated above, discrimination by commercial airlines against handicapped persons deprives those persons of equal access to the benefits provided by federally supported airport and airway programs. An airport can properly be considered in violation of @ 504 when, through its contractual agreement with the airlines, it perpetuates discrimination against handicapped persons giving those persons unequal access to those programs. See

49 CFR @ 27.7 (1985).

III

This case raises important and difficult issues regarding the extent of federal regulatory authority over entities, not themselves direct recipients of federal financial assistance, that nonetheless, in important respects, control the terms of public access to the benefits of such assistance. The majority ignores these issues because it believes that the single question whether commercial airlines are direct "recipients" of federal financial assistance disposes of this case. Because I find the matter more complicated than that, I dissent.

Document Separator

Dr. Alfred Milbert, Appellant v. Dr. C. Everett Koop, U.S. Surgeon General, et al.

No. 86-5600

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

830 F.2d 354; 1987 U.S. App. LEXIS 13154; 44 Fair Empl. Prac. Cas. (BNA) 1694; 44 Empl. Prac. Dec. (CCH) P37,530; 265 U.S. App. D.C. 206

May 5, 1987, Argued
October 6, 1987, Decided

SUBSEQUENT HISTORY: As amended, February 19, 1988.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the District of Columbia, Civil Action No. 86-00625.

COUNSEL: Mark A. Packman, with whom Judith E. Schaeffer was on the brief, for appellant. Amy C. Applegate also entered an appearance for appellate.

Jeffrey Hunter Moon, Assistant United States Attorney, with whom Joseph E. diGenova, United States Attorney, R. Craig Lawrence and Michael J. Ryan, Assistant United States Attorneys, were on the brief, for appellees.

JUDGES: Edwards and Silberman*, Circuit Judges, and Kaufman**, Senior United States District Judge for the District of Maryland. Opinion for the Court filed by Senior District Judge Kaufman.

* Judge Silberman took no part in the preparation of this opinion and has recused himself in connection with this case.

** Of the United States District Court for the District of Maryland, sitting by designation pursuant to 28 U.S.C. @ 294(d)

OPINIONBY: KAUFMAN

OPINION: [*355] KAUFMAN, Senior United States District Judge

Appellant, Dr. Alfred N. Milbert, has been a member of the Commissioned Corps of the United States Public Health Service (PHS) since 1976. In 1981 the PHS assigned Milbert to the Food and Drug Administration (FDA) to work as a toxicologist. In 1982 Milbert began suffering from a variety of physical ailments allegedly caused by his [**2] exposure to airborne contaminants at his work site. n1. After Milbert was advised by his physicians to avoid further exposure to those contaminants, he requested his immediate supervisors in the FDA to move him to a new office. However, according to Milbert, those supervisors failed to grant the request. n2. Milbert further contends that because he so sought relief concerning his problems with the airborne contaminants, his supervisors retaliated against him by (1) failing to promote him, and (2) giving him a negative work performance appraisal in the October 25, 1987 Commissioned Officer's Effectiveness Report (COER).

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n1 Milbert's complaint in the within case was dismissed on the pleadings by the district court. Accordingly, Milbert's factual allegations are deemed to be true for purposes of this appeal. Shear v. National Rifle Association, 196 App. D.C. 344, 606 F.2d 1251, 1253 (D.C.Cir. 1979).

n2 Milbert states that he was subsequently assigned to another office after he had spoken with senior supervisory officials in the FDA.

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After Milbert had fully but unsuccessfully exhausted his administrative remedies concerning his claim of handicap discrimination, Milbert timely filed this case [**3] in the United States District Court for the District of Columbia, seeking relief solely under section 504 of the Rehabilitation Act, 29 U.S.C. @ 794. Milbert's said complaint was dismissed by the district court, with prejudice, on the ground that members of the Commissioned Corps of the PHS are not entitled to the protections of the Rehabilitation Act. The within appeal followed.

THE REHABILITATION ACT OF 1973 AS AMENDED IN 1978

Congress enacted the Rehabilitation Act in 1973 to aid handicapped individuals and in so doing, in section 501 of that Act, "established the principle that (a) the federal government, (b) federal contractors, and (c) recipients of federal funds cannot discriminate against the handicapped." Prewitt v. United States Postal Service, 662 F.2d 292, 301 (5th Cir. 1981). Section 504 provides that "no otherwise qualified individual . . . 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 financial assistance." 29 U.S.C. @ 794. Section 505 (a)(2) makes applicable to section 504 the "remedies, procedures and rights set forth in Title [**4] VI of the Civil Rights Act of 1964." 29 U.S.C. @ 794(a)(2).

In Prewitt, Judge Tate, in the course of reviewing the legislative history of the Act, commented:

Under the original 1973 Rehabilitation Act, a private cause of action founded on handicap discrimination was not recognized upon section 501 as against a federal government employer; the literal statutory wording merely required federal agencies to submit affirmative actions plans. However, due to differences in statutory wording, all courts that considered the issue found that section 504 established a private cause of action for handicapped persons subjected to discrimination by recipients of federal funds, while the federal courts split on the question whether the same was true under section 503 for individuals subjected to handicap discrimination by federal contractors.

In 1978, the Rehabilitation Act was amended to provide a private cause of [*356] action in favor of persons subjected to handicap discrimination by the federal government employing agencies. In the House, an amendment was adopted and ultimately enacted by the Congress that extended section 504's proscription against handicap discrimination to 'any program [**5] or activity conducted by an Executive agency or by the United States Postal Service;' the legislative history, as well as the judicial interpretations, fully recognized that a private right of action had been created by section 504.

The Senate, at the same time, added a new section 505(a)(1) to the Rehabilitation Act, which created a private right of action under section 501.

Prewitt, 662 F.2d at 302-03 (footnotes omitted) (emphasis in original).

Section 505(a) provides as follows:

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

fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in [**6] order to achieve an equitable and appropriate remedy.

The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. @ 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

42 U.S.C. @ 794(a)(1)(2),.

Thus, Title VII and its exhaustion requirements were incorporated by the Congress in 1978 into the remedy procedures of section 501. By way of contrast, section 504 incorporates Title VI -- not Title VII -- procedures. Title VI, which relates to the cutting off of funding of federal programs when certain prescribed discriminatory conduct occurs, does not contain exhaustion requirements similar to those of Title VII.

Ultimately, both Houses of Congress passed the 1978 amendments to the Rehabilitation Act of 1973, seemingly without recognizing that the 1978 amendments contained two different approaches in the creation of a right of action by a federal government employee against his agency. Commenting in that regard, Judge Tate wrote in Prewitt:

In summary, the 1978 amendments to the Rehabilitation Act [**7] 1) established a private right of action, subject to the same procedural constraints (administrative exhaustion, etc.) set forth in Title VII of the Civil Rights Act, in favor of section 501 claimants, and 2) extended section 504's proscription against handicap employment discrimination to cover the activities of the federal government itself.

Thus, by its 1978 amendments to the Rehabilitation Act, Congress clearly recognized both in section 501 and in section 504 that individuals now have a private cause of action to obtain relief for handicap discrimination on the part of the federal government and its agencies. The amendments to section 504 were simply the House's answer to the same problem that the Senate saw fit to resolve by strengthening section 501. The joint House-Senate conference committee could have chosen to eliminate the partial overlap between the two provisions, but instead the conference committee, and subsequently Congress as a whole, chose to pass both provisions, despite the overlap. 'When there are two acts upon the same subject, the rule is to give effect to both if possible.' United States v. Borden Co., 308 U.S. 188, 198, 60 S. Ct. 182, 188, 84 L.Ed. 181 [**8] (1939). By this same principle, in order to give effect to both the House and the Senate 1978 amendments finally enacted, we must read the [*357] exhaustion of administrative remedies requirement of section 501 into the private remedy recognized by both section 501 and section 504 for federal government handicap discrimination. Prewitt, 662 F.2d at 304 (emphasis in original).

Since 1978, the right of a federal governmental employee to sue his employing agency under the Rehabilitation Act has been unquestioned. See, e.g., Morgan v. United States Postal Service, 798 F.2d 1162 (8th Cir. 1986); Boyd v. United States Postal Service, 752 F.2d 410 (9th Cir. 1985); Shirey v. Devine, 670 F.2d 188 (D.C.Cir. 1982). But there exists a split among the courts as to whether such a suit may be brought under section 504 as well as under section 501. Compare Morgan v. United States Postal Service, 798 F.2d 1162, 1165 (8th Cir. 1986) and cases stated thereat; Smith v. United States Postal Service, 742 F.2d 257, 259-60 (6th Cir. 1948); Prewitt v. United States Postal Service, 662 F.2d 292, 304 (5th Cir. 1981), answering the question in the affirmative, with Boyd [**9] v. United States Postal Service, 752 F.2d 410, 413 (9th Cir. 1985); McGuinness v. United States Postal Service, 744 F.2d 1318, 1321 (7th Cir. 1984), indicating a negative response to that question. However, those courts which have taken the approach that a private cause of action exists under either

section 501 or section 504 or both, have read into section 504 the requirement of exhaustion of administrative remedies in the manner prescribed by section 505(a)(1) and thus by Title VI.

The court below seemingly did not decide the question of whether Milbert can proceed under section 504 since it denied relief on the basis of the "military exception" discussed infra. On appeal, while maintaining his right to proceed herein under section 504, Milbert has alternatively asked this Court to permit him, on remand, to amend his complaint to seek relief under section 501. In view of the underlying philosophy of Fed.R.Civ.P. 15, n3 which favors the grant of petitions to amend, and in view of our disagreement with the court below with regard to the "military exception," see the discussion infra at pp. 9-12, there would appear no reason why we should not grant Milbert's said [**10] alternative request to amend his complaint to enable him to go forward under section 501. In that context, we need not resolve the question, which has divided the circuits, whether a person such as Milbert can proceed under section 504 as well as under section 501. We would, however, strongly suggest that in the future, plaintiffs such as Milbert seek relief under section 501 rather than under section 504.

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n3 See Hanson v. Hoffman, 202 App. D.C. 42, 628 F.2d 42, 53 n. 11 (D.C.Cir. 1980).

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APPLICABILITY OF THE REHABILITATION ACT TO EMPLOYEES OF PHS

Title 42 U.S.C. @ 2000e-16 (referred to in section 501) provides:

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriate funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial [**11] branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin. (Emphasis added).

The question has arisen in other cases as to whether uniformed members of the military service are "employees . . . in military departments" as those words are used in Title VII. A number of courts have answered that question in the negative. In Johnson v. Alexander, 572 F.2d 1219 (8th Cir.), cert. denied, 439 U.S. 986 [*358] (1978), Judge Henley wrote:

From our consideration of the record and of the briefs and arguments it is clear to us that at the heart of plaintiff's claim is the premise that the relationship between the government and a uniformed member of the Army, Navy, Marine Corps, Air Force or Coast Guard is that of employer-employee, and that an applicant for enlistment in one of those armed services is an applicant for 'employment' and should have his application judged by Title VII standards. We cannot accept that premise and accordingly cannot accept counsels' conclusions based thereon.

While military service possesses some of the characteristics [**12] of ordinary civilian employment, it differs materially from such employment in a number of respects that immediately spring to mind, n4 and the peculiar status of uniformed personnel of our armed forces has frequently been recognized by the courts. See, for example, the following cases which, among others, were cited by the district court in its discussion of the question of whether the case

presented a justiciable controversy: Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974); Gilligan v. Morgan, 413 U.S. 1, 93 S. Ct. 2440, 37 L. Ed. 2d 407 (1973); Orloff v. Willoughby, 345 U.S. 83, 73 S. Ct. 534, 97 L. Ed. 842 (1953). See also the discussion of the status of an enlistee in the Army that appears in the rather old case of In re Grimley, 137 U.S. 147, 11 S. Ct. 54, 34 L. Ed. 636 (1890).

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n4 An enlisted man in the Army, for example, is not free to quit his 'job,' nor is the Army free to fire him from his employment. Additionally, the soldier is subject not only to military discipline but also to military law.

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Johnson, 572 F.2d at 1223-24. Similarly, in Gonzalez v. Department of Army, 714 F.2d 926 (9th Cir. 1983), Judge Fletcher concluded [**13] that the 1972 amendments to Title VII, 42 U.S.C. @ 2000e-16 (allowing federal employees to sue their employing federal agency) were "not intended to extend Title VII coverage to enlisted and commissioned members of the armed forces in active service." Gonzalez, 718 F.2d at 928. n4

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n4 But see Judge Weinstein's opposite views in Hill v. Berkman, 635 F. Supp. 1228 (E.D.N.Y. 1986).

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This Circuit has not yet determined, and in the within case, need not determine the question of whether members of the armed forces may bring suit under Title VII. Assuming, however, arguendo only, that members of the armed forces have no such right, the question here at issue is whether commissioned officers of the PHS are, as the court below concluded, analogously expected from the protections of Title VII and, because of Title VII's incorporation into the Rehabilitation Act as amended in 1978, also from the protections of that latter Act. 29 U.S.C. @ 794a(a)(1); 42 U.S.C. @ 2000e-16.

In Salazar v. Heckler, 787 F.2d 527 (10th Cir. 1986), the Tenth Circuit concluded that the case law excepting members of the military from Title VII is equally applicable to commissioned officers of [**14] the PHS. Id. at 533. In Salazar, Judge Bohanon reviewed the many similarities between the commissioned officers of the PHS and members of the armed forces. Salazar, 787 F.2d at 530-31. However, there are also many material differences between commissioned officers of the PHS and members of the armed forces, differences which, in our view, make inapplicable the stated and implied rationales for the "military exception" relied upon by those courts which have excluded active members of the armed forces from the protection of Title VII. Those differences include:

(1) The PHS is not defined as one of the "armed forces." See 10 U.S.C.@ 101(4); 37 U.S.C.) 101(4), n5.

(2) The PHS is an agency of the Department of Health and Human Services. 42 U.S.C. @ 202. It is neither a component [*359] of any armed force nor is its primary mission the assistance of any armed force. Rather, the Congress has assigned to it the task of generally aiding and improving the public health.

(3) Unlike most members of the armed forces, a commissioned officer of the PHS

is free unilaterally to terminate his status as a commissioned officer of the PHS. See Officers Handbook for Officers of the Commissioned Corps (CCPM Pamphlet 10-B) at 7-8. ("Except during a period of war or national emergency when the commissioned corps has been declared a military service, an officer may resign

his commission at any time.")

(4) The PHS is not a "Military Service" until the President so declares, by executive order, in time of war or national emergency. 42 U.S.C. @ 217.

(5) Officers of the PHS are not subject to the Code of Military Justice unless the President so declares pursuant to the provisions of 42 U.S.C. @ 217.

[**15]

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n5 It is to be noted, however, that the PHS is a "uniformed service." See 5 U.S.C. @ 2101(3); 10 U.S.C. @ 1072(1); 37 U.S.C. @ 101(3); 42 U.S.C. @ 201(p). However, the wearing of a uniform does not necessarily mean that the wearer is engaged in military-type duty.

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While the issue is not free from debate, we are of the view that these differences significantly and sufficiently distinguish members of the PHS from members of the armed forces so as to cause us to conclude that the "military exception" to Title VII and therefore to the Rehabilitation Act does not apply to a commissioned officer of the PHS and bar him from bringing suit under the Rehabilitation Act. Therefore, Milbert's within suit is not barred because he is employed by the PHS.

Accordingly, we hereby remand the instant case to the district court for further proceedings during which Milbert shall be permitted to amend his complaint to assert his right to relief under section 501.

Reversed and remanded.

Minnie M. HONEYCUTT, Plaintiff-Appellant, v. John E. LONG, Major General Commander, Army and Air Force Exchange Service, Defendant-Appellee

No. 87-1803

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

861 F.2d 1346; 1988 U.S. App. LEXIS 17197; 48 Empl. Prac. Dec. (CCH) P38,517; 12 Fed. R. Serv. 3d (Callaghan) 705

December 20, 1988

SUBSEQUENT HISTORY: As amended December 20, 1988.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Northern District of Texas.

COUNSEL: Hal H. Gillespie, Dallas, Texas, ATTORNEY FOR APPELLANT.

Myrna B. Silen, AUSA, Dallas, Texas, Mariann Irene Martin, Dallas, Texas, ATTORNEYS FOR APPELLEE.

JUDGES: Brown, Williams and Garwood, Circuit Judges.

OPINIONBY: WILLIAMS

OPINION: [*1348]

JERRE S. WILLIAMS, Circuit Judge:

Minnie E. Honeycutt instituted this employment discrimination suit against Major General John E. Long, in his role as Commander of the Army & Air Force Exchange Service ("AAFES"). The district court dismissed Honeycutt's suit for failure to name the proper party defendant and for insufficiency of process under Fed.R.Civ.P. 4(d)(4) and (5). We affirm.

I. Facts and Prior Proceedings

Honeycutt has been employed by the AAFES since October 23, 1967. On September 6, 1985, Honeycutt contacted an AAFES Equal Employment Opportunity counselor to complain that she had not been promoted because of her sex, age, and handicap. Honeycutt proceeded through the appropriate administrative channels, and on January 14, 1987, she received a final adverse decision from the AAFES. Honeycutt filed this suit on February 4, 1987 under Title VII, 29 U.S.C. @ 2000e-16, the Rehabilitation Act, [**2] 29 U.S.C. @ 791, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. @ 633a, naming Long as the sole defendant. Honeycutt served process on Long on February 11, 1987.

On April 9, 1987, Long filed a motion to dismiss or, in the alternative, for summary judgment on the grounds that Long was not the proper party defendant and that service of process was insufficient under Fed.R.Civ.P. 4(d)(4) and (5).n1 Honeycutt responded to the motion by asserting she had sued the correct party and by requesting leave to amend her complaint to add the Secretary of Defense as the named defendant under Fed.R.Civ.P. 15(c). Honeycutt also proceeded to perfect process by serving the United States Attorney for the Northern District of Texas on June 2, 1987.

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n1 Rule 4(d)(4) and (5) provide a uniform and comprehensive method of service of the federal government:

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

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[**3]

A memorandum order and final judgment were issued on July 23, 1987. The district court granted the Commander's motion to dismiss or, in the alternative, for summary judgment and denied Honeycutt's request to amend her complaint. This appeal followed.

II. The Proper Party Defendant

A government employee has thirty days from the receipt of the final agency ruling informing her of her rights to appeal by filing a Title VII employment discrimination action. n2 42 U.S.C. @ 2000e-16(c); Brown v. General Serv. Admin., 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976); Bell v. Veterans Admin. Hosp., 826 F.2d 357, 360-61 (5th Cir.1987). In this case, Honeycutt had until February 13, 1987 to file her complaint against the proper defendant. [*1349] She timely filed her complaint on February 4, 1987; however, she mistakenly chose Long as the defendant.

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n2 Honeycutt could have filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and awaited the EEOC's decision before filing a lawsuit. 42 U.S.C. @ 2000e-16(c). She elected instead to bypass the EEOC and institute this action.

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Under Title VII and the Rehabilitation Act the proper defendant is "the head of the department, [**4] agency, or unit, as appropriate." 42 U.S.C. @ 2000e-16(c); 29 U.S.C. @ 794(a)(1) (adopts Title VII procedures). The Supreme Court has also held that the ADEA is to be construed in accordance with Title VII. Lehman v. Nakshian, 453 U.S. 156, 168 n. 15, 101 S.Ct. 2698, 2705 n. 15, 69 L.Ed.2d 348 (1981) ("measures used to protect Federal employees [from age discrimination] would be substantially similar to those" in Title VII); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756, 99 S.Ct. 2066, 2071, 60 L.Ed.2d 609 (1979) (stating the parallel provisions of the ADEA should be construed consistently with Title VII); see also Smith v. Office of Personnel Management, 778 F.2d 258, 262 (5th Cir.1985), cert. denied, 476 U.S. 1105, 106 S.Ct. 1949, 90 L.Ed.2d 358 (1986) (stating Title VII case law will be used to construe the ADEA). Thus, the appropriate defendant to be sued under the ADEA is the same

person as under Title VII and the Rehabilitation Act.

Both Title VII and the ADEA specifically state that this law identifying the proper defendant applies to personnel actions affecting employees in military departments as defined in 5 U.S.C. @ 102, and in executive agencies as defined

[**5] by 5 U.S.C. @ 105. See 42 U.S.C. @ 2000e-16(a) and 29 U.S.C. @ 633a(a). Military departments are defined as the Department of Army, the Department of Air Force, and the Department of Navy. 5 U.S.C. @ 102. An executive agency means an executive department, a government corporation, and an independent establishment. 5 U.S.C. @ 105. The Department of Defense is an executive department. 5 U.S.C. @ 101. An independent establishment means an establishment in the executive branch which is not an executive department, military department, or part thereof. 5 U.S.C. @ 104. The AAFES is a part of the Department of Defense. n3 Thus, the AAFES by statutory definition is not an executive department, military department, executive agency, or independent establishment.

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n3 The AAFES is a Nonappropriated Fund Instrumentality ("NAFI") of the United States operating under the Department of Defense. It is directed by a board of directors composed of Army and Air Force members. In the Department of Defense Directive 1401.1-M, Personnel Policy Manual for NAFI's, NAFI employees are stated to be federal employees within the Department of Defense.

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Clearly, the Commander of AAFES is then not the head [**6] of a "department, agency, or unit" so that he would be a proper defendant under the statute. n4 A proper defendant in this case would be the head of the Department of Defense, the Secretary of Defense, since the Department of Defense is an executive department. n5 Thus, Honeycutt incorrectly sued the wrong party.

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n4 Unit as set out in 42 U.S.C. @ 2000e-16(c) is a unit of the District of Columbia or the federal legislative and judicial branches having positions in the competitive service. AAFES, therefore, cannot be a unit as NAFI employees are not civil servants.

n5 Also, since the AAFES is run jointly by the Department of the Air Force and the Department or the Army, Honeycutt could properly have sued the Secretary of the Air Force and the Secretary of the Army jointly. See Gonzales v. Secretary of the Air Force, 824 F.2d 392 (5th Cir.1987), cert. denied, U.S. , 108 S.Ct. 1245, 99 L.Ed.2d 443 (1988).

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III. Relation back under Fed.R.Civ.P. 15(c)

Honeycutt asserts the district court was incorrect in denying Honeycutt's motion to amend her complaint to add the Secretary of Defense as the proper party. Under 15(c) of the Fed.R.Civ.P., this amendment [**7] would allow for relation back to the original filing date so that Honeycutt would be deemed to have filed timely against the Secretary. n6 This Court is [*1350] bound by Schiavone v. Fortune, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986), which sets out four requirements for relation back of an amended pleading that brings in a new party under Rule 15(c):

(1) the basic claim must have arisen out of the conduct set forth in the original pleading; 2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; 3) the party must or should have known that, but for a mistake concerning identity, the action would

have been brought against it; and 4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Id. at 29, 106 S.Ct. at 2384. In order for an amended pleading to relate back, all four factors must be satisfied. It is not disputed that Honeycutt satisfies the first factor. It is the other three factors that are at issue on appeal.

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n6 Fed.R.Civ.P. 15(c) reads as follows:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

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[**8]

The questions before us then are (1) whether the Secretary of Defense had sufficient notice of Honeycutt's federal law suit so that no prejudice would result to the Secretary in maintaining a defense, (2) whether the Secretary knew or should have known that the action brought against Long would have been brought against him but for Honeycutt's mistake in the complaint naming Long, and (3) whether the above two requirements were satisfied within the 30-day limitations period of 42 U.S.C. @ 2000e-16(c). Thus, the focus is on notice within the limitations period.

In Schiavone, the Supreme Court did not decide the type of notice required to satisfy the set out requirements but it did decide proof of some notice was necessary. It also indicated the focus should not be on when notice is given, but when it is received. The court concluded that Rule 15(c) should be applied literally:

We do not have before us a choice between a "liberal" approach toward Rule 15(c), on the one hand, and a "technical" interpretation of the Rule, on the other hand. The choice instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says.
[**9] Id. at 30, 106 S.Ct. at 2385.

This Court has applied the Schiavone factors in three recent decisions. Gonzales, supra; Brown v. Department of the Army, 854 F.2d 77 (5th Cir.1988); Lamb v. United States Postal Service, 852 F.2d 845 (5th Cir.1988). In [Text Deleted by Court Emendation] these cases, we upheld the District Court's ruling denying the plaintiff the benefit of Rule 15(c). In [Text Deleted by Court Emendation] each case, it was clear that no government entity had any notice within the 30 day period.

Honeycutt's situation is distinguishable since AAFES, a government entity, had actual notice within the statutory period. Nevertheless, relief must be denied because of the failure of any notice of any kind to the proper government defendant within the required time period. In Gonzales, this Court expressly left open whether some kind of informal notice to the proper defendant within the statutory period would be sufficient under 15(c). 824 F.2d at 396, n. 3. In Barkins v. International Inns Inc., 825 F.2d 905, 907 (5th Cir.1987), this Court said that Schiavone did not affect this Circuit's precedent concerning what constitutes notice under 15(c), suggesting that as long as there is evidence of

some [**10] kind of notice to the proper party, whether formal or informal, within the appropriate period, the Schiavone factors might be satisfied. Thus, Honeycutt needed to prove some kind of notice to the Secretary of Defense that prevented prejudice. Otherwise she could not claim the benefit of rule 15(c).

Honeycutt argues that by serving process on Long on February 4, eight days before the statutory time period ran out, knowledge of the suit can be assumed to [*1351] have reached, or at least can be imputed to, the Secretary of the Defense. The district court found it unconvincing that there was sufficient identity n7 between the AAFES and the Department of Defense for purposes of service or for purposes of notice of the pending lawsuit. Based upon Schiavone, we are compelled to agree. Honeycutt failed to submit any evidence on the issue other than the fact Long was served.

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n7 Generally "identity of interest" means the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of litigation to the other. See Kirk v. Cronvich, 629 F.2d 404, 408 n. 4 (5th Cir.1980) (the court found a sufficient identity between the sheriff and the sheriff department to impute notice).

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[**11]

First, we cannot conclude that service of Long within the statutory period resulted in actual notice to the Secretary of Defense. The lack of evidence compels the conclusion that notice did not make it through the ranks of the military in eight days, the amount of time remaining in the period from the day Long was served with process. The only evidence in the record reflects that there was no notice. Service was not even acknowledged in the AAFES office until February 11, 1987, which was only two days before the statutory period ended. It is highly unlikely that in two days the Secretary of Defense's office became aware of the suit.

Honeycutt also failed to prove that notice should be imputed. The District Court correctly held a lack of "identity of interest" between the two defendants. The AAFES is a subdivision of the Department of Defense, but it is located in a different city and does not share counsel with the Department. n8

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n8 It is noteworthy that only the General Counsel of the Department of Defense may accept service of process for the Secretary. 32 C.F.R. @ 257.5(a).

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Honeycutt's case is distinguishable from prior cases in which we have found enough relation between the [**12] original party sued and the one sought to be added to infer sufficient notice. In Hendrix v. Memorial Hospital of Galveston County, 776 F.2d 1255, 1257-58 (5th Cir.1985), the evidence showed that the original party and the party sought to be added used the same mailing address, same counsel, and were located in the same complex. This Court was willing to infer notice. Honeycutt's facts are far removed from such focussed service.

In Marks v. Prattco, Inc., 607 F.2d 1153, 1156 (5th Cir.1979), we allowed relation back where counsel for the party sought to be added had participated in the original hearing and in its answer to the original complaint had made it clear that it was aware of the law suit within the relevant period. In the case before us, Secretary of Defense's counsel did not participate in any way.

In Montalvo v. Tower Life Building, 426 F.2d 1135, 1146-47 (5th Cir.1970), plaintiffs named the Tower Life Building in the original complaint and sought to amend to name the Tower Life Insurance Company. We allowed relation back, holding that the allegation of the name of the party was simply a misnomer. We found relevant the fact that it was through the general counsel [**13] of the Company that the Building answered. Also, the Company was officed in the Building and kept the records of the Building. Id. at 1146.

Finally, in Barkins, we also allowed relation back. The original party and the party sought to be added shared counsel who had represented the employer at the EEOC hearing and had received a copy of the EEOC's right to sue letter. 825 F.2d at 907. Honeycutt's situation does not fall into any of these fact patterns.

It is the utmost importance to emphasize that a person doubtful about whom to sue in the federal government has a safe and effective option under Rule 15(c). Realizing that the appropriate party defendant can be confusing when suing the government, Congress amended Fed.R.Civ.P. 15(c) in 1966 to provide specific guidance:

The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a [*1352] proper defendant if named, satisfies the requirements of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Thus, Honeycutt [**14] could have preserved her right to use Rule 15(c) simply by serving the United States Attorney within the 30 day period. Service upon the United States Attorney within the statutory limitations period allows relation back under Rule 15(c). Edwards v. United States, 755 F.2d 1155, 1156 (5th Cir.1985). If she had followed the clear language of 15(c), she would have achieved adequate service to allow later amendment. n9

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n9 The earlier holdings of our Circuit in Hendrix and in Kirk that the period for notice includes a reasonable time to perfect service were explicitly rejected in Schiavone. 477 U.S. at 30, 106 S.Ct. at 2385. Thus, the fact that service was perfected on June 2 by serving the United States Attorney does not help Honeycutt here. She had to accomplish it in the 30 day period to be protected under 15(c).

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In addition, we must recognize that the concerns with allowing relation back when the government is the defendant are more stringent than in private civil cases. The Federal Government is clothed with the cloak of sovereign immunity. 453 U.S. at 161, 101 S.Ct. at 2701. Waivers of sovereign immunity are to be strictly construed. Library of Congress v. [**15] Shaw, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986). Title VII allows for suits against the Government; thus, it must be strictly construed.

IV. Equitable Tolling and the ADEA Statute of Limitations

Honeycutt raises for the first time on this appeal the claim that the district court erred in applying the 30 day statute of limitations to her ADEA claim and in not addressing equitable considerations before dismissing the suit based on the statute of limitations.

An issue raised for the first time on appeal may be considered by this Court where exceptional circumstances are present, provoking a miscarriage of justice. Ayers v. Western Line Consolidated School District, 691 F.2d 766, 768 (5th

Cir.1982). Exceptional circumstances include 1) when a pure question of law is involved and a refusal to consider it would result in a miscarriage of justice, Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1144-1145 (5th Cir.1981); and 2) where the interests of substantial justice are at stake, Edwards v. Sears, Roebuck, and Company, 512 F.2d 276, 286 (5th Cir.1975). Honeycutt has failed to show exceptional circumstances in light of the established law under [**16] Schiavone and the protections to proper service procedure in Rule 15(c). Honeycutt's failure to raise the application of the statute of limitations and the equitable claim of relief from the application of the statute at the District Court level precludes the consideration of either one as grounds for reversal.

V. Conclusion

We hold that appellant's suit was properly dismissed for failure to designate the Secretary of Defense as the proper defendant or to substitute for that failure service on the United States Attorney or the Attorney General under Fed.R.Civ.P. 15(c). Further, we hold that the District Court was correct in denying Honeycutt's motion to amend her petition under the same rule. We must affirm.

AFFIRMED.

CONCUR BY: BROWN, (In Part)

DISSENT BY: BROWN, (In Part)

DISSENT: JOHN R. BROWN, Circuit Judge, dissenting in fact, but concurring n1 with lamentations in law.

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n1 The Court, over my somewhat spirited defense, has ruled in Gonzales v. Secretary of Air Force, 824 F.2d at 395; therefore as a loyal trooper I am bound although still convinced of the error of our--and with utmost deference, the Supreme Court's--ways.

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Perhaps, at least with respect to F.R. Civ.P. 15(c) cases, I should adopt [**17] the position of a former Chief Judge that dissenting opinions are "generally useless." See Payne v. McLemore's Wholesale and Retail Stores, 654 F.2d 1130, 1147 (5th Cir.1981); (Coleman, J., dissenting). Despite the temptation to resign myself to the futility [*1353] of dissent, I find the unfairness of dismissing litigants such as Minnie Honeycutt--especially in light of the intent of the 1966 amendments to Rule 15(c) to mitigate the harshness of pleading errors which impart no damage to the opposing party--too severe to be accepted as an unavoidable evil under the guise of interpretation.

While I agree with the court's conclusion in Part II that Commander Long of AAFES is not a proper party defendant, I find myself once again at odds with the court with respect to the application of Rule 15(c)'s allowance for an amendment of a complaint to relate back. See Gonzales v. Secretary of Air Force, 824 F.2d 392, 396-400 (5th Cir.1987) (Brown, J., dissenting). Unlike Gonzales, my disagreement in the instant case is primarily factual for I disagree with the court's conclusion that the Secretary of Defense failed to receive any notice--actual or imputed--within the 30-day limitations period [**18] and therefore cannot be substituted as the defendant under Rule 15(c).

Will the Real Defendant Please Stand Up?

I find no fault with the court's analysis of 42 U.S.C. @ 2000e-16(c) and related statutory provisions which ultimately concludes that Long, the Commander of AAFES, is not a proper defendant in this ADEA action. In this context,

however, I must point out that (i) the Commander of AAFES has been a named defendant in a Title VII class action, n2 and (ii) the Third Circuit recently stated, in interpreting @ 2000e-16(c), that the correct defendant in a Title VII action is either the Secretary of Defense or the head of AAFES. Williams v. Army and Air Force Exchange Service, 830 F.2d 27, 31 (3d Cir.1987). ("It is clear that had . . . counsel consulted the statute . . . he would have ascertained that the correct defendant was the Secretary of Defense or the head of the Agency (AAFES).") I raise these two points to highlight the fact that Honeycutt's failure to sue the correct party should not be scoffed at or dismissed as a mere act of attorney carelessness. To the contrary, Honeycutt and her attorneys could stand fairly confident that they had indeed sued the correct party. [**19] Although--as the majority urges with respect to relation back--the plaintiff employee could have safely served process on the United States Attorney under F.R.Civ.P. 15(c), this option is of little aid to one who has no serious doubt that he has served a proper party defendant.

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n2 Shafer v. Commander, Army and Air Force Exchange Service, 667 F.Supp. 414 (N.D.Tex. 1985) (a formidable Title VlI sex discrimination class action suit).

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Finally, I believe this court should join the ranks of those courts n3 which have criticized ambiguities in EEOC and agency right to sue letters, and extend that criticism to agency correspondence which advises prospective plaintiffs of their legal rights to sue in federal court. n4 I urge AAFES, as the court urged the Secretary of Defense in Williams, n5 to reconstruct its notice to employees about their rights to appeal agency disposition of discrimination complaints to identify by specific name and title the proper party to be sued in a civil action. n6 This does not rest on any notion [*1354] that there has been any active misrepresentation to employees such as Honeycutt. Rather it is to acknowledge the inherent confusion of applying @ 2000e-16(c) [**20] to an organizational structure as complex as AAFES. n7

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n3 Williams v. Army and Air Force Exchange Service, 830 F.2d 27, 31 (3d Cir.1987); Mondy v. Secretary of the Army, 845 F.2d 1051, 1052 n. 1 (D.C.Cir.1988); Lubniewski v. Department of Navy, 682 F.Supp. 462, 464 (N.D.Cal.1988).

n4 The Department of Health and Human Services identifies the proper defendant in its right to sue letters, and I see no reason why AAFES cannot do the same for its AAFES employees in correspondence explaining their options to file civil actions.

n5 See Williams, supra, 830 F.2d at 31.

n6 Honeycutt received a Notice of Proposed Disposition of Discrimination Complaint from an AAFES Deputy EEO Officer in addition to the final agency decision. The Notice, pursuant to 29 C.F.R. @@ 1613.221 and 1613.282, advised Honeycutt that "[u]pon receipt of notification [of the proposed disposition of her complaint], you may appeal to the Equal Employment Opportunity Commission . . . or file a civil action in an appropriate U.S. District Court within 30 days." Only one additional phrase would be required to identify the proper defendant and give an employee not only notice of her right to sue, but also a chance to vindicate her overriding right to be free from employment discrimination. [**21]

n7 In the first place what is the agency, and then who is its head? Is it the Department/Secretary of the Army? The Department/Secretary of the Navy? The Department/Secretary of the Air Force? Or the Department/Secretary of Defense?

AAFES is called a nonappropriated fund instrumentality of the Department of Defense. In other words, "The Secretary of Defense has vested in the Secretaries of the Army and the Air Force all functions, power, and duties relating to exchange and motion picture activities within their departments." A.R. 60-10/AFR 147-7, para. 1-5.

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Relation Back: A Long-Lost Cousin?

In the oft repeated words of Schiavone, notice is the "linchpin" of relation back under Rule 15(c). Schiavone, 477 U.S. 21, 33, 106 S.Ct. 2379, 2386, 91 L.Ed.2d 18, 29. The notice requirement serves to protect a party from prejudice who is named to the suit after the limitation period. The court concludes that the record does not establish whether the Secretary of Defense had either actual or imputed notice of the suit against AAFES's Commander Long. My objection to the court's position is basic: (i) neither the trial court nor this court afforded any opportunity to Honeycutt either [**22] to establish or, for that matter ascertain through minimal discovery, whether that global enterprise known officially as The Department of Defense (and its Head, the Secretary) and symbolized by the Pentagon which houses its thousands of employees, was aware, before expiration of the statute of limitations, of the suit against Commander Long; and (ii) there is sufficient evidence of identity of interest to impute notice from Commander Long of AAFES to the Secretary of Defense.

Looking first at (ii) identity of interest this court has previously stated in Kirk that "where service of the original complaint is perfected upon an agent of a party sought to be brought in by amendment, there is adequate notice of the action to that party." Kirk v. Cronvich, 629 F.2d 404, 407 (citations omitted). A review of the structure of AAFES supports the conclusion that the Commander of AAFES is an agent of the Secretary of Defense, and therefore notice can be imputed.

The Secretary of Defense delegated authority to the Secretaries of the Army and Air Force to operate AAFES. n8 Those two Secretaries, in turn, set up a Board of Directors to administer AAFES. Commander Long serves as the executive [**23] agent for the Board of Directors for the administration of AAFES and also as a member of the Board of Directors. n9

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n8 See n. 5 supra.

n9 A.R. 60-10/AFR 147-7 paras. 1-7, 2-1.

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AAFES civilian personnel, such as Honeycutt, are federal employees within the Department of Defense. n10 The Commander of AAFES is responsible for setting "the policies, programs and procedures governing the administration of AAFES civilian employees . . . according to the objectives of the DOD [Department of Defense] Personnel Policy Manual . . . and the basic policies approved by the Board of Directors." n11

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n10 Personnel Policy Manual For Nonappropriated Fund Instrumentalities, DOD 1401.1-M, para. 1-E.

n11 A.R. 60-10/AFR 147-7, para. 3-10d(2).

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Additionally, the notice that Honeycutt received of her final interview with the AAFES EEO Counselor stated in paragraph 3 that the Commander of AAFES was authorized to receive discrimination complaints. n12

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n12 The AAFES letterhead on which the notice appeared displayed both the shield of the Department of Defense and the AAFES logo.

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Putting the Picture Puzzle Together--Where Does--The AAFES--the DOD Fit?

Putting these pieces of the puzzle [**24] together, we have undeniable delegation of authority on the part of the Secretaries of Defense, Army and Air Force to the Commander [*1355] of AAFES to handle, at minimum, all civilian personnel matters, including discrimination complaints and suits. This delegation indicates that at the very least Commander Long was an agent of the Secretary of Defense. Thus under Kirk we may, and should, impute notice to the Secretary of Defense from the timely service upon Long. There is no reason why this agency relationship should be deemed to evaporate when an employee's claim of discrimination leaves the realm of the administrative process and enters the doors of a federal court.

The Government's argument that placement of the Department of Defense shield along with that of AAFES on the notice letterhead (see n. 10 supra) should alert employees that the Secretary of Defense, not AAFES, is the proper defendant in Title VII and ADEA cases is, or borders on, the absurd. That very shield illustrates the closeness of the two entities. Whom to sue, and how the respondent is to be described--by title or by name, by the agencies above or below him/her--are not reflected in these Heraldic Shields.

[**25] Was the Exalted Secretary of Defense Aware of Knowledge by His Subordinate:--AAFES--Commander Long?

Even assuming that notice cannot be imputed to the Secretary of Defense from service on Commander Long as I have urged under (ii), I further think it is most objectionable that this court declines to remand this case to the trial court to determine, after carefully controlled discovery, whether the Secretary of Defense or an authorized subordinate had actual notice within the meaning of Schiavone of the pendency of this case within the limitation period.

The court flatly rejects the notion that there indeed could have been actual informal notice by speculating that "it is highly unlikely that in two days [n13] the Secretary of Defense's office became aware of the suit." The court also states that Honeycutt failed to prove that notice of her claim against AAFES filtered "through the ranks of the military" within the eight day period between delivery of service to Commander Long and the running of the limitation period.

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n13 The time remaining in the limitation period after service on Commander Long was acknowledged.

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There is no contest that the record is insufficient to [**26] show actual notice. The trouble is that the trial court--even worse this court--denied the employee any opportunity to ascertain, much less establish what the facts are. Without the benefit of discovery, which in effect we now deny, I cannot fathom how an untutored government employee face to face with the glacial ominence of

the federal establishment can be expected to make a showing of actual notice. Without either access to relevant materials from the files of the Commander of AAFES, his legal counsel, the Secretary of Defense and the General Counsel of the Secretary of Defense, or answers to interrogatories to ascertain other notices of the Honeycutt suit, the employee has no means of proving actual i.e. imputed or informal notice.

If the notion of informal actual (including imputed) notice is to be accorded any meaning, then the employee must be afforded an opportunity for discovery before the trial or this court decides the issue.

Discovery Thwarted

Before Honeycutt received Commander Long's responses to a set of interrogatories, the trial court granted Long's motion to stay all discovery pending resolution of his motion to dismiss. This court has long recognized the trial [**27] judge's broad discretion with respect to handling discovery. We find an abuse of discretion only if a discovery order is arbitrary or clearly unreasonable. See, e.g., Mayo v. Tri-Bell Industries, 787 F.2d 1007, 1012 (5th Cir.1986); Dukes v. South Carolina Insurance, 770 F.2d 545, 548-49 (5th Cir.1985); Scroggins v. Air Cargo, Inc., 534 F.2d 1124, 1133 (5th Cir.1976). However, a denial [*1356] of discovery as to matters relevant to a motion for denial or grant of summary judgment can constitute an abuse of discretion. Petrus v. Bowen, 833 F.2d 581 (5th Cir.1987), Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1304 (5th Cir. 1983); Scroggins, supra, 534 F.2d at 1133; Panola Land Buyers Ass'n. v. Shuman, 762 F.2d 1550, 1560 (11th Cir.1985).

Even though the employee did not directly challenge the trial court's denial (stay) of discovery, the problem remains as to the role of the district court, and this court when there is a Schiavone and relation-back problem by a governmental employee seeking to vindicate the right given him/her by Congress to challenge in an Article III court the right to relief.

That discovery would have been fruitful can hardly be [**28] doubted in this day and world of big, big government and its enveloping bureaucracy. It would have displayed to an almost certainty that the last thing the Secretary of Defense--surrounded by hundreds of civilian experts and literally thousands of military supporters of tan, green and blue uniforms, conferring with Joint Chiefs of Staff on worldwide problems of defense strategy, the planning for and choice of defensive weapons bearing worldwide political implications--would be concerned about is this suit in Dallas Texas by one single AAFES employee claiming she was discriminated against by being denied various promotions.

Obviously in an enterprise as widefolding and demanding, Congress--with or without the focus of national TVs--would have expressed dismay, indeed outright disapproval, of any system--really non-system--that committed any such prosaic matters to a person already so overwhelmed by global, political, military, geographic problems.

Obviously within this vast bureaucracy, the Secretary must have, a formalized system n14 for receipt of legal notices, summons, and citations which Congress has ordained--or courts have declared--are to be served on "the Secretary."

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n14 On argument, the United States Attorney, clothed with the full armor of the sovereign advised this court that indeed, there is such an office in the Pentagon. Imagine in its absence the plight of a Deputy United States Marshal, trying to penetrate the maze of Pentagon halls to gain entrance into the bureaucratically defended redoubt of the Secretary, or worse a civilian attorney hand carrying service of process as allowed under F.R. Civ.P. 4(c)(2)(A).

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[**29]

Undoubtedly within the labyrinth of the Pentagon there was an office to whom Commander Long routinely under appropriate regulations or directives sent word that he had been served with a legal summons in Honeycutt's case. If this took place it was enough to charge then Secretary Weinberger (or his successor) with notice that such a claim was being asserted. No one--and certainly not the Supreme Court--over envisioned that its Schiavone notice had to be actual, not imputed.

In the never ending list of those cases n15 in which we throw out at least qualified suitors for failure to distinguish between the United States or the Departments of Defense, Army, Air Force, Navy, or Coast Guard and the relevant Department's Secretary, the minimum the trial and this court should do is to permit proof, with adequate discovery, of the governmental agency's procedure on service of notice or summons.

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n15 E.g., Brown v. Department of Army, 854 F.2d 77 (5th Cir.1988); Harris v. Department of Transportation, 843 F.2d 219 (5th Cir.1988); Williams v. Army & Air Force Exchange Service, supra, 830 F.2d 27; Koucky v. Department of Navy, 820 F.2d 300 (9th Cir.1987); Lubniewski supra, 682 F.Supp. 462; Portis v. Department of Army, 117 F.R.D. 579 (E.D.Va.1987).

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[**30]

Conclusion

For these reasons, I cannot endorse the further erosion of the principles of the 1966 amendments to Rule 15(c). These amendments sought to eliminate the inequities and injustice of the "sporting theory of justice" n16 whereby minor pleading errors deprived litigants with legitimate claims of their day in a federal court.

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n16 Schiavone, 477 U.S. 21, 33, 106 S.Ct. 2379, 2386, 91 L.Ed.2d 18, 29 (Stevens, J., dissenting) (quoting Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A.B.A. Reps. 395, 404-05 (1906).

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[*1357] Therefore, I respectfully dissent and concur with reservations.

YVONNE OLIVER, as Administratrix of the Estate of Clarence Oliver, deceased, PLAINTIFF, v. THE UNITED STATES ARMY, and MICHAEL P.W. STONE, Secretary of the Army; THE UNITED STATES AIR FORCE and DONALD B. RICE, Secretary of the Air Force; the ARMY and AIR FORCE EXCHANGE SERVICE, and MERVIN ROBINSON, Each and All in Their Official Capacities, DEFENDANTS

No. LR-C-90-41

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

758 F. Supp. 484; 1990 U.S. Dist. LEXIS 18506

December 13, 1990, Decided
December 13, 1990, Filed

SUBSEQUENT HISTORY: Supplemental Opinion Reported at 1991 U.S. Dist. LEXIS 3317.

PRIOR HISTORY:
Reported at 758 F. Supp. 484 at 487.

COUNSEL: [**1]

Ms. Arkie Byrd, Little Rock, Arkansas, for Plaintiff.
Ms. Lesa Jackson, Asst. U.S. Atty., Little Rock, Arkansas, for Defendants

JUDGES: Elsijane T. Roy, United States District Judge.

OPINIONBY: ROY

OPINION: [*484] ORDER

ELSIJANE T. ROY, UNITED STATES DISTRICT JUDGE

Before the Court is the defendants Motion to Dismiss and Motion to Strike. The plaintiff has responded and the defendants have filed a reply brief.

As grounds for the motion, the defendants state that plaintiff is deceased and no party may be substituted for him under the Rehabilitation Act; that plaintiff has failed to exhaust administrative remedies; and that the United States Army, the United States Air Force, the Army & Air force Exchange Service ("AAFES"), and Mr. Mervyn Robinson are not proper party defendants.

[*485] The plaintiff filed a Suggestion of Death with this Court on May 9, 1990, and filed a timely Motion for Substitution of Party, which was granted by the Court. Therefore, the defendants' argument relating to the timeliness of the filing of the Motion for Substitution of Party is moot.

In his amended complaint, the plaintiff alleges that defendants discriminated against him because of his handicap, Acquired Immune Deficiency Syndrome (AIDS) Related Complex, in violation of the Vocational [**2] Rehabilitation Act of 1973 [hereinafter cited as the Rehabilitation Act] , 29 U.S.C. @ 794. Plaintiff claimed that defendants failed to accommodate his disease while employed with the AAFES and that he was forced to terminate his employment because of the failure to accommodate. More specifically, plaintiff contends that when it was discovered he had AIDS, he was transferred from his position in Food Services to a retail clerk's position, and then to work outside mowing the lawn of the defendant AAFES facilities. Plaintiff contends that his condition was severely aggravated by this position due to AIDS related problems.

The defendants argue that under the authority of Robertson v. Wegmann, 436 U.S. 584, 56 L. Ed. 2d 554, 98 S. Ct. 1991 (1978) and Parkerson v. Carrouth, 782 F.2d 1449 (8th Cir. 1986), the Arkansas survivorship statute, Ark.Code Ann. @ 16-62-101 (formerly Ark.Stat.Ann. @ 27-901) does not allow survival of a civil rights action. In Wegmann, the Supreme Court decided that 42 U.S.C. @ 1988 requires courts to apply state law to questions of survival of federal civil rights actions, as long as the state law is not inconsistent with the Constitution and the laws [**3] of the United States. In Parkerson, plaintiff filed a civil rights action under 42 U.S.C. @@ 1983, 1985 and 1986, stating a claim for libel, slander, malicious prosecution, and intentional injury to the plaintiff's medical practice. Plaintiff sought damages for monetary loss and the anxiety and mental anguish he allegedly suffered. The Eighth Circuit Court of Appeals affirmed the district court decision that, stripped of the libel and slander claims that plaintiff conceded did not survive, the action for malicious prosecution and intentional injury to plaintiff's medical practice did not survive the plaintiff's death.

The Court finds Parkerson to be distinguishable from the case sub judice. In this case, the plaintiff is alleging injury directly to his person, which places the plaintiff's cause of action squarely within the scope of the Arkansas survival statute. This is consistent with the earlier Arkansas case construed by the Eighth Circuit in Parkerson, that of Ward v. Blackwood, 41 Ark. 295 (1883). In referring to Ward, the Court in Parkerson stated:

that statutory language identical to Ark.Stat.Ann. @ 27-901 included only actions involving [**4] 'bodily injury, or damage of a physical character, but [did] not extend to torts which do not directly affect the person, but only the feelings or reputation, such as malicious prosecution.' 41 Ark. at 298

(emphasis added).

Parkerson, 782 F.2d at 1452.

Since there are no Arkansas cases directly on point, this Court must speculate as to how the Arkansas Supreme Court would treat this issue. Based upon the authority cited above, the Court is of the opinion that they would allow the present cause of action to survive the plaintiff's death. n1

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n1 This holding is consistent with the argument made by the plaintiff in a case similar to this one, Glanz v. Vernick, 750 F. Supp. 39, 1990 U.S. Dist. LEXIS 15101 (D. Mass. 1990), that given the high mortality of AIDS patients, programs receiving federal funds may in fact feel free to discriminate against them, taking sanctuary in the knowledge that the @ 504 cause of action will likely abate.

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Defendants next argue that the [**5] plaintiff failed to exhaust his administrative remedies, and refer to several steps required to be taken administratively under specific regulations applicable to certain federal employees. Plaintiff argues that nonappropriated fund employees are not legally deemed to be employees of the Federal Government under Chapter 1 Section 1 of Army Regulation 215-3 and are therefore not required to exhaust administrative remedies. [*486] In her supplemental response, plaintiff has attached a copy of the Army Regulation 215-3, and under the provision entitled "1-1 Purpose" it states as follows:

Inasmuch as nonappropriated fund (NAF) employees are not legally deemed to be employees of the Federal Government (see para 1-6), the policies, procedures, and entitlements relating to employees paid from appropriated funds and those relating to NAF employees are different.

Plaintiff also refers to 5 U.S.C. @ 2105(c), which states that "An employee paid from nonappropriated funds of the Army and Air Force Exchange Service . . . . is deemed not an employee for the purpose of-(1) laws . . . administered by the Office of Personnel Management; . . ."

Defendant contends that 5 U.S.C. @ 2105(c) goes on [**6] to state that "This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities" and that Title VII and the Rehabilitation Act of 1973 are both administered by the Equal Employment Opportunity Commission (EEOC) rather than the OPM. Therefore, it is argued by defendants that plaintiff's reliance on particular language in 5 U.S.C. @ 2105(c) is misplaced.

There is much discussion among the various circuits regarding the requirement of exhaustion of administrative remedies in cases brought under the Rehabilitation Act. In Morgan v. United States Postal Service, 798 F.2d 1162 (8th Cir. 1986), cert. denied, 480 U.S. 948, 94 L. Ed. 2d 794, 107 S. Ct. 1608 (1987), the Eighth Circuit describes the two separate private causes of action for discrimination based on handicap and the exhaustion requirement:

Section 501 requires federal agencies to implement affirmative action programs in employment for handicapped individuals. 29 U.S.C. @ 791(b) (1982 & Supp. 1985). Section 505(a)(1) makes Title VII remedies available to persons having complaints under @ 501. 29 U.S.C. @ 794(a)(1) (1982). Accordingly, an express private cause of action exists [**7] under @ 501 for handicap discrimination claims in employment by federal agencies. (citations omitted).

Section 504 provides that:

* * * * * *
29 U.S.C. @ 794. Courts have implied a private cause of action from @ 504. (citations omitted).

Section 501 claims clearly must be exhausted before filing suit. 29 U.S.C. @ 794a(a)(1). Whether the same is true for a @ 504 claim, which Morgan asserts, however, is not as clear. . . . In cases where the federal government is not a defendant, several courts have held that exhaustion is not required because Title VI remedies do not provide individual relief. (citation omitted). In cases involving the federal government, however, courts have required exhaustion of Title VII remedies in @ 504 actions. (citations omitted). The difference appears to lie with the identity of the defendant. Id., 798 F.2d at 1164-1165.162

In Honeycutt v. Long, 861 F.2d 1346 (5th Cir. 1988), an AAFES employee brought suit against the major general who was commander of AAFES, under the Age Discrimination in Employment Act, Title VII, and the Rehabilitation Act. In Honeycutt, the Court held:

The AAFES is a Nonappropriated [**8] Fund Instrumentality ("NAFI") of the United States operating under the Department of Defense. It is directed by a board of directors composed of Army and Air Force members. In the Department of Defense Directive 1401.1-M, Personnel Policy Manual for NAFI's, NAFI employees are stated to be federal employees within the Department of Defense.

Id., 861 F.2d at 1349, n. 3.

Based upon the nature of the plaintiff's complaint and the language contained in Morgan and Honeycutt, the Court is inclined to think that exhaustion of remedies would be required. However, the Court would like further briefing from the parties on this issue.

The Court in Honeycutt further held:

Both Title VII and the ADEA specifically state that this law identifying the [*487] proper defendant applies to personnel actions affecting employees in

military departments as defined in 5 U.S.C. @ 102, and in executive agencies as defined by 5 U.S.C. @ 105. See 42 U.S.C. @ 2000e-16(a) and 29 U.S.C. @ 633(a). Military departments are defined as the Department of Army, the Department of Air Force, and the Department of Navy. 5 U.S.C. @ 102. An executive agency means an executive department, a government [**9] corporation, and an independent establishment. 5 U.S.C. @ 105. The Department of Defense is an executive department. 5 U.S.C. @ 101. An independent establishment means an establishment in the executive department, military department, or part thereof. 5 U.S.C. @ 104. The AAFES is a part of the Department of Defense. (footnote omitted). Thus, the AAFES by statutory definition is not an executive department, military department, executive agency, or independent establishment.

Id., 861 F.2d at 1349.

The Court would like the parties to provide it with supplemental briefs addressing the issue of exhaustion of administrative remedies, taking into consideration all of the language set out in the Army regulation the language in Morgan, and the language in Honeycutt. The parties should also state whether the same administrative remedies previously referred to by the defendants in their brief are applicable in light of the language contained in Honeycutt. The plaintiff will also have another opportunity to persuade the Court why exhaustion should not be required.

Finally, regarding the proper party defendant, the Court in Honeycutt found that a proper defendant [**10] would be the head of the Secretary of Defense, since the Department of Defense is an executive department. By way of footnote, the Court also stated that since the AAFES is run jointly by the Department of the Air Force and the Department of the Army, Honeycutt could properly have sued the Secretary of the Air Force and the Secretary of the Army jointly. Based upon this language, it appears that only the Secretary of the Air Force and the Secretary of the Army are proper party defendants in this case. The remaining defendants are therefore dismissed.

The supplemental briefs herein requested should be filed by no later than January 7, 1990.

ORDERED this 13th day of December, 1990.

DONALD JOHNSTON; LOLA LOVINA JOHNSTON, Plaintiffs-Appellants, v. CAPTAIN R. B. HORNE, COMMANDER PUGET SOUND NAVAL SHIPYARD, et al., BREMERTON METAL TRADES COUNCIL, a labor organization; JOHN DOE, SUPERVISOR, AND HIS MARITAL COMMUNITY; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE 282, a labor organization, Defendants-Appellees *

* By order of the court, the motion to dismiss defendants-appellees Bremerton Metal Trades Council and International Association of Machinists and Aerospace Workers, Local Lodge 282, has been granted.

No. 86-3956

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

875 F.2d 1415; 1989 U.S. App. LEXIS 7413; 49 Fair Empl. Prac. Cas. (BNA) 1806; 51 Empl. Prac. Dec. (CCH) P39,354; 50 Empl. Prac. Dec. (CCH)P39,056

January 11, 1989, Argued and Submitted
May 25, 1989, Filed

SUBSEQUENT HISTORY: As Amended on Denial of Rehearing and Rehearing En Banc August 7, 1989.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Western District of Washington, D.C. No. CV-82-1366-C, John C. Coughenour, District Judge, Presiding.

COUNSEL: Mary Ruth Mann and Kenneth R. Shear, Seattle, Washington, for the plaintiffs-appellants.

Charles Pinnell, Assistant United States Attorney, and James Beebeck, Assistant Regional Counsel, United States Navy, Seattle, Washington, for the defendants-appellees.

JUDGES: Eugene A. Wright, Thomas Tang and Charles Wiggins, Circuit Judges.

OPINIONBY: WRIGHT

OPINION: [*1417] OPINION

WRIGHT, Circuit Judge

Donald Johnston brought a number of claims arising from his employment at the Puget Sound Naval Shipyard.

I

The Shipyard hired him as a toolmaker in 1969. Although hearing impaired, he retained residual hearing and an ability to read lips which allowed him to communicate. He performed satisfactorily during his first five years at the Shipyard.

He failed in 1974 to obtain an outstanding performance award for those first five years and, after that, his productivity declined. He engaged in disruptive and sometimes dangerous behavior, violated shop rules repeatedly and became hostile and antagonistic toward peers and supervisors. A counselor [**2] and

physicians at the Shipyard dispensary noted his obsession with the failure to obtain the performance award.

Johnston's emotional state deteriorated to the point that he took sick leave in June, 1980. Returning to work on June 18th, the [*1418] Shipyard required that he see a psychiatrist. He refused.

The Shipyard then requested Johnston's medical retirement. A psychiatrist determined that he suffered from chronic paranoia, rendering him totally and permanently disabled. A second psychiatrist confirmed this diagnosis. The Office of Personnel Management retired him on the basis of this mental disability. The Merit Systems Protection Board affirmed that decision.

Johnston filed charges with the Equal Employment Opportunity Commission alleging that the Shipyard violated the Rehabilitation Act by discriminating against him because of his handicap. He contended that the Shipyard, by failing to accommodate his deafness, caused his agitated emotional state. After the EEOC rejected his claim, he brought this action.

Johnston alleges that the Shipyard discriminated against him in violation of the Rehabilitation Act, retaliated against him because he filed an EEOC complaint, and violated the Privacy [**3] Act and the constitution. The district court found for the Shipyard on all claims, determining that he suffered from a paranoid state that prevented him from working. It dismissed his constitutional claims.

II

Johnston brought a handicap discrimination claim against his federal employer alleging that it violated @ 501 and @ 504 of the Rehabilitation Act.

Before reviewing his claims, we consider if a private cause of action exists and if the district court had jurisdiction. A distinction exists between @ 501 of the Rehabilitation Act of 1973, 29 U.S.C. @ 791 (1986), and @ 504, 29 U.S.C.A. @ 794 (West Supp. 1989) (hereafter referred to as @ 791 and @ 794). Both prohibit discrimination on the basis of handicap. Section 791(b) obligates federal employers to provide reasonable accommodation for the handicapped and to develop and implement affirmative action plans for handicapped employees. Carter v. Bennett, 268 App. D.C. 183, 840 F.2d 63, 65 (D.C.Cir. 1988); Boyd v. United States Postal Serv., 752 F.2d 410, 412 (9th Cir. 1985); Gardner v. Morris, 752 F.2d 1271, 1277-78 (8th Cir. 1985). Section 794, in contrast, prohibits the exclusion of "otherwise qualified individuals" from government [**4] activities or programs receiving federal funds "solely by reason of their handicap." Mantolete v. Bolger, 767 F.2d 1416, 1421 (9th Cir. 1985).

We conclude that a private cause of action exists for the @ 791 claim, but that the court was without jurisdiction to hear it and that no private cause of action exists for a federal employee against a federal employer under @ 794. We affirm the district court.

A. Section 791 Claim

Congress obligates federal employers under @ 791(b) to develop and implement affirmative action plans for handicapped employees and provides under @ 794a(a)(1) a private cause of action for violations. Boyd, 752 F.2d at 412-13. Section 791(b) states:

Each department, agency and instrumentality . . . in the executive branch shall . . . submit to the Equal Employment Opportunity Commission . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps. . . .

Section 794a(a)(1) makes the remedies, procedures and rights of the Civil Rights Act of 1964, 42 U.S.C. @ 2000e-16 (1983), available to employees alleging

a violation of @ 791. Section 2000e-16(c) requires that a plaintiff bringing a discrimination claim [**5] name the appropriate head of the department, agency or unit within 30-days after receiving a final agency decision. n1 Koucky v. Department of Navy, 820 F.2d 300, 301-02 [*1419] (9th Cir. 1987); Cosgrove v. Bolger, 775 F.2d 1078, 1081 n. 2 (9th Cir. 1985); Cooper v. United States Postal Serv., 740 F.2d 714, 715-16 (9th Cir. 1984), cert. denied, 471 U.S. 1022, 85 L. Ed. 2d 316, 105 S. Ct. 2034 (1985). This 30-day period is jurisdictional. Cooper, 740 F.2d at 716 (citing Rice v. Hamilton Air Force Base Commissary, 720 F.2d 1082, 1083 (9th Cir. 1983)).

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n1 42 U.S.C. @ 2000e-16(c) Employment by Federal Government (1983):

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission . . . on a complaint of discrimination. . . an employee . . . if aggrieved by the final disposition of his complaint . . . may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

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Johnston filed a complaint within the required 30-day period. The EEOC on September 21, 1982, issued [**6] a final decision on his Rehabilitation Act

claims and he received that decision on October 18. He filed this complaint on November 17, 1982, "within thirty days of receipt of notice of final action taken . . . by the Equal Employment Opportunity Commission." @@ 2000e-16(c).

He failed, however, to file a complaint within the statutory period naming the appropriate head of the department, agency or unit. He named Captain Horne, Commander of the Shipyard and not the Secretary of the Navy, who was the appropriate defendant. See Koucky, 820 F.2d at 302 (citing Cooper, 740 F.2d at 715-16).

Johnston discovered his error after the 30-day period expired and moved under Fed.R.Civ.P. 15(c) to amend his complaint to name the appropriate defendant, the Secretary of the Navy. Rule 15(c) governs the relation back of amendments to pleadings.

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision [**7] is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

If a claim arises out of the same conduct, transaction or occurrence as the claim pleaded in the original complaint and if the notice requirements are met, a 15(c) amendment to add the Secretary of the Navy would relate back to the date of the original complaint. If the amendment relates back, Johnston within the 30-day period would have named the appropriate party and he could proceed with his action. See Cooper, 740 F.2d at 716.

Rule 15(c) cannot correct Johnston's error because the Secretary of the Navy did not, as required by 15(c), receive notice within the 30-day limitation period. The Rule applies only when the substituted party "within the period

provided by law for commencing the action" received "notice of the institution of the action." See [**8] Schiavone v. Fortune, 477 U.S. 21, 29-31, 91 L. Ed. 2d 18 , 106 S. Ct. 2379 (1986) ("Timely filing of a complaint, and notice within the limitations period to the party named in the complaint, permit imputation of notice to a subsequently named and sufficiently related party."); Koucky, 820 F.2d at 302 (Secretary of Navy did not have notice within 30-day limit; therefore, plaintiff cannot take advantage of 15(c)); Romain v. Shear, 799 F.2d 1416, 1419 (9th Cir. 1986), cert. denied, 481 U.S. 1050, 95 L. Ed. 2d 840, 107 S. Ct. 2183 (1987) (no government official served within 30-day period thus failure to name proper defendant cannot be cured by 15(c) amendment); Cooper, 740 F.2d at 717 (failure to notify substitute defendant of action until after statutory period had run precludes application of 15(c)).

We note that, if Johnston did not know whom to name, [**9] service of process on the United States Attorney or Attorney [*1420] General of the United States would have satisfied the notice provision of Rule 15(c). n2 Cooper, 740 F.2d at 717. He did not serve the United States Attorney until after the 30-day limitation period expired.

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n2 . . . The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

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Johnston contends also that the Secretary of the Navy was not the only appropriate defendant. He argues that the Commander of the Puget Sound Naval Shipyard qualified as head of an agency under @ 2000e-16(c) and that he, too, was a proper defendant. We disagree.

The Puget Sound Naval Shipyard is not an agency as defined in @ 2000e-16(a). An "agency" is an " executive agency" defined as "an Executive Department, a Government corporation, [or] an independent establishment." 5 U.S.C. @ 105. An "executive department" includes the eleven cabinet-level departments. 5 U.S.C. @
101. A government corporation means a corporation controlled by the United States government. 5 U.S.C. @ 103. An independent establishment includes the General Accounting Office and an establishment in the executive branch that is not a military department. 5 U.S.C. @ 104.

Because the Puget Sound Naval Shipyard does not for the purpose of @ 2000e-16 qualify as an agency, the Commander cannot be the head of an agency nor can he be the proper defendant here. See Honeycutt v. Long, 861 F.2d 1346, 1349 (5th Cir. 1988) (Army and Air Force Exchange Service not department, agency or unit; proper defendant Secretary of Army or Navy not Commander of AAFES); Hancock v. Egger, 848 F.2d 87, 88-89 (6th Cir. 1988) (Internal Revenue Service not department, agency or unit; proper defendant Secretary of Treasury not Commissioner).

The district court was without jurisdiction to hear the @ 791 claim.

B. Section 794 Claim

Section 794 provides:

No otherwise qualified handicapped individual with handicaps . . . as defined in section 706(8) of this title, shall, solely by reason of his handicap . . . be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive

agency or by the United States Postal Service.

An "otherwise qualified handicapped [**10] individual" under @ 794 may bring a private cause of action for handicap discrimination against an activity or program that receives federal funds. Boyd, 752 F.2d at 413 (citing Kling v. County of Los Angeles, 633 F.2d 876, 879 (9th Cir. 1980) (private plaintiff brought suit against federally assisted activity). Section 794 does not create a
private cause of action for handicap discrimination against a federal employer by a federal employee. Boyd, 752 F.2d at 413-14. Section 791 is the exclusive remedy for handicap discrimination claims by federal employees. n3 Id.

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n3 The court in Sisson v. Helms, 751 F.2d 991 (9th Cir.), cert. denied, 474 U.S. 846, 88 L. Ed. 2d 113, 106 S. Ct. 137 (1985), allowed a federal employee to bring an action against a federal employer. It did not, however, address the question of whether a federal employee may bring a claim under @ 794 against a federal employer. To the extent that Sisson contradicts Boyd, we reject it. To the extent that Sisson lays out the prima facie case for an employee of an activity or program receiving federal assistance, it remains binding.

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We acknowledge a split among the circuits as to whether a federal employee may sue [**11] the federal employing agency under @ 794. See Morgan v. United States Postal Serv., 798 F.2d 1162, 1165-66 (8th Cir. 1986), cert. denied, 480 U.S. 48 (1987) (answering affirmatively); Smith v. United States Postal Serv., 742 F.2d 257, 259-60 (6th Cir. 1984); Prewitt v. United States Postal Serv., 662 F.2d 292, 304 (5th Cir. 1981); but see Johnson v. United States Postal Serv., 861 F.2d 1475, 1478 (10th Cir. 1988) (@ 791 exclusive remedy); McGuinness v. United States Postal Serv., 744 F.2d 1318, 1321 (7th Cir. 1984). See also Milbert v. Koop, 265 App. D.C. 206, 830 F.2d 354, 357 (D.C.Cir. 1987) (not deciding the question).

[*1421] We, however, have stated:

[It] is unlikely that Congress, having specifically addressed employment of the handicapped by federal agencies (as distinct from employment by recipients, themselves nonfederal, of federal money) in section 501 [@ 791], would have done so again a few sections later in section 504 [@ 794].

Boyd, 752 F.2d at 413 (citing McGuinness, 744 F.2d at 1321). Although Boyd and most of the cases deciding this question find that @ 791 is the exclusive remedy for an employee alleging handicap discrimination by the Postal Service, [**12] we hold that a federal employee, like Johnston, may not under @ 794 sue the federal employing agency. See 752 F.2d at 413. If Postal Service employees,

mentioned specifically in @ 794, may not sue, it follows that federal employees may not. n4

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n4 The legislative history supports our conclusion that a federal employee does not have a cause of action against a federal employer. Congress amended recently 29 U.S.C. @ 794 (West Supp. 1989) by defining "program or activity." That definition does not refer to federal employers or employees but only to "programs or activities" to "which is extended Federal financial assistance." The legislative history indicates that the purpose of the amendment was "to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance." See S.Rep. No. 64, 100th Cong., 2d Sess., 2 reprinted in U.S.Code Cong. & Admin.News 3, 6. Representative Vanik stated that the amendment would insure equal educational and employment opportunities for the handicapped by making discrimination

illegal in federally assisted program activities." Id. at 8 (citing 118 Cong.Rec. 526) (emphasis added).

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Johnston has no cause of action under @ 794. n5 [**13]

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n5 Even if he had a cause of action, it would be barred for the same reasons that his claim under @ 791 is barred. We observe that @ 794, in contrast to @ 791, incorporates the remedies, procedures and rights of Title VI, 42 U.S.C. @ 2000, not 42 U.S.C. @ 2000e-16(c). @ 794a(a)(2). If @ 794 offered Johnston an alternative remedy, he could argue that the 30-day limitation of @ 2000e-16(c) which applied to @ 791 claims did not apply to his @ 794 claim. He could then fulfill the notice provision of Rule 15(c), having served the United States Attorney within the longer limitation period and proceed with this action.

We would, if a @ 794 claim were allowed, read into it the same procedural requirements of @ 2000e-16(c) that apply to @ 791. See Boyd, 752 F.2d at 413. This would be in accord with circuits that allow a federal employee under @ 794 to bring an action against a federal employer, for they hold that @ 2000e-16(c) procedural constraints apply to a plaintiff bringing an action under @ 794. See Morgan, 798 F.2d at 1165; Smith, 742 F.2d at 260, 262; Prewitt, 662 F.2d at 304.

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III

Johnston alleges that the Shipyard retaliated against him by retiring him after [**14] he filed an EEOC complaint. To establish a prima facie case of retaliation in violation of Title VII of the Civil Rights Act, 42 U.S.C. @ 2000e-3(a), a plaintiff must show that: (1) he engaged in activity protected by Title VII; (2) the employer made an adverse employment decision; and (3) a causal connection existed between the two. Yartzoff v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987).

The district court here found no causal connection between Johnston's EEOC complaint and his medical retirement. To show the requisite causal link, he must raise the inference that the EEOC complaint was the likely reason for his retirement. The court found that he was retired because of his paranoia. We would not disturb this finding. See Cohen v. Fred Meyer Inc., 686 F.2d 793, 793 (9th Cir. 1982). [**15]

IV

Johnston alleges that the Shipyard violated the Privacy Act of 1974. 5 U.S.C. @ 552a (1982). He contends first that it failed to maintain and distribute accurate records. An agency must maintain records that are accurate, relevant, timely and complete, @ 552a(e)(5), n6 and prior to disseminating any record the agency must assure that it is accurate, complete, timely and relevant for its purpose. @ 552(a)(e)(6). n7 Edison v. [*1422] Department of the Army, 672 F.2d 840, 842-43 (11th Cir. 1982). An agency need not keep perfect records but must act reasonably to assure their accuracy. Id. If it fails to meet this record keeping obligation, a person may recover actual damages resulting from the adverse determination based on the record. @ 552a(g)(1)(C), (g)(4); Hewitt v. Grabicki, 794 F.2d 1373, 1377 (9th Cir. 1986). The complaining party has the burden of proving a violation. Edison, 672 F.2d at 842.

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n6 Section 552(a)(e)(5) states: "Each agency that maintains a system of records shall maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual."
[**16]

n7 Section 552(a)(e)(6) states: "[Prior] to disseminating any record about an individual to any person other than an agency, [must] make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agencies purposes."

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The plaintiff must show, first, that a violation of @ 552a(e)(5) or (6) proximately caused the adverse effect; second, that the agency failed intentionally or willfully to maintain records as required; and third, that he suffered actual damage. @ 552a(g)(1)(c), (4); White v. Office of Personnel Management, 268 App. D.C. 205, 840 F.2d 85, 87 (D.C.Cir. 1988); Dickson v. Office of Personnel Management, 264 App. D.C. 182, 828 F.2d 32, 37 (D.C.Cir. 1987).

We have not defined previously a "willful or intentional" violation of the Privacy Act. The legislative history states:

In a suit for damages, the [compromise] amendment reflects a belief that a finding of willful, arbitrary or capricious action is too harsh a standard of proof for an individual to exercise the rights granted by this legislation. Thus the standard for recovery of damages was reduced to 'willful or intentional' action by an agency. On a continuum between negligence and the very high standard [**17] of willful, arbitrary, or capricious conduct, this standard is viewed as only somewhat greater than gross negligence.

Andrews v. Veterans Admin. of U.S., 838 F.2d 418, 424 (10th Cir.), cert. denied, 109 S. Ct. 56, 102 L. Ed. 2d 34 (1988) (citing Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, reprinted in 120 Cong. Rec. 40405, 40406 (1974) (emphasis added)).

Some courts require something more than gross negligence. See, e.g., White, 840 F.2d at 87; Andrews, 838 F.2d at 425; (clearly requires conduct amounting to more than gross negligence); Moskiewicz v. United States Dept. of Agriculture, 791 F.2d 561, 564 (7th Cir. 1986) ("Evidence of conduct which would meet a greater than gross negligence standard, focusing on evidence of reckless behavior and/or knowing violation of the Act on the part of the accused, must be advanced . . .").

Other courts seem to equate gross negligence with "willful or intentional." See, e.g., Chapman v. National Aeronautics and Space Admin., 736 F.2d 238, 243 (5th Cir.) (per curiam) (equating gross negligence with willfulness), cert. denied, 469 U.S. 1038, 105 S. Ct. 517, 83 L. Ed. 2d 406 (1984); Albright v. United [**18] States, 235 App. D.C. 295, 732 F.2d 181, 189 (D.C.Cir. 1984).

They, however, grapple with and elaborate on the definitions. See e.g. Laningham v. United States Navy, 259 App. D.C. 115, 813 F.2d 1236, 1242 (D.C.Cir. 1987) (intentional or willful means "so 'patently egregious and unlawful' that anyone undertaking the conduct should have known it 'unlawful') (quoting Wisdom v. Department of Housing & Urban Dev., 713 F.2d 422, 425 (8th Cir. 1983), cert. denied, 465 U.S. 1021, 104 S. Ct. 1272, 79 L. Ed. 2d 678 (1984); Albright, 732 F.2d at 189 (willful or intentional requirement met "by committing the act without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act."); Moskiewicz, 791 F.2d at 564 (7th Cir. 1986) (acts meeting greater than gross negligence standard require

evidence of "reckless behavior and/or knowing violations of the Act."); Chapman, 736 F.2d at 243 (5th Cir. 1984) (court looks for evidence of "unlawful intent" or "ulterior motive"); Wisdom, 713 F.2d at 425 (willful or intentional means "patently egregious and unlawful").

We find that the term "willful or intentional" requires conduct amounting to more than gross negligence but do [**19] not elaborate on definitions of gross negligence.

Johnston contends that in June 1980, Priddy, a Labor Relations Specialist at the Shipyard, compiled a background briefing for the purpose of having Johnston retired [*1423] involuntarily. He contends that this briefing violated the Privacy Act because it was inaccurate, untimely and incomplete. The district court found that he could not prevail because any inaccuracies or admissions in the briefing were not willful or intentional. We review for clear error. Chapman, 736 F.2d at 242 (intent question of fact); Albright, 732 F.2d at 190.

We find no evidence of conduct that we could call greater than gross negligence. Priddy prepared the briefing in June, 1980, immediately after the Shipyard requested that Johnston obtain a psychiatric exam. He prepared it for use by examining physicians. In it, he provided accounts of Johnston's aberrant behavior that he had obtained from a presentation given by Johnston's supervisor, Mills, who, at the time he gave the presentation, believed Johnston was competent. The district court found that testimony supported the facts in the briefing.

Johnston contends next that the Shipyard failed to provide him [**20] with the notes of his supervisor, Mills. The Act requires an agency to permit any person, upon request, to gain access to his record or any information about him contained in the system. @ 552a(d)(1); @ 552a(g)(1)(B), (4); Boyd v. Secretary of the Navy, 709 F.2d 684, 686 (11th Cir. 1983), cert. denied, 464 U.S. 1043, 79 L. Ed. 2d 173, 104 S. Ct. 709 (1984). A record is "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history. . . ." @ 552a(a)(4). A system of records is a "group of any records under the control of any agency from which information is retrieved by the name of the individual or some other identifying particular. . . . " @ 552a(a)(5).

A supervisor's private notes generally are not subject to the requirements of the Act, Bowyer v. United States Dept. of Air Force, 804 F.2d 428, 431 (7th Cir. 1986) (citing Boyd, 709 F.2d at 686), but can become subject to the Act if an agency uses them to make decisions that concern a person's employment status. Bowyer, 804 F.2d at 431; Boyd, 709 F.2d at 686.

The district court here found [**21] that the Shipyard did not use these notes when making its decision to retire Johnston. It found that they were Mills' personal notes and that he destroyed them before the Shipyard decided to retire Johnston. Johnston could not show a causal connection between the notes and the Shipyard's decision to retire him because they had been destroyed before he was retired. See Hewitt, 794 F.2d at 1379; Edison, 672 F.2d at 845.

IV

On June 18, 1980, Johnston returned to the Shipyard from a six-day medical leave. One of his supervisors, McNellis, sent him to the personnel office, where he was told not to return to work until he had submitted to a psychiatric evaluation and been found fit for duty. Instead of leaving the Shipyard grounds immediately as required by security regulations, Johnston went to the EEOC office to file a complaint in protest of the suspension. McNellis observed Johnston on his way to the EEOC office, located in a restricted area of the Shipyard to which Johnston knew he had no permission to enter. McNellis summoned two security guards who confronted Johnston as he sat in the EEOC office, confiscated his papers, and escorted him from the Shipyard. Johnston asserts

[**22] that these actions amounted to unlawful arrest, search, and seizure.

A. Fifth Amendment Due Process

Johnston claims that the personnel office failed to give notice or to provide a hearing before it suspended him pending psychiatric evaluation. He asserts that this procedure violated his Fifth Amendment right to due process and that he is entitled to damages under Bivens v. Six Known Fed. Narcotics Agents, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971).

"[A] federal civil servant can press a Bivens action only if the constitutional violations he claims cannot be adequately addressed under the regulatory scheme that governs the relationship between the government and its employees." Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1339 [*1424] (9th Cir. 1987). The existence of statutory and administrative procedures for addressing complaints of improper personnel action bars Johnston's claim. Bush v. Lucas, 462 U.S. 367, 76 L. Ed. 2d 648, 103 S. Ct. 2404 (1983).

Johnston's alleged constitutional violations could have been addressed adequately under the regulatory scheme provided for in 5 U.S.C. @@ 7701 and 7703 (1980 and Supp. 1989). As provided by these statutes, Johnston in fact exercised his right to administrative review [**23] and brought his claim before both the Office of Personnel Management and the Merit Systems Protection Board. Following exhaustion of his administrative remedies, he also had a right to judicial review under 5 U.S.C. @ 7703. His Bivens action is therefore barred.

B. Fourth Amendment Search and Seizure Claim

Johnston also claims a violation of his Fourth Amendment rights and asserts a cause of action under Bivens, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999. He names McNellis and the two security guards as defendants. The district court correctly granted the government's motion to dismiss.

Because Johnston failed to serve McNellis, the court lacked jurisdiction. Johnston named McNellis in his first amended complaint and served that complaint on the U.S. Attorney. Johnston sought damages from McNellis in his individual capacity. A Bivens action can be maintained against a defendant only in his or her individual capacity. Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987). Where the plaintiff seeks money damages from a federal Official in his individual capacity, he must effect personal service under Fed.R.Civ.P. 4(d)(1). Id. This Johnston failed to do.

Johnston's claim against the security [**24] guards is barred by the statute of limitation. In Bivens actions, we borrow the state statute that applies to analogous state law causes of action. Marshall v. Kleppe, 637 F.2d 1217, 1224 (9th Cir. 1980). This circuit has not yet decided which Washington state statute of limitation applies to Bivens claims. We have found that California's residual statute of limitation, which covers all actions "not hereinbefore provided for," applies to Bivens actions arising in that state. See Gibson v. United States, 781 F.2d 1334, 1342 (9th Cir. 1986), cert. denied, 479 U.S. 1054, 93 L. Ed. 2d 979, 107 S. Ct. 928 (1987) (applying Cal.Civ.P.Code @ 343 (West 1982)). Washington has a similar catch-all provision. Wash.Rev.Code @ 4.16.080(2) (1988). We hold that this three-year statute applies to Bivens claims arising in Washington.

Johnston's cause of action accrued on June 18, 1980, when the security guards detained him and removed him from the Shipyard. See Norco Constr., Inc. v. King County, 801 F.2d 1143, 1145 (9th Cir. 1986). The statute prescribed by Wash.Rev.Code @ 4.16.080(2) ran on June 18, 1983. Johnston filed his original complaint on November 17, 1982. However, he failed either to plead the [**25] Fourth Amendment claim or to name the two security guards in that complaint. He did not name the security guards as defendants until October 17, 1983, when he filed a second amended complaint.

An amended complaint, though filed after the statute has run, may be timely if it states a cause of action based on facts pleaded in the original complaint. Fed.R.Civ.P. 15(c). Because Johnston failed to plead the facts giving rise to the Fourth Amendment claim in his original complaint, the second amended complaint does not relate back under Rule 15(c). The claim against the security guards is time-barred.

V

We DISMISS Johnston's @ 791 Rehabilitation Act and retaliation claims for lack of jurisdiction and DISMISS his @ 794 claim because no cause of action exists. We AFFIRM the judgment in favor of defendants on the Privacy Act claim and AFFIRM the dismissal of his constitutional claims.

DONALD JOHNSTON; LOLA LOVINA JOHNSTON, Plaintiffs-Appellants, v. CAPTAIN R. B. HORNE, COMMANDER PUGET SOUND NAVAL SHIPYARD, et al., BREMERTON METAL TRADES COUNCIL, a labor organization; JOHN DOE, SUPERVISOR, AND HIS MARITAL COMMUNITY; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE 282, a labor organization, Defendants-Appellees *

* By order of the court, the motion to dismiss defendants-appellees Bremerton Metal Trades Council and International Association of Machinists and Aerospace Workers, Local Lodge 282, has been granted.

No. 86-3956

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

875 F.2d 1415; 1989 U.S. App. LEXIS 7413; 49 Fair Empl. Prac. Cas. (BNA) 1806; 51 Empl. Prac. Dec. (CCH) P39,354; 50 Empl. Prac. Dec. (CCH)P39,056

January 11, 1989, Argued and Submitted
May 25, 1989, Filed

SUBSEQUENT HISTORY: As Amended on Denial of Rehearing and Rehearing En Banc August 7, 1989.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Western District of Washington, D.C. No. CV-82-1366-C, John C. Coughenour, District Judge, Presiding.

COUNSEL: Mary Ruth Mann and Kenneth R. Shear, Seattle, Washington, for the plaintiffs-appellants.

Charles Pinnell, Assistant United States Attorney, and James Beebeck, Assistant Regional Counsel, United States Navy, Seattle, Washington, for the defendants-appellees.

JUDGES: Eugene A. Wright, Thomas Tang and Charles Wiggins, Circuit Judges.

OPINIONBY: WRIGHT

OPINION: [*1417] OPINION

WRIGHT, Circuit Judge

Donald Johnston brought a number of claims arising from his employment at the Puget Sound Naval Shipyard.

I

The Shipyard hired him as a toolmaker in 1969. Although hearing impaired, he retained residual hearing and an ability to read lips which allowed him to communicate. He performed satisfactorily during his first five years at the Shipyard.

He failed in 1974 to obtain an outstanding performance award for those first five years and, after that, his productivity declined. He engaged in disruptive and sometimes dangerous behavior, violated shop rules repeatedly and became hostile and antagonistic toward peers and supervisors. A counselor [**2] and physicians at the Shipyard dispensary noted his obsession with the failure to obtain the performance award.

Johnston's emotional state deteriorated to the point that he took sick leave in June, 1980. Returning to work on June 18th, the [*1418] Shipyard required that he see a psychiatrist. He refused.

The Shipyard then requested Johnston's medical retirement. A psychiatrist determined that he suffered from chronic paranoia, rendering him totally and permanently disabled. A second psychiatrist confirmed this diagnosis. The Office of Personnel Management retired him on the basis of this mental disability. The Merit Systems Protection Board affirmed that decision.

Johnston filed charges with the Equal Employment Opportunity Commission alleging that the Shipyard violated the Rehabilitation Act by discriminating against him because of his handicap. He contended that the Shipyard, by failing to accommodate his deafness, caused his agitated emotional state. After the EEOC rejected his claim, he brought this action.

Johnston alleges that the Shipyard discriminated against him in violation of the Rehabilitation Act, retaliated against him because he filed an EEOC complaint, and violated the Privacy [**3] Act and the constitution. The district court found for the Shipyard on all claims, determining that he suffered from a paranoid state that prevented him from working. It dismissed his constitutional claims.

II

Johnston brought a handicap discrimination claim against his federal employer alleging that it violated @ 501 and @ 504 of the Rehabilitation Act.

Before reviewing his claims, we consider if a private cause of action exists and if the district court had jurisdiction. A distinction exists between @ 501 of the Rehabilitation Act of 1973, 29 U.S.C. @ 791 (1986), and @ 504, 29 U.S.C.A. @ 794 (West Supp. 1989) (hereafter referred to as @ 791 and @ 794). Both prohibit discrimination on the basis of handicap. Section 791(b) obligates federal employers to provide reasonable accommodation for the handicapped and to develop and implement affirmative action plans for handicapped employees. Carter v. Bennett, 268 App. D.C. 183, 840 F.2d 63, 65 (D.C.Cir. 1988); Boyd v. United States Postal Serv., 752 F.2d 410, 412 (9th Cir. 1985); Gardner v. Morris, 752 F.2d 1271, 1277-78 (8th Cir. 1985). Section 794, in contrast, prohibits the exclusion of "otherwise qualified individuals" from government [**4] activities or programs receiving federal funds "solely by reason of their handicap." Mantolete v. Bolger, 767 F.2d 1416, 1421 (9th Cir. 1985).

We conclude that a private cause of action exists for the @ 791 claim, but that the court was without jurisdiction to hear it and that no private cause of action exists for a federal employee against a federal employer under @ 794. We affirm the district court.

A. Section 791 Claim

Congress obligates federal employers under @ 791(b) to develop and implement affirmative action plans for handicapped employees and provides under @ 794a(a)(1) a private cause of action for violations. Boyd, 752 F.2d at 412-13. Section 791(b) states:

Each department, agency and instrumentality . . . in the executive branch shall . . . submit to the Equal Employment Opportunity Commission . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps. . . .

Section 794a(a)(1) makes the remedies, procedures and rights of the Civil Rights Act of 1964, 42 U.S.C. @ 2000e-16 (1983), available to employees alleging a violation of @ 791. Section 2000e-16(c) requires that a plaintiff bringing a discrimination claim [**5] name the appropriate head of the department, agency or unit within 30-days after receiving a final agency decision. n1 Koucky

v. Department of Navy, 820 F.2d 300, 301-02 [*1419] (9th Cir. 1987); Cosgrove v. Bolger, 775 F.2d 1078, 1081 n. 2 (9th Cir. 1985); Cooper v. United States Postal Serv., 740 F.2d 714, 715-16 (9th Cir. 1984), cert. denied, 471 U.S. 1022, 85 L. Ed. 2d 316, 105 S. Ct. 2034 (1985). This 30-day period is jurisdictional. Cooper, 740 F.2d at 716 (citing Rice v. Hamilton Air Force Base Commissary, 720 F.2d 1082, 1083 (9th Cir. 1983)).

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n1 42 U.S.C. @ 2000e-16(c) Employment by Federal Government (1983):

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission . . . on a complaint of discrimination. . . an employee . . . if aggrieved by the final disposition of his complaint . . . may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

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Johnston filed a complaint within the required 30-day period. The EEOC on September 21, 1982, issued [**6] a final decision on his Rehabilitation Act

claims and he received that decision on October 18. He filed this complaint on November 17, 1982, "within thirty days of receipt of notice of final action taken . . . by the Equal Employment Opportunity Commission." @@ 2000e-16(c).

He failed, however, to file a complaint within the statutory period naming the appropriate head of the department, agency or unit. He named Captain Horne, Commander of the Shipyard and not the Secretary of the Navy, who was the appropriate defendant. See Koucky, 820 F.2d at 302 (citing Cooper, 740 F.2d at 715-16).

Johnston discovered his error after the 30-day period expired and moved under Fed.R.Civ.P. 15(c) to amend his complaint to name the appropriate defendant, the Secretary of the Navy. Rule 15(c) governs the relation back of amendments to pleadings.

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision [**7] is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

If a claim arises out of the same conduct, transaction or occurrence as the claim pleaded in the original complaint and if the notice requirements are met, a 15(c) amendment to add the Secretary of the Navy would relate back to the date of the original complaint. If the amendment relates back, Johnston within the 30-day period would have named the appropriate party and he could proceed with his action. See Cooper, 740 F.2d at 716.

Rule 15(c) cannot correct Johnston's error because the Secretary of the Navy did not, as required by 15(c), receive notice within the 30-day limitation period. The Rule applies only when the substituted party "within the period provided by law for commencing the action" received "notice of the institution of the action." See [**8] Schiavone v. Fortune, 477 U.S. 21, 29-31, 91 L. Ed. 2d 18 , 106 S. Ct. 2379 (1986) ("Timely filing of a complaint, and notice

within the limitations period to the party named in the complaint, permit imputation of notice to a subsequently named and sufficiently related party."); Koucky, 820 F.2d at 302 (Secretary of Navy did not have notice within 30-day limit; therefore, plaintiff cannot take advantage of 15(c)); Romain v. Shear, 799 F.2d 1416, 1419 (9th Cir. 1986), cert. denied, 481 U.S. 1050, 95 L. Ed. 2d 840, 107 S. Ct. 2183 (1987) (no government official served within 30-day period thus failure to name proper defendant cannot be cured by 15(c) amendment); Cooper, 740 F.2d at 717 (failure to notify substitute defendant of action until after statutory period had run precludes application of 15(c)).

We note that, if Johnston did not know whom to name, [**9] service of process on the United States Attorney or Attorney [*1420] General of the United States would have satisfied the notice provision of Rule 15(c). n2 Cooper, 740 F.2d at 717. He did not serve the United States Attorney until after the 30-day limitation period expired.

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n2 . . . The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

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Johnston contends also that the Secretary of the Navy was not the only appropriate defendant. He argues that the Commander of the Puget Sound Naval Shipyard qualified as head of an agency under @ 2000e-16(c) and that he, too, was a proper defendant. We disagree.

The Puget Sound Naval Shipyard is not an agency as defined in @ 2000e-16(a). An "agency" is an "executive agency" defined as "an Executive Department, a Government corporation, [or] an independent establishment." 5 U.S.C. @ 105. An "executive department" includes the eleven cabinet-level departments. 5 U.S.C. @
101. A government corporation means a corporation controlled by the United States government. 5 U.S.C. @ 103. An independent establishment includes the General Accounting Office and an establishment in the executive branch that is not a military department. 5 U.S.C. @ 104.

Because the Puget Sound Naval Shipyard does not for the purpose of @ 2000e-16 qualify as an agency, the Commander cannot be the head of an agency nor can he be the proper defendant here. See Honeycutt v. Long, 861 F.2d 1346, 1349 (5th Cir. 1988) (Army and Air Force Exchange Service not department, agency or unit; proper defendant Secretary of Army or Navy not Commander of AAFES); Hancock v. Egger, 848 F.2d 87, 88-89 (6th Cir. 1988) (Internal Revenue Service not department, agency or unit; proper defendant Secretary of Treasury not Commissioner).

The district court was without jurisdiction to hear the @ 791 claim.

B. Section 794 Claim

Section 794 provides:

No otherwise qualified handicapped individual with handicaps . . . as defined

in section 706(8) of this title, shall, solely by reason of his handicap . . . be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

An "otherwise qualified handicapped [**10] individual" under @ 794 may bring a private cause of action for handicap discrimination against an activity or program that receives federal funds. Boyd, 752 F.2d at 413 (citing Kling v. County of Los Angeles, 633 F.2d 876, 879 (9th Cir. 1980) (private plaintiff brought suit against federally assisted activity). Section 794 does not create a
private cause of action for handicap discrimination against a federal employer by a federal employee. Boyd, 752 F.2d at 413-14. Section 791 is the exclusive remedy for handicap discrimination claims by federal employees. n3 Id.

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n3 The court in Sisson v. Helms, 751 F.2d 991 (9th Cir.), cert. denied, 474 U.S. 846, 88 L. Ed. 2d 113, 106 S. Ct. 137 (1985), allowed a federal employee to bring an action against a federal employer. It did not, however, address the question of whether a federal employee may bring a claim under @ 794 against a federal employer. To the extent that Sisson contradicts Boyd, we reject it. To the extent that Sisson lays out the prima facie case for an employee of an activity or program receiving federal assistance, it remains binding.

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We acknowledge a split among the circuits as to whether a federal employee may sue [**11] the federal employing agency under @ 794. See Morgan v. United States Postal Serv., 798 F.2d 1162, 1165-66 (8th Cir. 1986), cert. denied, 480 U.S. 48 (1987) (answering affirmatively); Smith v. United States Postal Serv., 742 F.2d 257, 259-60 (6th Cir. 1984); Prewitt v. United States Postal Serv., 662 F.2d 292, 304 (5th Cir. 1981); but see Johnson v. United States Postal Serv., 861 F.2d 1475, 1478 (10th Cir. 1988) (@ 791 exclusive remedy); McGuinness v. United States Postal Serv., 744 F.2d 1318, 1321 (7th Cir. 1984). See also Milbert v. Koop, 265 App. D.C. 206, 830 F.2d 354, 357 (D.C.Cir. 1987) (not deciding the question).

[*1421] We, however, have stated:

[It] is unlikely that Congress, having specifically addressed employment of the handicapped by federal agencies (as distinct from employment by recipients, themselves nonfederal, of federal money) in section 501 [@ 791], would have done so again a few sections later in section 504 [@ 794].

Boyd, 752 F.2d at 413 (citing McGuinness, 744 F.2d at 1321). Although Boyd and most of the cases deciding this question find that @ 791 is the exclusive remedy for an employee alleging handicap discrimination by the Postal Service, [**12] we hold that a federal employee, like Johnston, may not under @ 794 sue the federal employing agency. See 752 F.2d at 413. If Postal Service employees, mentioned specifically in @ 794, may not sue, it follows that federal employees may not. n4

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n4 The legislative history supports our conclusion that a federal employee does not have a cause of action against a federal employer. Congress amended recently 29 U.S.C. @ 794 (West Supp. 1989) by defining "program or activity."

That definition does not refer to federal employers or employees but only to "
programs or activities" to "which is extended Federal financial assistance." The legislative history indicates that the purpose of the amendment was "to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance." See S.Rep. No. 64, 100th Cong., 2d Sess., 2 reprinted in U.S.Code Cong. & Admin.News 3, 6. Representative Vanik stated that the amendment would insure equal educational

and employment opportunities for the handicapped by making discrimination illegal in federally assisted program activities." Id. at 8 (citing 118 Cong.Rec. 526) (emphasis added).

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Johnston has no cause of action under @ 794. n5 [**13]

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n5 Even if he had a cause of action, it would be barred for the same reasons that his claim under @ 791 is barred. We observe that @ 794, in contrast to @ 791, incorporates the remedies, procedures and rights of Title VI, 42 U.S.C. @ 2000, not 42 U.S.C. @ 2000e-16(c). @ 794a(a)(2). If @ 794 offered Johnston an alternative remedy, he could argue that the 30-day limitation of @ 2000e-16(c) which applied to @ 791 claims did not apply to his @ 794 claim. He could then fulfill the notice provision of Rule 15(c), having served the United States Attorney within the longer limitation period and proceed with this action.

We would, if a @ 794 claim were allowed, read into it the same procedural requirements of @ 2000e-16(c) that apply to @ 791. See Boyd, 752 F.2d at 413. This would be in accord with circuits that allow a federal employee under @ 794 to bring an action against a federal employer, for they hold that @ 2000e-16(c) procedural constraints apply to a plaintiff bringing an action under @ 794. See Morgan, 798 F.2d at 1165; Smith, 742 F.2d at 260, 262; Prewitt, 662 F.2d at 304.

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III

Johnston alleges that the Shipyard retaliated against him by retiring him after [**14] he filed an EEOC complaint. To establish a prima facie case of retaliation in violation of Title VII of the Civil Rights Act, 42 U.S.C. @ 2000e-3(a), a plaintiff must show that: (1) he engaged in activity protected by Title VII; (2) the employer made an adverse employment decision; and (3) a causal connection existed between the two. Yartzoff v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987).

The district court here found no causal connection between Johnston's EEOC complaint and his medical retirement. To show the requisite causal link, he must raise the inference that the EEOC complaint was the likely reason for his retirement. The court found that he was retired because of his paranoia. We would not disturb this finding. See Cohen v. Fred Meyer Inc., 686 F.2d 793, 793 (9th Cir. 1982). [**15]

IV

Johnston alleges that the Shipyard violated the Privacy Act of 1974. 5 U.S.C. @ 552a (1982). He contends first that it failed to maintain and distribute accurate records. An agency must maintain records that are accurate, relevant, timely and complete, @ 552a(e)(5), n6 and prior to disseminating any record the agency must assure that it is accurate, complete, timely and relevant for its purpose. @ 552(a)(e)(6). n7 Edison v. [*1422] Department of the Army, 672 F.2d 840, 842-43 (11th Cir. 1982). An agency need not keep perfect records but must act reasonably to assure their accuracy. Id. If it fails to meet this record keeping obligation, a person may recover actual damages resulting from the adverse determination based on the record. @ 552a(g)(1)(C), (g)(4); Hewitt v. Grabicki, 794 F.2d 1373, 1377 (9th Cir. 1986). The complaining party has the burden of proving a violation. Edison, 672 F.2d at 842.

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n6 Section 552(a)(e)(5) states: "Each agency that maintains a system of records shall maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual."
[**16]

n7 Section 552(a)(e)(6) states: "[Prior] to disseminating any record about an individual to any person other than an agency, [must] make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agencies purposes."

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The plaintiff must show, first, that a violation of @ 552a(e)(5) or (6) proximately caused the adverse effect; second, that the agency failed intentionally or willfully to maintain records as required; and third, that he suffered actual damage. @ 552a(g)(1)(c), (4); White v. Office of Personnel Management, 268 App. D.C. 205, 840 F.2d 85, 87 (D.C.Cir. 1988); Dickson v. Office of Personnel Management, 264 App. D.C. 182, 828 F.2d 32, 37 (D.C.Cir. 1987).

We have not defined previously a "willful or intentional" violation of the Privacy Act. The legislative history states:

In a suit for damages, the [compromise] amendment reflects a belief that a finding of willful, arbitrary or capricious action is too harsh a standard of proof for an individual to exercise the rights granted by this legislation. Thus the standard for recovery of damages was reduced to 'willful or intentional' action by an agency. On a continuum between negligence and the very high standard [**17] of willful, arbitrary, or capricious conduct, this standard is viewed as only somewhat greater than gross negligence.

Andrews v. Veterans Admin. of U.S., 838 F.2d 418, 424 (10th Cir.), cert. denied, 109 S. Ct. 56, 102 L. Ed. 2d 34 (1988) (citing Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, reprinted in 120 Cong. Rec. 40405, 40406 (1974) (emphasis added)).

Some courts require something more than gross negligence. See, e.g., White, 840 F.2d at 87; Andrews, 838 F.2d at 425; (clearly requires conduct amounting to more than gross negligence); Moskiewicz v. United States Dept. of Agriculture, 791 F.2d 561, 564 (7th Cir. 1986) ("Evidence of conduct which would meet a greater than gross negligence standard, focusing on evidence of reckless behavior and/or knowing violation of the Act on the part of the accused, must be advanced . . .").

Other courts seem to equate gross negligence with "willful or intentional." See, e.g., Chapman v. National Aeronautics and Space Admin., 736 F.2d 238, 243 (5th Cir.) (per curiam) (equating gross negligence with willfulness), cert. denied, 469 U.S. 1038, 105 S. Ct. 517, 83 L. Ed. 2d 406 (1984); Albright v. United [**18] States, 235 App. D.C. 295, 732 F.2d 181, 189 (D.C.Cir. 1984).

They, however, grapple with and elaborate on the definitions. See e.g. Laningham v. United States Navy, 259 App. D.C. 115, 813 F.2d 1236, 1242 (D.C.Cir. 1987) (intentional or willful means "so 'patently egregious and unlawful' that anyone undertaking the conduct should have known it 'unlawful') (quoting Wisdom v. Department of Housing & Urban Dev., 713 F.2d 422, 425 (8th Cir. 1983), cert. denied, 465 U.S. 1021, 104 S. Ct. 1272, 79 L. Ed. 2d 678 (1984); Albright, 732 F.2d at 189 (willful or intentional requirement met "by

committing the act without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act."); Moskiewicz, 791 F.2d at 564 (7th Cir. 1986) (acts meeting greater than gross negligence standard require evidence of "reckless behavior and/or knowing violations of the Act."); Chapman, 736 F.2d at 243 (5th Cir. 1984) (court looks for evidence of "unlawful intent" or "ulterior motive"); Wisdom, 713 F.2d at 425 (willful or intentional means "patently egregious and unlawful").

We find that the term "willful or intentional" requires conduct amounting to more than gross negligence but do [**19] not elaborate on definitions of gross negligence.

Johnston contends that in June 1980, Priddy, a Labor Relations Specialist at the Shipyard, compiled a background briefing for the purpose of having Johnston retired [*1423] involuntarily. He contends that this briefing violated the Privacy Act because it was inaccurate, untimely and incomplete. The district court found that he could not prevail because any inaccuracies or admissions in the briefing were not willful or intentional. We review for clear error. Chapman, 736 F.2d at 242 (intent question of fact); Albright, 732 F.2d at 190.

We find no evidence of conduct that we could call greater than gross negligence. Priddy prepared the briefing in June, 1980, immediately after the Shipyard requested that Johnston obtain a psychiatric exam. He prepared it for use by examining physicians. In it, he provided accounts of Johnston's aberrant behavior that he had obtained from a presentation given by Johnston's supervisor, Mills, who, at the time he gave the presentation, believed Johnston was competent. The district court found that testimony supported the facts in the briefing.

Johnston contends next that the Shipyard failed to provide him [**20] with the notes of his supervisor, Mills. The Act requires an agency to permit any person, upon request, to gain access to his record or any information about him contained in the system. @ 552a(d)(1); @ 552a(g)(1)(B), (4); Boyd v. Secretary of the Navy, 709 F.2d 684, 686 (11th Cir. 1983), cert. denied, 464 U.S. 1043, 79 L. Ed. 2d 173, 104 S. Ct. 709 (1984). A record is "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history. . . ." @ 552a(a)(4). A system of records is a "group of any records under the control of any agency from which information is retrieved by the name of the individual or some other identifying particular. . . . " @ 552a(a)(5).

A supervisor's private notes generally are not subject to the requirements of the Act, Bowyer v. United States Dept. of Air Force, 804 F.2d 428, 431 (7th Cir. 1986) (citing Boyd, 709 F.2d at 686), but can become subject to the Act if an agency uses them to make decisions that concern a person's employment status. Bowyer, 804 F.2d at 431; Boyd, 709 F.2d at 686.

The district court here found [**21] that the Shipyard did not use these notes when making its decision to retire Johnston. It found that they were Mills' personal notes and that he destroyed them before the Shipyard decided to retire Johnston. Johnston could not show a causal connection between the notes and the Shipyard's decision to retire him because they had been destroyed before he was retired. See Hewitt, 794 F.2d at 1379; Edison, 672 F.2d at 845.

IV

On June 18, 1980, Johnston returned to the Shipyard from a six-day medical leave. One of his supervisors, McNellis, sent him to the personnel office, where he was told not to return to work until he had submitted to a psychiatric evaluation and been found fit for duty. Instead of leaving the Shipyard grounds immediately as required by security regulations, Johnston went to the EEOC office to file a complaint in protest of the suspension. McNellis observed Johnston on his way to the EEOC office, located in a restricted area of the

Shipyard to which Johnston knew he had no permission to enter. McNellis summoned two security guards who confronted Johnston as he sat in the EEOC office, confiscated his papers, and escorted him from the Shipyard. Johnston asserts [**22] that these actions amounted to unlawful arrest, search, and seizure.

A. Fifth Amendment Due Process

Johnston claims that the personnel office failed to give notice or to provide a hearing before it suspended him pending psychiatric evaluation. He asserts that this procedure violated his Fifth Amendment right to due process and that he is entitled to damages under Bivens v. Six Known Fed. Narcotics Agents, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971).

"[A] federal civil servant can press a Bivens action only if the constitutional violations he claims cannot be adequately addressed under the regulatory scheme that governs the relationship between the government and its employees." Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1339 [*1424] (9th Cir. 1987). The existence of statutory and administrative procedures for addressing complaints of improper personnel action bars Johnston's claim. Bush v. Lucas, 462 U.S. 367, 76 L. Ed. 2d 648, 103 S. Ct. 2404 (1983).

Johnston's alleged constitutional violations could have been addressed adequately under the regulatory scheme provided for in 5 U.S.C. @@ 7701 and 7703 (1980 and Supp. 1989). As provided by these statutes, Johnston in fact exercised his right to administrative review [**23] and brought his claim before both the Office of Personnel Management and the Merit Systems Protection Board. Following exhaustion of his administrative remedies, he also had a right to judicial review under 5 U.S.C. @ 7703. His Bivens action is therefore barred.

B. Fourth Amendment Search and Seizure Claim

Johnston also claims a violation of his Fourth Amendment rights and asserts a cause of action under Bivens, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999. He names McNellis and the two security guards as defendants. The district court correctly granted the government's motion to dismiss.

Because Johnston failed to serve McNellis, the court lacked jurisdiction. Johnston named McNellis in his first amended complaint and served that complaint on the U.S. Attorney. Johnston sought damages from McNellis in his individual capacity. A Bivens action can be maintained against a defendant only in his or her individual capacity. Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987). Where the plaintiff seeks money damages from a federal Official in his individual capacity, he must effect personal service under Fed.R.Civ.P. 4(d)(1). Id. This Johnston failed to do.

Johnston's claim against the security [**24] guards is barred by the statute of limitation. In Bivens actions, we borrow the state statute that applies to analogous state law causes of action. Marshall v. Kleppe, 637 F.2d 1217, 1224 (9th Cir. 1980). This circuit has not yet decided which Washington state statute of limitation applies to Bivens claims. We have found that California's residual statute of limitation, which covers all actions "not hereinbefore provided for," applies to Bivens actions arising in that state. See Gibson v. United States, 781 F.2d 1334, 1342 (9th Cir. 1986), cert. denied, 479 U.S. 1054, 93 L. Ed. 2d 979, 107 S. Ct. 928 (1987) (applying Cal.Civ.P.Code @ 343 (West 1982)). Washington has a similar catch-all provision. Wash.Rev.Code @ 4.16.080(2) (1988). We hold that this three-year statute applies to Bivens claims arising in Washington.

Johnston's cause of action accrued on June 18, 1980, when the security guards detained him and removed him from the Shipyard. See Norco Constr., Inc. v. King County, 801 F.2d 1143, 1145 (9th Cir. 1986). The statute prescribed by Wash.Rev.Code @ 4.16.080(2) ran on June 18, 1983. Johnston filed his original

complaint on November 17, 1982. However, he failed either to plead the [**25] Fourth Amendment claim or to name the two security guards in that complaint. He did not name the security guards as defendants until October 17, 1983, when he filed a second amended complaint.

An amended complaint, though filed after the statute has run, may be timely if it states a cause of action based on facts pleaded in the original complaint. Fed.R.Civ.P. 15(c). Because Johnston failed to plead the facts giving rise to the Fourth Amendment claim in his original complaint, the second amended complaint does not relate back under Rule 15(c). The claim against the security guards is time-barred.

V

We DISMISS Johnston's @ 791 Rehabilitation Act and retaliation claims for lack of jurisdiction and DISMISS his @ 794 claim because no cause of action exists. We AFFIRM the judgment in favor of defendants on the Privacy Act claim and AFFIRM the dismissal of his constitutional claims.

BERNARD SCHROEDER, Plaintiff, v. CITY OF CHICAGO, JOHN J. TULLY, and AUDLEY CONNOR, individually and as agents of the Chicago Fire Department, Defendants

No. 88 C 9496

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

715 F. Supp. 222; 1989 U.S. Dist. LEXIS 7287; 50 Fair Empl. Prac. Cas. (BNA) 582; 51 Empl. Prac. Dec. (CCH) P39,325

June 27, 1989, Decided

COUNSEL: [**1]

J. Peter Dowd, Esq., N. Caroline Harney, Esq., Dowd & Resnick, Chicago, Illinois, Attorneys for Plaintiff.

Judson H. Miner, Corporation Counsel, City of Chicago, by Laura Hutchinson, Patricia M. Carroll, Assistant Corporation Counsel, Chicago, Illinois, Attorneys for Defendant.

JUDGES: Nicholas J. Bua, United States District Judge.

OPINIONBY: BUA

OPINION: [*222] ORDER

NICHOLAS J. BUA, UNITED STATES DISTRICT JUDGE

Plaintiff claims that defendants arbitrarily removed him from the payroll of the Chicago Fire Department. Plaintiff also blames defendants for the delay in his receipt of disability benefits. Based on these allegations, plaintiff has filed suit pursuant to 42 U.S.C. @ 1983 and 29 U.S.C. @ 794. His three-count complaint asserts violations [*223] of procedural due process, substantive due process, and the Rehabilitation Act of 1973. Defendants now move to dismiss a substantial portion of plaintiff's complaint. In the same motion, defendants seek dismissal of the City of Chicago from Counts I and II of the complaint. For the reasons stated herein, the court grants defendants' motion.

FACTS

For nearly 20 years, plaintiff Bernard Schroeder worked as a firefighter for the City of Chicago. While fighting a fire on October 23, 1985, Schroeder

suffered injuries to his [**2] back, head, and neck. These injuries rendered Schroeder incapable of remaining on active duty. As a result, he began an extended medical lay-up. During the first ten months of 1986, Schroeder underwent a series of physical examinations - three by his personal physician, two by a doctor whom the Chicago Fire Department had recommended. Following these examinations, both doctors told Fire Department officials that Schroeder was unable to resume active duty.

On November 15, 1986, Chief John Tully, the Fire Department's Director of Personnel, allegedly removed Schroeder from the Fire Department payroll without giving Schroeder notice or a hearing. According to the complaint, Tully discharged Schroeder based on unfounded allegations that Schroeder had engaged in alcohol abuse during his tenure with the Fire Department.

After his removal from the payroll, Schroeder applied for duty disability benefits pursuant to the Illinois Pension Code, Ill. Rev. Stat. ch. 108 1/2, para. 6-151 (1987). Although Schroeder ultimately received an award of benefits, the Retirement Board of the Firemen's Annuity and Benefit Fund ("the Retirement Board") did not process Schroeder's application until eight months [**3] had elapsed. Schroeder attributes this eight-month delay to the actions of Tully and Dr. Audley Connor, Director of the Fire Department's medical Section. Initially, the Retirement Board refused to consider Schroeder's eligibility for benefits until it received a discharge certificate from the Fire Department. Tully and Dr. Connor allegedly failed or refused to provide such a discharge certificate to the Retirement Board.

DISCUSSION

Schroeder's complaint names three defendants: Tully, Dr. Connor,

and the City of Chicago. The complaint alleges that defendants arbitrarily discharged Schroeder and improperly obstructed his acquisition of disability benefits. Based on these alleged improprieties, Schroeder asserts three claims against defendants. Count I of the complaint alleges that defendants violated Schroeder's Fourteenth Amendment right to procedural due process. Count II contends that defendants infringed Schroeder's substantive due process rights under the Fourteenth Amendment. Finally, Count III maintains that defendants discriminated against Schroeder in contravention of @ 504 of the Rehabilitation Act of 1973, 29 U.S.C. @ 794.

Insofar as Schroeder bases his procedural due process [**4] claim on the delay in his acquisition of benefits, defendants move to dismiss Count I. In addition, defendants ask the court to dismiss Counts II and III in their entirety. Defendants also move to dismiss the City of Chicago from Counts I and II. The court will now examine the various aspects of defendants' motion to dismiss.

I. Procedural Due Process

In Count I, Schroeder claims that defendants violated his right to procedural due process in two ways - first by discharging him arbitrarily, then by impeding the processing of his application for benefits. Defendants argue that Schroeder cannot maintain a due process claim based on the delay in his receipt of disability benefits. This court agrees.

In order to allege a violation of procedural due process, Schroeder must first establish that defendants deprived him of a property interest protected by the Fourteenth Amendment. See Cornelius v. LaCroix, 838 F.2d 207, 210 (7th Cir. 1988). Schroeder claims to possess a property interest in [*224] duty disability benefits; but "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation [**5] of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). By establishing the terms of eligibility for certain benefits, state law defines the scope of an individual's property interest in those benefits. Id. Therefore, to determine the dimensions of Schroeder's property interest in disability benefits, this court must consult the state law on which Schroeder based his claim of entitlement. Under the Illinois Pension Code, an injured firefighter may not receive duty disability benefits until the Retirement Board has authorized payment of such benefits. Ill. Rev. Stat. ch. 108 1/2, paras. 6-179, 6-185 (1987). Consequently, until the Retirement Board ruled on Schroeder's application, he had no legitimate claim of entitlement to benefits. Defendants' alleged misconduct preceded the Retirement Board's ruling. Thus, at the time defendants purportedly violated his right to due process, Schroeder had only a unilateral expectation that he would receive disability benefits. Even assuming that defendants took steps to delay Schroeder's acquisition of benefits, defendants did not deprive Schroeder of a property interest [**6] that he already possessed. n1 For this reason, Schroeder cannot state a due process claim based on the delay in his receipt of benefits. He simply cannot invoke the Due Process Clause to protect a property interest in benefits that he had not yet obtained: "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." Roth, 408 U.S. at 576 (emphasis added); see also Cornelius, 838 F.2d at 210 (the Fourteenth Amendment protects property rights derived from people's "legitimate claim of entitlement to keep that which presently securely belongs to them").

n1 Perhaps if the Illinois Pension Code mandated prompt resolution of disability claims, then Schroeder could argue that defendants deprived him of his property interest in an expeditious ruling on his application. The Illinois Pension Code, however, provides no timetable for the processing of disability claims.

II. Substantive Due Process

Count II asserts that defendants violated Schroeder's substantive due process rights under the Fourteenth Amendment. As the court has already noted, the delay in Schroeder's receipt [**7] of disability benefits does not constitute a due process violation. Consequently, Schroeder can state a claim under Count II only if he can establish that defendants violated his substantive due process rights by discharging him.

In moving to dismiss Count II, defendants do not challenge Schroeder's assertion of a property interest in his job with the Chicago Fire Department. A municipal ordinance provides that firefighters for the City of Chicago may only be discharged for just cause. For firefighters like Schroeder, this ordinance creates a property right in continued employment. See Cleveland Board of Education v. Louder mill, 470 U.S. 532, 538-39, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). Without questioning the validity of this property interest, defendants contend that the court should dismiss Count II because the doctrine of "substantive due process" does not apply to property rights. Contrary to defendants' assertion, both the Supreme Court and the Seventh Circuit have employed substantive due process analysis when assessing the constitutionality of zoning ordinances and zoning decisions. See Village of Belle Terre v. Boraas, 416 U.S. 1, 39 L. Ed. 2d 797, 94 S. Ct. 1536 (1974); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, [**8] 71 L. Ed. 303, 47 S. Ct. 114 (1926); Harding v. County of Door, 870 F.2d 430 (7th Cir. 1989); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988). Indeed, the Seventh Circuit has not ruled out the possibility that some deprivations of property might arouse substantive due process concerns. Coniston Corp., 844 F.2d at 465-68. Likewise, this court cannot categorically conclude that [*225] the loss of property never implicates substantive due process rights.

In the instant case, however, Schroeder fails to state a substantive due process claim based on his discharge from the Fire Department. Under the doctrine of substantive due process, a property deprivation passes constitutional muster unless it is invidious or irrational. Harding, 870 F.2d at 431; Coniston Corp., 844 F.2d at 467. After considering the allegations in Schroeder's complaint, this court cannot properly characterize Schroeder's discharge as either invidious or irrational. To qualify as an invidious act, a deprivation of property must violate specific constitutional guarantees. Coniston Corp., 844 F.2d at 467. Thus, when determining whether a particular deprivation is invidious, the courts have regarded "substantive [**9] due process" as "a shorthand for the fact that the Supreme Court has interpreted the due process clause of the Fourteenth Amendment to confer certain substantive rights based mainly on the Bill of Rights." Brown v. Brienen, 722 F.2d 360, 366 (7th Cir. 1983). Schroeder does not contend that his discharge violated any specific constitutional guarantees contained in the Bill of Rights. Instead, he maintains that defendants discharged him arbitrarily. The facts alleged in

Schroeder's complaint, however, belie his assertion that defendants acted irrationally when they removed him from the Fire Department payroll. According to the complaint, two doctors who examined Schroeder repeatedly told Fire Department officials that Schroeder's injuries would prevent him from returning to active duty. Based on these medical opinions, defendants could quite reasonably have concluded that Schroeder should no longer remain on the payroll. Given his medical condition at the time of his discharge, Schroeder cannot plausibly depict defendants' decision to discharge him as "irrational." As a result, Schroeder cannot obtain relief under a substantive due process theory.

III. Section 504 of the Rehabilitation [**10] Act

Count III alleges that defendants discriminated against Schroeder based on his past history of treatment for alcoholism. Schroeder asserts that defendants' allegedly discriminatory conduct violated @ 504 of the Rehabilitation Act of 1973, 29 U.S.C. @ 794. Section 504 prohibits discrimination against otherwise qualified individuals based on their handicaps. To state a claim under @ 504, however, Schroeder must allege that he suffered discrimination under a program or activity receiving federal financial assistance. See 29 U.S.C. @ 794(a). Schroeder's complaint fails to identify any program or activity that falls within the purview of the Rehabilitation Act. The complaint simply alleges that the City of Chicago is a program or activity receiving federal financial assistance as defined by 29 U.S.C. @ 794(b)(1)(A). This allegation rests on a misinterpretation of the statute. Section 504(b)(1)(A) of the Rehabilitation Act defines " program or activity" as the operations of "a department, agency, special purpose district, or other instrumentality of a State or of a local government." Id. @ 794(b)(1)(A). The City of Chicago does not fit this statutory definition of "program or [**11] activity. " The City is not a department or instrumentality of a local government. Rather, as a full-blown municipality, the City embodies an entire local government.

Even after its expansion by a 1988 Congressional amendment, the Rehabilitation Act's definition of "program or activity" does not encompass the City of Chicago. When discussing its rationale for amending the Act, Congress cited a need to restore the "broad, institution-wide application" of federal antidiscrimination laws whose scope the Supreme Court had narrowed. Civil Rights Restoration Act of 1987, Pub. L. 100-259, @ 2, 102 Stat. 28 (1988) (to be codified at 20 U.S.C. @ 1687 note) (emphasis added). By referring to "institution-wide" application of the Rehabilitation Act, Congress indicated its intent to include federally funded institutions like hospitals or universities within the amended definition of "program or activity. " By contrast, nothing in the amendment's legislative history suggests that Congress contemplated classifying an entire municipality like the City of Chicago as a " program or activity" [*226] subject to @ 504 of the Rehabilitation Act. Therefore, Schroeder cannot base a @ 504 claim on the premise that [**12] the City of Chicago constitutes a " program or activity" under the Rehabilitation

Act.

IV. The City's Liability under Section 1983

Generally, the tortious acts of municipal employees do not expose a municipality to liability under 42 U.S.C. @ 1983. Monell v. Department of Social Services, 436 U.S. 658, 691, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). A municipality incurs liability under @ 1983 only if execution of the municipality's official policy or custom results in a constitutional injury. Id. at 694. Schroeder's complaint does not allege that his injuries stemmed from the application of an official policy or custom. For this reason, defendants ask the court to dismiss the City of Chicago from Counts I and II, which assert due process claims based on @ 1983. As Schroeder points out, however, the action of a single municipal official can subject a municipality to @ 1983 liability if the official "possesses final authority to establish municipal policy with respect to the action ordered." Pembaur v. City of Cincinnati, 475 U.S. 469, 481, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986). Schroeder claims that Tully and Dr. Connor wielded final policymaking authority when they discharged Schroeder and delayed his acquisition of benefits. Relying on [**13] this rationale, Schroeder avers that his complaint provides a basis for holding the City of Chicago liable for his injuries under @ 1983.

As this court has already observed, most of the improprieties alleged in Counts I and II do not amount to due process violations. Now that the court has dismissed part of Count I and all of Count II, Schroeder's only remaining @ 1983 claim revolves around the allegation that his discharge violated procedural due process. With respect to Schroeder's discharge, neither Tully nor Dr. Connor possessed ultimate policymaking authority. In 1982, the Chicago City Council adopted an ordinance governing the discharge of firefighters. This ordinance requires the Chicago Fire Department to give notice to an employee before discharging him. If Tully discharged Schroeder without notice, as the complaint alleges, then Tully violated established municipal policy. Under these circumstances, the court cannot fairly attribute Tully's action to the City of Chicago: "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." [**14] City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915, 926, 99 L. Ed. 2d 107 (1988). Because Schroeder's complaint fails to allege facts justifying municipal liability under @ 1983, the court dismisses the City of Chicago from Counts I and II.

CONCLUSION

For the foregoing reasons, this court grants defendants' motion to dismiss. The court dismisses Count I insofar as it alleges a due process violation based on the delay in Schroeder's receipt of disability benefits. In addition, the

court dismisses Counts II and III in their entirety. Finally, the court dismisses the City of Chicago from Counts I and II. IT IS SO ORDERED.

Dated: June 27, 1989

HAYWOOD WILLIAMS, JR., Plaintiff-Appellant, v. EDWIN MEESE; NORMAN A. CARLSON; JERRY O'BRIEN; SUPERINTENDENT, FEDERAL PRISON INDUSTRIES; JOB PLACEMENT SUPERVISOR USP LEAVENWORTH; CHAPLAIN CRAIG; CHAPLAIN MABRY; MR. SPENCER, Librarian; MR. VINCENT, Recreation Supv.; MR. GERALD AUSTIN; MR. GAUNCE; MR. ANDERSON; DR. HILL; MR. HACKLER; MR. MORRIS; COMMISSARY SUPERVISOR; MR. SIMPSON, Job Placement Officer; UNKNOWN MEMBERS OF THE INSTITUTION INMATE WORK AND PERFORMANCE COMM.; and MR. M. HAMMEKE, Defendants-Appellees.

No. 90-3122

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

926 F.2d 994; 1991 U.S. App. LEXIS 2893; 55 Fair Empl. Prac. Cas. (BNA) 390; 55 Empl. Prac. Dec. (CCH) P40,577

February 27, 1991, Filed

PRIOR HISTORY:
[**1]

Appeal from the United States District Court for the District of Kansas; D.C. No. 86-3224.

COUNSEL: Haywood Williams, Jr., pro se.

Lee Thompson, United States Attorney and Connie R. DeArmond, Assistant United States Attorney, Topeka, Kansas, for defendants-appellees.

JUDGES: Logan, Moore, and Baldock, Circuit Judges.

OPINIONBY: MOORE

OPINION: [*995]

MOORE, Circuit Judge

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff, who is incarcerated in the federal penitentiary in Leavenworth, Kansas, commenced the underlying action to recover monetary, injunctive, and declaratory relief for defendants' alleged violations of plaintiff's civil rights. Plaintiff incorporated into his complaint, and filed simultaneously [*996] therewith, various documents concerning the administrative grievances he had filed about the violations alleged in the complaint.

Plaintiff's allegations related to essentially five claims: (1) that defendants denied him certain prison job assignments, for which he was qualified, solely on the basis of [**2] his age, race, or handicap; (2) that defendants retaliated against him for filing administrative grievances in assigning him to jobs; (3) that defendants deprived him of his graduation ring and all but twenty dollars worth of postage stamps without affording him due process; (4) that defendants discriminated against him on the basis of his race in depriving him of the property; and (5) that the administrative grievance procedures were inadequate.

After most of the defendants answered the complaint, plaintiff filed a motion seeking, among other things, the appointment of counsel. Thereafter, the remainder of the defendants answered and two of them filed a motion to dismiss

for lack of personal jurisdiction. Plaintiff subsequently filed a motion for summary judgment on his claims relating to the deprivation of his property, and moved to amend his complaint to allege that after he filed the present action, defendants retaliated against him by transferring him from his position as law library clerk to a position as laborer, and by denying his application for vacation.

By order dated March 26, 1990, the district court denied plaintiff's motion for summary judgment, specifically refused [**3] to address defendants' motion to dismiss for lack of personal jurisdiction, and dismissed plaintiff's action for failure to state a claim for relief. Plaintiff moved the court for reconsideration, which it denied by order dated April 12, 1990. Plaintiff then filed a notice of appeal and application for leave to proceed in forma pauperis on appeal. The district court denied the latter and plaintiff renewed his request with this court.

Plaintiff makes the following arguments on appeal: (1) that the district court erred in failing to appoint counsel to represent him; (2) that the district court failed to consider all of the jurisdictional statutes set forth in the complaint; (3) that the district court incorrectly construed the allegations in the complaint as asserting a constitutional right to employment, rather than impermissible discrimination in employment; n1 (4) that the district court erred in concluding that plaintiff was not entitled to either a pre- or post-deprivation hearing regarding the seizure of his property; and (5) that the "administrative procedure of grievance is not constitutionally adequate for the reasons stated in the complaint," Brief of Appellant at 7.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 Defendants assert for the first time on appeal that the district court did not have subject matter jurisdiction over plaintiff's discrimination in employment claim because plaintiff did not file a timely complaint with the EEOC. We disagree. "Filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982). Since defendants did not raise below plaintiff's failure to file a timely complaint with the EEOC, they waived that requirement.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[**4]

Turning to the first of plaintiff's arguments, "the district court has broad discretion to appoint counsel for indigents under 28 U.S.C. @ 1915(d), and its denial of counsel will not be overturned unless it would result in fundamental unfairness impinging on due process rights." Maclin v. Freake, 650 F.2d 885, 886 (7th Cir. 1981). In determining whether to appoint counsel, the district court should consider a variety of factors, including the merits of the litigant's claims, the nature of the factual issues raised in the claims, the litigant's ability to present his claims, and the complexity of the legal issues raised by the claims. Id. at 887-89. The district court here did not specifically rule on plaintiff's motion for the appointment of counsel, and, therefore, did not state its reasons for not appointing counsel. The court may have declined to appoint counsel because it concluded that none of plaintiff's allegations stated a claim for relief. Since we conclude that plaintiff has stated two claims [*997] for relief, as discussed below, on remand, the district court should reconsider plaintiff's request for the appointment of counsel in light of the factors set forth in Maclin [**5] .

We will construe plaintiff's second argument, that the district court failed to consider all of the jurisdictional statutes set forth in the complaint, as well as the remainder of plaintiff's arguments, as a challenge to the district court's conclusion that none of the allegations in plaintiff's complaint was

sufficient to state a claim for relief.

"The sufficiency of a complaint is a question of law which we review de novo." Morgan v. City of Rawlins, 792 F.2d 975, 978 (10th Cir. 1986). A court may dismiss a complaint for failure to state a claim only if it concludes that "the plaintiff can prove no set of facts in support of his claim to entitle him to relief." Id. Furthermore, for purposes of making the foregoing determination, a court must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff. Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

Plaintiff alleged the following sources of substantive rights as the bases of his claim for discrimination in the assignment of prison jobs: Title VII; the Age Discrimination in Employment Act (ADEA); the Equal Pay Act of 1963; the Rehabilitation [**6] Act of 1973; 42 U.S.C. @@ 1981 and 1997; and the fifth and eighth amendments to the United States Constitution. We will consider each in turn.

Neither Title VII nor the ADEA provides plaintiff any substantive rights because he does not have an employment relationship with the Federal Bureau of Prisons or any of the defendants. "Title VII protections apply only where there is some connection with an employment relationship." Baker v. McNeil Island Corrections Center, 859 F.2d 124, 127 (9th Cir. 1988). The same is true of the protections afforded by the ADEA. See Messina v. Kroblin Transp. Sys., Inc., 903 F.2d 1306, 1308 (10th Cir. 1990)("it is appropriate for courts to use the law developed in the context of Title VII cases in ADEA disputes").

Whether a plaintiff is an "employee" for purposes of Title VII is a question of federal law. Calderon v. Martin County, 639 F.2d 271, 272-73 (5th Cir. 1981). We conclude that plaintiff is not an "employee" under either Title VII or the ADEA because his relationship with the Bureau of Prisons, and therefore, with the defendants, arises out of his status as an inmate, not an employee. Although his relationship with defendants may contain [**7] some elements commonly present in an employment relationship, it arises "from [plaintiff's] having been convicted and sentenced to imprisonment in the [defendants'] correctional institution. The primary purpose of their association [is] incarceration, not employment." Prisoner Not Protected From Racial Job Bias, 2 Empl. Prac. Guide (CCH) para. 6865, at 7099 (April 18, 1986) (EEOC Decision No. 86-7). Since plaintiff has no employment relationship with defendants, he cannot pursue a claim for discrimination against them under either Title VII or the ADEA.

The foregoing analysis precludes plaintiff's claims for discrimination under the Equal Pay Act and the Rehabilitation Act, as well. Plaintiff's claims under those statutes also have additional defects. Subsection (d) of 29 U.S.C. @
206 (Equal Pay Act), cited by plaintiff in his complaint, concerns only discrimination based on sex, not race, age, or handicap. The section of the Rehabilitation Act cited by plaintiff, 29 U.S.C. @ 794, does not give plaintiff any substantive rights since the Federal Bureau of Prisons does not fit the definition of "programs or activities" governed by that section.

Plaintiff's reliance on 42 U.S.C. @@ 1981 and [**8] 1997 also is misplaced, since those statutes do not apply to plaintiff's claim of discrimination. Section 1981 protects rights not at issue in plaintiff's complaint, and sections 1997 through 1997j protect the rights of persons institutionalized in state, not federal, facilities.

[*998] Plaintiff's complaint also fails to state a claim for relief based on the eighth amendment. The eighth amendment prohibits the infliction of cruel and unusual punishment. Plaintiff's allegations that he has been assigned jobs inconsistent with his prior work experience and physical abilities do not rise to the level of deliberate indifference to his serious medical needs and, therefore, do not state a claim for cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976).

The allegations of plaintiff's complaint are sufficient, however, to state a Bivens n2 claim for deprivation of the right to equal protection secured by the fifth amendment. Although plaintiff has no right to a job in the prison or to any particular job assignment, see Ingram v. Papalia, 804 F.2d 595, 596 (10th Cir. 1986), prison officials cannot discriminate against him on the basis of his age, race, or handicap, [**9] in choosing whether to assign him a job or in choosing what job to assign him, see Bentley v. Beck, 625 F.2d 70, 70-71 (5th Cir. 1980). Therefore, to the extent that plaintiff's discrimination claim is based on the fifth amendment, the district court erred in determining that he failed to state a claim for relief.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n2 Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Similarly, the district court erred in dismissing plaintiff's claim that he was denied particular job assignments or was transferred from one job to another in retaliation for filing administrative grievances or the present civil rights action. Again, although plaintiff has no right to a job or to any particular assignment, prison officials cannot punish plaintiff for exercising his first amendment rights by denying him certain job assignments or transferring him from one job to another. Cf. Frazier v. Dubois, 922 F.2d 560, 561-62 (10th Cir. 1990) (although prisoner has no right to remain in any particular prison, prison [**10] officials cannot punish him for exercising his first amendment rights by transferring him to another prison).

The court correctly dismissed plaintiff's claims for deprivation of property without due process since the administrative grievance documents incorporated by plaintiff into his complaint showed that the ring and postage stamps seized by prison officials were sent to an address of plaintiff's choosing. Although plaintiff no longer has possession of the property, he still retains control over it and, therefore, has not been "deprived" of the property. Plaintiff's conclusory allegations that the seizure of his property was racially discriminatory are not sufficient to state a claim for relief since he does not allege that nonblack inmates were permitted to retain possession of similar jewelry or more than twenty dollars worth of postage stamps.

Finally, the district court properly dismissed plaintiff's claim that the grievance procedures were inadequate. The allegations are too conclusory to state a claim for relief and assert, at most, negligent conduct that does not implicate the due process clause. See Bryson v. City of Edmond, 905 F.2d 1386, 1390 (10th Cir. 1990).

In sum, [**11] the district court properly dismissed all of plaintiff's claims except that of discrimination in job assignments in violation of the fifth amendment, and that of retaliation for the exercise of first amendment rights.

Accordingly, plaintiff's request to proceed in forma pauperis on appeal is GRANTED, and the judgment of the United States District Court for the District of Kansas is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this order and judgment. Plaintiff's request for the appointment of counsel on appeal is DENIED. Defendants' motion to supplement the record on appeal is DENIED as moot.

ALONZEL A. RHODES, JR., PLAINTIFF v. CHARTER HOSPITAL, DEFENDANT

Civil Action No. J89-0062(L)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

730 F. Supp. 1383; 1989 U.S. Dist. LEXIS 16361

August 31, 1989, Decided

COUNSEL: [**1]

Elizabeth L. Gilchrist, Jackson, Mississippi, for Plaintiff.

James A. Keith, BRUNINI, GRANTHAM, GROWER & HEWES, Jackson, Mississippi, for Defendant.

JUDGES: Tom S. Lee, United States District Judge.

OPINIONBY: LEE

OPINION: [*1383] MEMORANDUM OPINION AND ORDER

TOM S. LEE, UNITED STATES DISTRICT JUDGE.

Plaintiff, Alonzel A. Rhodes, Jr., brought this action alleging discrimination and intentional infliction of emotional distress by defendant, Charter Hospital of Jackson, Inc. (Charter). The cause is presently before the court on the motion of Charter to dismiss for failure to state a claim upon which relief may be granted. Plaintiff has responded to the motion, and the court has considered the memoranda with authorities submitted by the parties in ruling on the motion.

In June 1987 plaintiff was admitted to Charter, a private psychiatric hospital in Rankin County, Mississippi. Prior to his [*1384] admission, plaintiff had been diagnosed as having AIDS Related Complex. n1 After approximately thirteen days of treatment, hospital staff imposed a quarantine upon plaintiff, isolating him from other patients and restricting him to his room at all times, including meals. These restrictions prohibited him from participating in group therapy. A sign was placed on the door of Rhodes' room indicating [**2] that he suffered from an infectious disease. Whenever Charter personnel were in his room for any reason, they wore masks, gowns and gloves.

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n1 AIDS Related Complex is a non-specific term often used to refer to the condition of being infected with the AIDS virus.

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Plaintiff brought this action under 42 U.S.C. @ 1983 (1981) and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. @ 794 (1985 & Supp. 1989), alleging that these actions by Charter constituted intentional discrimination against him because of his disease and caused the psychological condition for which he was admitted to the hospital to worsen. n2 He also alleges a state-law claim for intentional infliction of emotional distress. He seeks damages for emotional distress and mental anguish. n3

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n2 Defendant justifies its actions as precautionary measures which were reasonable in light of medical knowledge available at that time concerning the spread of the AIDS virus. Defendant does not address, and this court does not reach, the question of whether this type of conduct could ever constitute discrimination within the meaning of the Rehabilitation Act.

n3 The complaint also seeks declaratory and injunctive relief, but plaintiff concedes that these claims are now moot.

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[**3]

DAMAGES UNDER SECTION 504 OF THE REHABILITATION ACT

In support of its motion to dismiss, defendant argues that there can be no private action for damages for emotional distress under section 504 of the Rehabilitation Act. Section 504 prohibits discrimination against the handicapped by programs receiving federal funds:

No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or 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. . . .

29 U.S.C. @ 794 (1985 & Supp. 1989). n4 The Rehabilitation Act is patterned closely after Title VI of the Civil Rights Act of 1964, 42 U.S.C. @ 2000d et

seq. (1981), and incorporates the remedies of Title VI, stating that "[the] remedies, procedures, and rights set forth in Title VI . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance." 29 U.S.C. @ 794. Nevertheless, the question of what monetary damages are available under section 504 is unsettled, having aptly been described by one court as "murky." [**4] Parks v. Pavkovic, 753 F.2d 1397, 1409 (9th Cir.), cert. denied474 U.S. 918, 106 S. Ct. 3529, 87 L. Ed. 2d 653 (1985). The incorporation of Title VI remedies does little to illuminate the matter, as the remedies available under that statute are similarly uncertain. The specific question of whether damages for emotional distress may be recovered under section 504 has been addressed by only a handful of courts and is a question of first impression before this court.

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n4 The Rehabilitation Act defines the term "individual with handicaps" as any person who

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. @ 706(8)(B) (1985 & Supp. 1989). The Supreme Court has held that a contagious disease may in some circumstances fall within this definition. School Bd. of Nassau County, Florida v. Arline, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987). Defendants do not dispute that plaintiff is within the Act's definition.

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The starting point in this circuit for the analysis of remedies available to a section 504 plaintiff is Drayden v. Needville Independent School District, [**5] 642 F.2d 129 (5th Cir. Unit A April 1981), an employment discrimination case brought under Title VI. n5 Discussing the relief available to the [*1385] appellants, the court, without elaboration, stated that the right to maintain a private cause of action under Title VI "does not include the right to recover backpay or other losses. Id. at 133. However, subsequently the United States Supreme Court specifically addressed the nature of the remedies available under section 504, holding that a plaintiff alleging intentional discrimination may bring an action for back pay. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 104 S. Ct. 1248, 79 L. Ed. 2d 568 (1984). Thus, Drayden's sweeping prohibition against all monetary relief in Title VI actions no longer applies.

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n5 Because the Rehabilitation Act incorporates Title VI remedies, cases addressing the available remedies under Title VI are authoritative with respect to section 504. See Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348, 1357 (5th Cir. 1983).

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Also relevant to the issue of damages under section 504 is the 1983 Supreme Court case of Guardians Association v. Civil Service Commission of New York, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983), in which a badly fragmented [**6] court held that absent intentional discrimination, there can be no private cause of action for damages under Title VI. Although the separate opinions filed in that case express a wide variety of views as to the relief available under Title VI, a majority of the justices did imply that some form of monetary relief might be available under Title VI for intentional discrimination. n6 The parties in the present case make much of the question of the extent to which Guardians implicitly over ruled Drayden. It is important to note that the monetary relief which had been awarded by the lower court in Guardians was in the limited form of back pay and back benefits, not more general damages; thus, one could conclude that the justices who implied that some monetary relief might be available were, at most, approving the recovery of only back pay or similar awards. See Bradford v. Iron County C-4 School Dist., 37 Empl.Prac.Dec. (CCH) para. 35,404 (E.D.Mo. 1984) (term "compensatory damages" as used in Guardians refers only to retrospective equitable damages akin to those awarded under Title VII). Discrimination cases commonly distinguish between awards for back pay and other [**7] types of monetary damages, characterizing back pay as an equitable, rather than legal, remedy. Because Drayden prohibited all monetary remedies, Drayden cannot be said to have been overruled in its entirety, either implicitly by Guardians or, as that case applies to section 504 actions, by Darrone. The court concludes that the prohibition in Drayden against damages other than back pay in Title VI actions remains the law of this circuit and is therefore applicable to section 504 cases.

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n6 Justice White, announcing the judgment of the court in an opinion joined in relevant part by Justice Rehnquist, stated that "it may be that the victim of the intentional discrimination should be entitled to a compensatory award." Guardians, 463 U.S. at 597. Justice Marshall, in a dissenting opinion joined by Justices Stevens, Brennan, and Blackmun, indicated that compensatory relief should be allowed under Title VI for both intentional and unintentional

discrimination. Justice Powell, concurring in the judgment in an opinion joined in relevant part by the Chief Justice, would allow no private action for Title VI violations. Justice O'Connor, concurring, did not address the question.

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[**8]

Even were Drayden no longer authoritative on the question, other considerations compel the conclusion that damages for emotional distress are unavailable under section 504. The Supreme Court has indicated that section 504 analysis is to be balanced: "Any interpretation of @ 504 must . . . be responsive to two powerful but countervailing considerations -- the need to give effect to the statutory objectives and the desire to keep @ 504 within manageable bounds." Alexander v. Choate, 469 U.S. 287, 299, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985). Hardly anything could have greater potential for rendering section 504 actions unmanageable than the allowance of damages for emotional distress. In Bradford, a section 504 employment discrimination case, the court reached this very conclusion:

Damages for mental suffering and humiliation are difficult to measure at best, are often sizeable, and have been editorialized as gratuitous bonuses or prize [*1386] money for prosecuting a successful suit. . . . The incremental remedial and deterrent effect that would be occasioned by damages for mental anxiety or humiliation does not warrant imposing significant added demands on funds intended to reach other innocent beneficiaries [**9] of federal financial assistance programs. As was said in a different context, @ 504 was not intended to create general tort liability.

Bradford, 37 Empl.Prac.Dec. at 38,613-14 (citation omitted). This court finds the Bradford reasoning persuasive. Other courts addressing the issue have reached the conclusion that damages for emotional distress, pain and suffering, or similar injuries are not available under section 504. See Marshburn v. Postmaster Gen. of the United States, 678 F. Supp. 1182 (D.Md.) (no damages for pain and suffering), aff'd, 861 F.2d 265 (4th Cir. 1988); Shuttleworth v. Broward County, 649 F. Supp. 35 (S.D.Fla. 1986) (no damages for pain and suffering); Martin v. Cardinal Glennon Memorial Hosp. for Children, 599 F. Supp. 284 (E.D.Mo. 1984) (no damages for mental anxiety and humiliation); cf. Byers v. Rockford Mass Transit Dist., 635 F. Supp. 1387 (N.D.Ill. 1986) (back pay recoverable but not compensatory or punitive damages); David H. v. Spring Branch Indep. School Dist., 569 F. Supp. 1324 (S.D.Tex. 1983)(recovery limited to costs expended because of discrimination).

Plaintiff contends that because most of these cases denying [**10] emotional distress damages for section 504 violations arose in the context of employment discrimination, they are not instructive on the question of what damages may be awarded in other contexts. He argues that it is unfair to limit

section 504 recovery to back pay when back pay would obviously not be available in a nonemployment discrimination case. But even though in many cases of discrimination against the handicapped there may be no possible claim for back pay, it does not follow that those plaintiffs alleging other kinds of discrimination are entitled to other monetary relief. Indeed, it would hardly be consistent to allow recovery of damages for emotional distress by a plaintiff alleging discrimination outside of the employment context, but deny those same damages to a plaintiff alleging employment discrimination. n7

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n7 In David H., 569 F. Supp. at 1331, the court indicated that damages in the form of reimbursement of private school tuition are similar to back pay awards and are recoverable by a student discriminated against by a public school even though other monetary damages are not recoverable.

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The court concludes that the better reasoned view and the one most in [**11] keeping with the purpose of the Rehabilitation Act is that damages for emotional distress and humiliation are not recoverable and that therefore plaintiff has failed to state a claim under section 504.

SECTION 1983

Defendant also contends that plaintiff's section 1983 claim should be dismissed. No lengthy analysis is necessary to conclude that plaintiff has failed to state a claim under section 1983. Defendant is a private entity, and plaintiff has alleged no facts that indicate that defendant acted under color of state law or that its acts constituted state action. See Burgess v. City of Houston, 718 F.2d 151, 154 (5th Cir. 1983).

CONCLUSION

The court concludes that plaintiff has failed to state a claim under either the Rehabilitation Act or section 1983 and that these claims should be dismissed. Because plaintiff's federal claims are being dismissed at the pleading stage, judicial economy favors dismissal of the pendent state-law claim as well. See La Porte Constr. Co. v. Bayshore Nat'l Bank of La Porte, Tex., 805 F.2d 1254, 1257 (5th Cir. 1986). However, an unconditional dismissal of the state-law claim could constitute an abuse of discretion in light of the fact [**12] that the one-year statute of limitations, Miss.Code Ann. @ 15-1-35 (1972 & Supp. 1988), has run on this claim. Guthrie v. J.C. Penney Co., Inc., 803 F.2d 202 (5th Cir. 1986); Saulsberry v. Atlantic Richfield Co., 673 F. Supp.

811, 816 [*1387] (N.D.Miss. 1987) (citing L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 428 (11th Cir. 1984); O'Brien v. Continental Ill. Nat'l Bank & Trust Co., 593 F.2d 54, 64-65 (7th Cir. 1979)). Accordingly, the court will dismiss the pendent state-law claim upon the condition that defendant submit to the jurisdiction of the state circuit court and that it waive any defense to this claim based on the statute of limitations. Although it is plaintiff's election as to whether to pursue the state-law claim in state court, that choice shall be made within thirty days of entry of this order.

A separate judgment shall be entered pursuant to Federal Rule of Civil Procedure 58.

ORDERED this 31st day of August, 1989.

BERNARD SCHROEDER, Plaintiff-Appellant, v. CITY OF CHICAGO, JOHN J. TULLY, and AUDLEY CONNOR, Defendants-Appellees

No. 90-1144

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

927 F.2d 957; 1991 U.S. App. LEXIS 4066

November 7, 1990, Argued
March 13, 1991, Decided

PRIOR HISTORY:
[**1]
Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 88 C 9496; Nicholas J. Bua, Judge.

DISPOSITION: Affirmed.

COUNSEL: J. Peter Dowd, Janet B. Johnson-Vinion, DOWD & BLOCH, Chicago, Illinois, for Plaintiff-Appellant.

L. Anita Richardson, Jean Dobrer, OFFICE OF THE CORPORATION COUNSEL, Chicago,

Illinois, Laura Hutchinson, OFFICE OF THE CORPORATION COUNSEL, Chicago, Illinois, Kelly R. Welsh, OFFICE OF THE CORPORATION COUNSEL, Appeals Division, Chicago, Illinois, for Defendant-Appellee.

JUDGES: Bauer, Chief Judge, and Posner and Ripple, Circuit Judges. Ripple, Circuit Judge, concurring.

OPINIONBY: POSNER

OPINION: [*958] POSNER, Circuit Judge

This is a suit under the ubiquitous 42 U.S.C. @ 1983 by a former employee of the Chicago fire department who is complaining about delay in the receipt of disability benefits. The suit was dismissed for failure to state a claim, so we are confined to the facts stated in the complaint. On October 23, 1985, Bernard Schroeder was injured while fighting a fire. He was placed on medical leave at full pay and remained in that status for more than a year, during which time he was examined by a number of doctors all of whom concluded that he would [**2] be unable to resume his duties as a fireman. On November 16, 1986, the fire department stopped paying him and the next month he applied to the Retirement Board of the Fireman's Annuity and Benefit Fund of Chicago -- a public agency

separate from the City of Chicago, Ill. Rev. Stat. ch. 108 1/2, para 22-402 -- for permanent "duty disability" benefits, that is, benefits for a disability incurred in the line of duty.

The complaint states that the law of Illinois prohibits the Retirement Board from acting on an application for benefits until it receives a medical certificate from the fire department indicating the reason why the fireman has been struck off the department's payroll. The defendants counter that the statute expressly gives the Board "exclusive original jurisdiction" over all claims for benefits, Ill. Rev. Stat. ch. 108 1/2, para. 6-185, and further provides that the necessary proof of a duty disability is to be furnished to the Board by a physician appointed by it. Para. 6-153. The Board can require additional evidence of disability, id., but is under no duty to do so -- certainly no duty to await a medical certification from the fire department. To this Schroeder ripostes [**3] that an earlier paragraph of the statute provides that "whenever an active fireman is or becomes so injured or sick, as to require medical or hospital attention, the chief officer of the fire department of the city shall file, or cause to be filed, with the [Retirement Board] a report of the nature and cause of his disability, together with the certificate or report of the physician attending or treating. . . . Any injury . . . for which a physician's report or copy of the hospital record is not on file with the board shall not be considered for the payment of duty disability benefits." Para. 6-151. So maybe the submission of a medical report or certificate by the fire department is a condition precedent to the Board's "exclusive original jurisdiction" attaching. And whether it is or not, the Board customarily asks the fire department for a medical certificate (so at least the complaint alleges); it did here. It got no response, and in consequence did not process Schroeder's application. Eventually he demanded a hearing before the Board. It was held on August 19, 1987, eight months after he had applied for benefits. At the hearing it was revealed that John Tully, the fire department's [**4] director of personnel, and Audley Connor, its medical director, had refused to furnish the medical certificate because they believed that the real reason for Schroeder's inability to work was alcoholism rather than any work-related injury. The complaint says that [*959] they knew better, and in fact were acting maliciously. However this may be, the Board disagreed with the opinion of Tully and Connor and either at the conclusion of the hearing or directly afterward awarded Schroeder duty disability benefits retroactive to the date on which he had applied for them. It did this even though the fire department never did furnish the medical certificate that Schroeder contends is a condition precedent to an award of benefits. If in doing this the Board violated the law, it violated it in Schroeder's favor and he can't complain.

One might have thought that a full retroactive award of benefits would have ended any dispute between Schroeder and the Chicago fire department. Not so. Schroeder complains that during the eight months in which his application for disability benefits was in limbo he had no money to live on and as a result both

suffered emotional injury -- including a fall off [**5] the wagon after what he contends was a ten-year period of sobriety (Tully and Connor may have a different view on this matter) -- and incurred legal expenses to obtain the benefits. He attributes the Board's delay and the resulting injury and expense to him to the willful and malicious conduct of Tully and Connor in withholding the vital medical certificate from the Retirement Board, conduct which he claims deprived him of property without due process of law. The complaint joins the City of Chicago, Tully's and Connor's employer, as an additional defendant, but this joinder is frivolous. The isolated misconduct of two employees in refusing to furnish a certificate to another agency is precisely the type of random and unauthorized act which, even if deliberate, is not deemed the act of their municipal employer. City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988).

The claim against Tully and Connor is more substantial but faces two steep hurdles. The first is the requirement that the plaintiff show a deprivation of property, the second that he show a denial of due process. A disability benefit that is a matter [**6] of right, not of grace, is a property right within the meaning of the due process clause. But in what sense was Schroeder deprived of his benefit? He received it in full, only some months later than he applied. If he received it after he was entitled to receive it, then he was deprived of an entitlement, and entitlements are what the due process clause has been held to protect in the name of "property." Patterson v. Portch, 853 F.2d 1399, 1405 (7th Cir. 1988); Fleury v. Clayton, 847 F.2d 1229, 1231 (7th Cir. 1988). If you are entitled to receive $ 1,000 on May 1, 1989, and you receive it on May 2, you have been deprived of an entitlement. It is a limited, temporary, and easily reparable deprivation the loss, in effect, of a day's interest on $ 1,000, which is less than a dollar. But it is a deprivation nevertheless, and we may assume that it would be actionable. Tavarez v. O'Malley, 826 F.2d 671, 674 (7th Cir. 1987); Sutton v. City of Milwaukee, 672 F.2d 644, 645 (7th Cir. 1982). But Schroeder points to no source in positive law for an entitlement to be awarded a fireman's disability benefit on the day he applies, or [**7] on the following day, or within a month, or a year. If there is unreasonable delay the applicant can seek a writ of mandamus from an Illinois state court. People ex rel. Ulrich v. Board of Trustees, 344 Ill. App. 210, 100 N.E.2d 815 (1951) (abstract); cf. Kermeen v. City of Peoria, 65 Ill. App. 3d 969, 382 N.E.2d 1374, 22 Ill. Dec. 619 (1978). But that is different from a substantive entitlement to begin receiving money within a fixed interval of the application. Probably the draftsmen of the statute assumed that between the provision for making awards retroactive and the right of an applicant to seek mandamus in an extreme case, unreasonable hardship resulting from delays in the processing of pension and disability claims would be minimized. In any event they decided not to create a legally enforceable right, an entitlement, to immediate payment, and the consequence is that a delay in the payment of Schroeder's disability benefit did not deprive him of a property right in the Fourteenth Amendment sense.

[*960] Justice delayed is justice denied, the saying goes; and at some point delay must ripen into deprivation, [**8] because otherwise a suit alleging deprivation would be forever premature. The distinction is explained in Isaacs v. Bowen, 865 F.2d 468, 477 (2d Cir. 1989), which considered delays of six months and even nineteen months in the processing of a claim for social security benefits unremarkable, while citing with approval a case that had held a delay of almost four years in acting upon a request for an annuity to be a deprivation of property. Kelly v. Railroad Retirement Bd., 625 F.2d 486, 490 (3d Cir. 1980). Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), which held that a hearing on whether to restore social security disability benefits that have been terminated can be held after termination, condoned a delay of more than a year, on average, in the restoration of benefits wrongfully terminated. Id. at 342. Cf. Heckler v. Day, 467 U.S. 104, 118, 81 L. Ed. 2d 88, 104 S. Ct. 2249 (1984). If there is irreparable harm from delay, then delay injures, and by injuring deprives. But a loss of the time value of money, [**9] consequent on delay in receiving money to which one is entitled, is not considered an irreparable harm, even though it is a real loss, and even if there is no way to recover it. Cf. Proimos v. Fair Automotive Repair, Inc., 808 F.2d 1273, 1277 (7th Cir. 1987); Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 386 (7th Cir. 1984).

The cases on unreasonable delay are best understood as holding that implicit in the conferral of an entitlement is a further entitlement, to receive the entitlement within a reasonable time. The fact that mandamus might lie under Illinois law to rectify egregious stalling tactics suggests that such a further entitlement may be implicit in that law. This we need not decide. The delay was not sufficiently egregious in this case to deprive Schroeder of this additional, implicit entitlement, assuming he had such a thing.

Another interpretation of these cases is that deadlines for action on applications for benefits define what process is due. Wright v. Califano, 587 F.2d 345, 354-56 (7th Cir. 1978); Givens v. United States Railroad Retirement Bd., 232 U.S. App. D.C. 21, 720 F.2d 196, 201 (D.C. Cir. 1983). [**10] The difficulty with this approach is that it leaves the anterior question whether there was a deprivation hanging in the air. Without a deprivation, the issue of due process does not arise. Olim v. Wakinekona, 461 U.S. 238, 250-51, 75 L. Ed. 2d 813, 103 S. Ct. 1741 (1983); Cleveland Bd. of Educate v. Loudermill, 470 U.S. 532, 541, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). But however the matter is approached, Schroeder must lose because there was no deadline for the Retirement Board to act on his application.

This is not the only reason there was no denial of due process, at least in the procedural sense of the term. Supposing that Tully and Connor did maliciously and unjustifiably withhold a certificate that would have speeded up the Board's consideration of Schroeder's application, what has that to do with Schroeder's procedural rights? Procedural due process so far as relevant to his

case must refer to the procedure used by the Board in processing Schroeder's application. That procedure satisfied the requirements of the Constitution. The hearing before the Board was unaffected by Tully's and Connor's [**11] machinations (unlike the situation in Tavarez v. O'Malley, supra, 826 F.2d at 674), for the Board awarded Schroeder his duty disability benefits retroactive to the date of his application. No procedural right of Schroeder's was infringed. For we have just seen that he had no right to a prompter hearing than he received. Stated differently, the right to a hearing and to obtain mandamus if the hearing was unreasonably delayed gave Schroeder all the process that was due him to protect him against random and unauthorized acts of subordinate officials (Tully and Connor) aimed at depriving him of his claimed property. Zinermon v. Burch, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990); Easter House v. Felder, 910 F.2d 1387 (7th Cir. 1990) (en banc).

But may not Schroeder have been denied substantive due process? He argues [*961] that Tully and Connor deprived him of the prompt receipt of his benefits by refusing to submit a medical certificate to the Retirement Board. It is as if they had shot him on his way to the hearing, or as if, instead of condemning private property for a public use, which merely entitles [**12] the owner to the fair market value of the property, government officials seize private property for a private use; in that event they must restore the property or, if that is infeasible, pay full common law damages, not just fair market value. In Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464-65 (7th Cir. 1988), we suggested, without having to decide, that such a claim is properly laid under the takings clause of the Fifth Amendment, which has been held applicable to state action through the due process clause of the Fourteenth Amendment. It is true that the takings clause, read literally, is limited to takings for a public use, and then requires only payment of fair market value to the owner. But there is authority, noted in Coniston, for regarding a taking for a private use as forbidden by the takings clause altogether, in contrast to a taking for a public use, which is permitted upon condition that the owner is offered the fair market value of his property.

This interpretation of the takings clause is attractive because it helps to domesticate the concept of substantive due process, whose tendency to formlessness has been blamed for a host of usurpative [**13] decisions ranging from Dred Scott to Lochner and beyond. Narrowly viewed -- saved from total formlessness without being completely extinguished -- "substantive due process" refers to the incorporation into the due process clause of rights found elsewhere in the Constitution. The principal example is the incorporation of most of the Bill of Rights into the due process clause of the Fourteenth Amendment, making them rights against state as well as federal action. A slightly more esoteric example is the incorporation of the equal protection clause of the Fourteenth Amendment into the due process clause of the Fifth Amendment, first done in Bolling v. Sharpe, 347 U.S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954), which forbade the federal government to discriminate against

black people. The example in the preceding paragraph was of the incorporation of the takings clause of the Fifth Amendment, broadly construed to bar takings for other than a public use. Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 239, 41 L. Ed. 979, 17 S. Ct. 581 (1897); Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984). [**14] A controversial example is the incorporation into the due process clause of both the Fifth and Fourteenth Amendments, beginning in Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965), of a right of sexual and reproductive freedom founded on values believed to inform several of the amendments that compose the Bill of Rights, especially the Fourth Amendment. The Court's preference for tethering substantive due process claims to specific provisions in the Bill of Rights is illustrated by its recent decision that complaints about excessive force in arrests are to be judged by the standards of the Fourth Amendment, not by some free-wheeling concept of outrageous governmental conduct. Graham v. Connor, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989).

We doubt there is more to substantive due process than these examples. We do not consider it a blanket protection against unjustifiable interferences with property. That way Lochner lies. So even if Schroeder had an entitlement to immediate receipt of his disability benefit -- which he did not -- and even though Tully and Connor [**15] (if the complaint is true) interfered with that hypothetical entitlement, we do not think they violated Schroeder's constitutional rights. There is no suggestion that what they did could be fitted within the boundaries of the takings clause, even broadly construed. We add the practical consideration that Schroeder did not need the aid of a federal court to protect him against Tully's and Connor's scheming. He could have asked for a hearing before the Retirement Board earlier, pointing out to them that he had no other source of support and [*962] that the Board should not (as in the end it did not) await the certificate from the fire department before acting on his application. And if he got no satisfaction he could seek mandamus. His state remedies were adequate. There is no need to invent a constitutional one.

Schroeder presses another claim, that Chicago violated the Rehabilitation Act of 1973, 29 U.S.C. @ 794, which makes it unlawful for any "program or activity" receiving federal financial assistance to discriminate against the handicapped. The statute, as amended in 1988, defines program or activity to mean "all the operations" of a department, agency, district, or other instrumentality [**16] of state or local government that receives or dispenses federal financial assistance. The statute was intended to overrule Grove City College v. Bell, 465 U.S. 555, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984), so that the various civil rights statutes including the Rehabilitation Act would apply to the entirety of any state or local institution that had a program or activity funded by the federal government. So "program or activity" was expanded from a specific program or specific activity to "all the operations" of the university or hospital or other institution that conducted

the program or activity. S. Rep. No. 64, 100th Cong., 2d Sess. 16 (1988) ("If federal health assistance is extended to a part of a state health department, the entire health department would be covered in all of its operations. If the office of a mayor receives federal financial assistance and distributes it to local departments or agencies, all of the operations of the mayor's office are covered along with the departments or agencies which actually get the aid"). But the amendment was not, so far as we are able to determine -- there are no cases on the question -- intended [**17] to sweep in the whole state or local government, so that if two little crannies (the personnel and medical departments) of one city agency (the fire department) discriminate, the entire city government is in jeopardy of losing its federal financial assistance. We therefore need not decide whether, if Schroeder had a claim under the Rehabilitation Act, he could obtain damages, as he seeks to do in this suit. 29 U.S.C. @ 794a(a)(2); Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983) (plurality opinion); Drayden v. Needville Independent School District, 642 F.2d 129, 133 (5th Cir. 1981).

AFFIRMED.

CONCURBY: RIPPLE

CONCUR: RIPPLE, Circuit Judge, concurring.

This case requires us to review the district court's dismissal of the plaintiff's case on the ground that the complaint did not state a claim upon which relief could be granted. See Fed. R. Civ. P. 12(b)(6). In reviewing such a dismissal, we are obliged to accept the allegations in the complaint as true. See Conley v. Gibson, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Here, put quite simply, Mr. Schroeder [**18] alleges that the individual defendants willfully withheld a medical certification from the Retirement Board and thus delayed the commencement of the retirement benefits to which, under the law of Illinois, Mr. Schroeder was entitled. Consequently, Mr. Schroeder alleges that he suffered significant economic, physical, and emotional deprivation for which he remains uncompensated despite the later award of retirement benefits retroactive to the date of application.

I cannot agree that the complaint does not allege adequately the deprivation of a cognizable property right. The Illinois statutory scheme, when read as a whole, clearly contemplates that, if a firefighter is separated from the service due to injury, he may apply for retirement benefits in order to ensure that misfortune in the line of duty is not compounded by economic ruin. Here, the enjoyment of these benefits, vested by law, was postponed -- according to the complaint -- not by the normal delay of bureaucratic processing but by the willful sabotage of that process by government officials. Whatever the time frame contemplated for the processing of the application by the statutory scheme, it certainly does not include an [**19] expectation of a delay caused

by such interference.

[*963] It does appear, however, that Mr. Schroeder was not without an adequate remedy under state law in the form of mandamus. That remedy afforded Mr. Schroeder an adequate remedy against the random and unauthorized acts of the individual defendants. See Zinermon v. Burch, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990); Easter House v. Felder, 910 F.2d 1387 (7th Cir. 1990) (en banc). Accordingly, he cannot maintain an action for the deprivation of his right to due process of law under the federal constitution. On this basis, I join the judgment of the court.

GEORGE LOCASCIO, et al., Plaintiffs, v. CITY OF ST. PETERSBURG, et al., Defendants

Case No. 88-962-CIV-T-17(B)

UNITED STATES DISTRICT COURT FORTHE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

731 F. Supp. 1522; 1990 U.S. Dist. LEXIS 2704

March 8, 1990, Decided

COUNSEL: [**1]

GEORGE K. RAHDERT, ESQ., PATRICIA FIELDS ANDERSON, ESQ., RAHDERT, ACOSTA, P.A., St. Petersburg, Florida, for Plaintiffs.

JANET L. GIFFORD & JACQUELINE W. HUBBARD, Assistant City Attorneys Trial Counsel, St. Petersburg, Florida.

OSCAR BLASINGAME, ESQ., St. Petersburg, Florida.

Co-Trial Counsel, JOHN M. BRECKENRIDGE, JR., Tampa, Florida, for Defendants.

JUDGES: Elizabeth A. Kovachevich, United States District Judge.

OPINIONBY: KOVACHEVICH

OPINION: [*1523] ORDER ON MOTIONS

ELIZABETH A. KOVACHEVICH, UNITED STATES DISTRICT JUDGE.

The cause is before the Court on the following motions, responses, and pleadings:

1. Defendant, city of St. Petersburg,'s motion to dismiss pendant state claims and memorandum of law, filed September 8, 1989. (Docket No. 50).

2. Defendant, City of St. Petersburg,'s motion for partial summary judgment on all federal claims, appendix thereto, and memorandum of law, filed September 8, 1989. (Docket Nos. 51 and 52).

3. Defendant, City of St. Petersburg,'s motion for oral argument, filed September 8, 1989.

4. Plaintiffs' memorandum in opposition to motion for partial summary judgment, filed September 20, 1989. (Docket No. 53).

5. Plaintiffs' memorandum in opposition to motion to dismiss pendant state claims, filed September 20, 1989. (Docket No. 54).

6. Plaintiffs' appendix [**2] to response to motion for partial summary judgment, filed September 20, 1989. (Docket No. 55).

7. Court-ordered joint memorandum of law on motion for partial summary judgment, filed October 20, 1989. (Docket No. 58).

8. Joinder of Defendant, Hellmuth, Obata & Kassabaum, Inc., in motion for partial summary judgment and memorandum in support thereof, filed November 8, 1989. (Docket Nos. 59 and 60).

9. Defendant, Hellmuth, Obata & Kassabaum,'s motion for summary judgment on all issues and memorandum of law, filed January 16, 1990. (Docket Nos. 72 and 73).

10. Affidavit of Paul L. Watson is support of motion for summary judgment, filed January 16, 1990. (Docket No. 74).

11. Notice of filing of document in support of motion for summary judgment, filed January 24, 1990. (Docket No. 76).

12. Plaintiffs' motion to strike Defendant Hellmuth, Obata & Kassabaum, Inc.'s motion for summary judgment, or, alternatively, motion for extension time to respond to motion for summary judgment, filed January 29, 1990. (Docket No. 29)

This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue [**3] as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. Sweat v. The Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. Hayden v. First National Bank of Mt. Pleasant, 595 F.2d 994, 996-7 (5th Cir. 1979), quoting Gross v. Southern Railroad Co., 414 F.2d 292 (5th Cir. 1969). Factual disputes preclude summary judgment.

The Supreme Court of the United States held, in Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548, (1986),

In our view the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. 477 U.S. at 322, 91 L. Ed. 2d at 273.

The Court also said, "Rule 56(e) therefore requires that nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing there is a genuine issue [**4] for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at p. 274.

Complaint was filed in this cause of action June 30, 1988. Plaintiffs named in the [*1524] complaint are George Locascio; Disabled American Veterans-Department of Florida, Inc.; Florida Gulf Coast Paralyzed Veterans Association, Inc.; National Spinal Cord Injury Association-Tampa Bay Area Chapter; Organization for the Promotion of Access and Travel for the Handicapped, Inc.-Tampa Bay Area Chapter; Ingrid L. Kohler; Joseph Churuti; Phillip G. Faas; J.R. Sanchez, Jr.; Dr. David H. Baras; Angus Farnum; William Culhane, as parent and next friend of Christopher Culhane; Central Florida Paralyzed Veterans Associations, Inc.; Paralyzed Veterans Association of Florida, Inc.; and Kevin Butler. (hereinafter collectively Plaintiffs). The named defendants were City of St. Petersburg (City); Robert Ulrich (Ulrich or Mayor), as Mayor; and Hellmuth, Obata & Kassabaum, Inc. (HOK)

Upon order of the Court, Plaintiffs filed an amended complaint on October 31, 1988, the named plaintiffs and defendants remained the same. However, on January 30, 1989, by stipulation, Defendant Robert Ulrich, as mayor, was dismissed, with prejudice, from the action. Subsequently, by stipulation [**5] Defendant Hellmuth, Obata & Kassabaum, Inc. was dismissed on February 28, 1990.

The amended complaint alleged that the Suncoast Dome, then under construction, failed to meet various state and federal requirements as to handicapped facilities. The amended complaint contained the following counts: 1) action under Federal law for declaratory and injunctive relief, including violation of 42 U.S.C. @ 1983; 2) violation of equal protection and due process clause of the Fourteenth amendment; and 3) state claims, violation of Sections 255.21 and 553.48, Florida Statutes, and the Florida Constitution.

On September 8, 1989, Defendant City filed a motion for partial summary judgment on the federal claims (Counts I and II) and asserted that there is no

genuine issue of material fact concerning the fact that the City did not use federal financial assistance in the construction of the Florida Suncoast Dome (the Stadium); that there is no federal obligation regarding the handicapped; and that Defendant City is entitled to summary judgment as matter of law. Defendant, also on that date, moved to dismiss the pendant state claims if the motion for judgment on the federal claims were to be granted. [**6] The motion was joined by Defendant HOK on November 8, 1989.

On January 16, 1990, Defendant HOK filed a motion for summary judgment on all issues as to it. Even though HOK has been dismissed as a Defendant, the Court will address the issue in order to clarify the record.

Plaintiffs' have moved to strike the HOK motion for summary judgment. This Court ordered, on January 11, 1989, that all dispositive motions be filed on or before September 8, 1989. On December 1, 1989, on order was issued giving the parties sixty (60) days prior to trial, scheduled for March 1990, in which to file motions for summary judgment. It is the Court's position that the January 11, 1989, order takes precedence over the form order issued December 1, 1989. However, under either order, the Court finds the motion for summary judgment was untimely filed and should be stricken from the Court's consideration.

FINDINGS OF FACT

Upon instruction of the Court, the parties prepared and filed a joint memorandum of law delineating disputed and undisputed issues of fact and law on October 20, 1989. The following "facts" are undisputed between the parties, the parties do disagree on the application of the relevant law:
[**7]
A. Federal Funding

1. The City is the recipient of federal funds including Community Development Block Grant (Block Grant) funds. The Block Grant funds are administered through the Department of Housing and Urban Development (HUD) pursuant to Title I of the Housing and Community Development Act of 1974, 42 U.S.C. @ 5301, et seq.

2. The Block Grant fund application documents indicate that a portion of the Block Grants funds were used for the acquisition of land, relocation of occupants, [*1525] and demolition in the Gas Plant Redevelopment Project (the Project or Area).

3. In 1982 and 1983, the City also applied for Section 108 Loan Guarantee (@ 108) funds to complete the acquisition, relocation, and demolition in the Gas Plant Area within two years.

4. The relevant language from the Block Grant and @ 108 documents is as follows:

(a)(I) From the 1979-80 Block Grant application, the Project Summary section, covering the Project, reads:

The Gas Plant area has long been recognized as one of the worst areas of housing in St. Petersburg. Based on surveys showing that over 80% of the structures in the area were deteriorated or dilapidated, the City Council declared Gas Plant an area of slum [**8] and blight suitable for redevelopment in September of 1978 and mandated the preparation of a redevelopment plan.

A draft of the plan has now been completed and was adopted in September, 1979. The plan seeks to rid the area of slum and blight as well as to "expand the employment and economic base of the City" (City Council Goal No. 4) and "encourage and reinforce downtown development" (City Council Goal No. 7) in conformance with the City's adopted Comprehensive Land Use Plan-Intown Sector.

* * * *

Towards accomplishing these objectives, the plan proposes the acquisition of 182 properties, the relocation of 25 businesses and 45 owner-occupant and 281 tenant households, the demolition of 262 structures, and extensive sight improvements, including street and sidewalk improvements, landscaping, the construction of detention basins and some municipal parking, and rerouting of utilities to provide redevelopment parcels unencumbered by utility and access easements.

These activities, estimated to cost $ 9.5 million are proposed to be carried out utilizing the City's Community Development Block Grant as a primary funding source over the next nine years in four phases. Disposition parcels [**9] will be made available for sale to developers at the completion of each phase.

Activity during this CDBG program will include acquisition, relocation, demolition and disposition in portions of all phases of the project.

(a)(II) The assurances section of the Block Grant application states:

The applicant hereby assures and certifies that:

(k) It will require every building or facility (other than a privately owned residential structure) designed, constructed or altered with funds provided under 24 CFR 570 to comply with the "American Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by the Physically Handicapped," Number A-117.1-R 1971, subject to the exceptions contained in 41 CFR 101-19.604. The applicant will be responsible for conducting inspections to insure compliance with these specifications by the contractor. n1

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 In the joint-memorandum, the parties, note in footnote 1, that they disagree as to whether or not the stadium is constructed in accordance with these standards. However, later in the same memorandum, the parties stipulate that they agree that the Stadium does not completely comply with the UFAS requirements. It is unclear to the Court as to whether or not there is an issue of fact as to compliance; therefore, the Court cannot determine this issue at this time and it remains for the trial finder of fact.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

(b) From the 1980-81 Block Grant application, the Project Summary section of the application for the Project uses virtually the same language as that found in the 1979 application.

(c) From the 1981-82 Block Grant application, the language is virtually identical to the previous two grant applications.

(d) From the 1982-83 Block [**10] Grant application, the Final Statement of Community Development Objectives and Projected Use of Funds section lists as three of seven objectives:

[*1526] Develop recreational areas to their fullest potential (through rehabilitation of existing facilities, installation of new equipment, provision of recreational opportunities or implementation of related programs), according to the identified needs.

Provide additional land for economic development activities within the City, through the acquisition of blighted and underutilized areas and the relocation of any occupants. A Section 108 Loan Guarantee is being sought to assist with these activities.

Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial center.

(e) From the 1982 @ 108 loan guarantee, the cover letter dated August 12, 1982, states, in pertinent part:

The City intends to use the [Section 108 Loan Guarantee] funds for acquisition, relocation and demolition activities in the Gas Plant Redevelopment project, which was initially approved for CDBG funding in April, 1978. . . . Provision of funds under the Loan Guarantee program will allow City to accelerate land acquisition [**11] in the blighted area. . . .

The Certifications section of the @ 108 application states, in relevant part:

[The] grantee gives assurances and certifies with respect to the grant that:

(g) The grant will be conducted and administered in compliance with:

(7) Section 504 of the Rehabilitation Act of 1973 (PUB.L. 93-112), as amended, and implementing regulations and published for effect. . . .

(f) From the 1983 @ 108 loan guarantee application, the cover letter dated January 20, 1983, states:

[The Section 108 Loan Guarantee funds are to] provide further funding for the previously approved Section 108 activity, which is the acquisition, relocation and demolition in the Gas [**12] Plant Redevelopment area.

The Certification section of the application reads the same as in the 1982 application.

(g) From the 1983-84 @ 108 loan guarantee application, the final statement of objectives and use states as three of twelve objectives and uses:

Provide additional land for economic development activities which will benefit low- and moderate-income persons.

Support economic development activities in order to provide more livable communities.

Acquire property, relocate occupants and demolish structures under the Gas Plant Redevelopment Plan.

The Certifications section of the application reads the same as the 1982 and 1983 applications.

(h) From the 1984-85 Block Grant application, the Projected Use section, under the heading Gas Plant Redevelopment states:

In prior years, the City of St. Petersburg has received two Section 108 Loan Guarantees from HUD to accelerate acquisition and relocation in the Gas Plant. This budget item provides for partial repayment of those loans.

The Final Statement of Community Development Objectives section of the application lists as four of its objectives:

Support the creation of employment opportunities for low- and moderate-income [**13] persons.

Support economic development activities in low- and moderate-income areas of the City.

Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial and employment center.

Eliminate blighting conditions by acquisition of substandard structures, relocation of occupants, and demolition.

The Certifications section of the application states:

The grantee certifies that:

It will comply with the other provisions of the Act and with other applicable laws.

The section of this application titled "1982-82 Program", which discusses the use of Block Grant funds the previous year, identifies the projected use relating to providing additional land through the acquisition [*1527] of blighted areas and relocation of occupants as the only objective pertaining to a
major redevelopment effort of the Gas Plant area. The projected use relating to developing recreational areas to their fullest potential, relates to expanding recreational facilities for low- income and moderate-income persons by expanding Campbell Park and Clearview Park. The projected use relating to economic development activities to expand and strengthen downtown St. Petersburg [**14] as a regional commercial center relates to the Detroit Block revitalization project.

(i) From the 1985-86 Block Grant application, the Final Statement of Community Development Objectives lists as four of twelve objectives the following:

Support the creation of employment opportunities for low- and moderate-income persons.

Support economic development activities in low- and moderate-income areas of the City.

Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial and employment center.

Eliminate blighting conditions by acquisition of substandard structures, relocation of occupants, and demolition.

Under the Projected Use section of the application the Gas Plant Redevelopment headings contains the same language as the

1984-85 grant application The certifications section contains the same language as the 1983-84 application.

The Relationship of Projects to Objectives chart accompanying this application, showing the 1984-85 objectives, states the Gas Plant Project is related to the objectives:

Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial and employment [**15] center.

Eliminate blighted conditions by acquisition of substandard structures, relocation of occupants and demolition.

(j) From the 1986-87 Block Grant application, the Final Statement of Community Development Objectives lists as four of thirteen objectives:

Support economic development activities and infrastructure improvements in low- and moderate-income areas of the City.

Support the creation of employment opportunities of low- and moderate-income persons.

Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial and employment center.

Eliminate blighting conditions by acquisition of substandard structures, relocation of occupants and demolition.

The Projected Use section contains the same language as the 1984-85 application and the Certifications section is the same as for the 1983-84 application.

The Assessment of Fiscal Year 1985-86 Program section lists as four of twelve objectives adopted by the City Counsel for Fiscal Year 1985-86:

Support the creation of employment opportunities for low- and moderate-income persons.

Support economic development activities in low- and moderate-income areas of the City.
[**16]
Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial and employment center.

Eliminate blighting conditions by acquisition of substandard structures, relocation of occupants, and demolition.

(k) From the 1987-88 Block Grant application, the Amended Final Statement of Community Development Objectives identifies as four of its thirteen goals to:

Support the creation of employment opportunities for low- and moderate-income persons.

Support economic development activities in low- and moderate-income areas of the City.

Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial and employment center.

[*1528] Eliminate blighting conditions by acquisition of substandard structures, relocation of occupants, and demolition.

The Projected Use section of the application contains essentially the same language as the 1984-85 application and the Certifications section is the same as that of the 1983-84 application.

The Assessment of Fiscal Year 1986-87 Program section, lists as four of twelve objectives adopted by the City Counsel for Fiscal Year 1985-86:

Support the creation [**17] of employment opportunities for low- and moderate-income persons.

Support economic development activities in low- and moderate-income areas of the City.

Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial and employment center.

Eliminate blighting conditions by acquisition of substandard structures, relocation of occupants, and demolition.

(l) From the 1988-89 Block Grant application, the Final Statement of Community Development Objectives section lists as three of twelve objectives to:

Support economic development activities and infrastructure improvements in low- and moderate-income of the City.

Support the creation of employment opportunities for low- and moderate-income persons through the use of Entitlement Section 108 funds.

Eliminate blighting conditions of substandard structures, relocation of occupants and demolition.

The Projected Use of Funds section lists as projects approved for funding during the fiscal year, under the heading of "Section 108 Loan Repayment":

In prior years the City of St. Petersburg has received two Section 108 Loan Guarantees from HUD to accelerate acquisition and relocation [**18] in the Gas Plant Redevelopment area.

Under the heading of "Gas Plant Redevelopment," the application states:

The Gas Plant redevelopment project is located between First and Fifth Avenues South and Ninth and Sixteenth Streets and is a total clearance of the area. These funds will pay legal and appraisal fees for acquisition of the parcel at 1036 Third Avenue South and demolition of the properties at 204 16th Street South and 1334 First Avenue South (census tract 216.95). This project addresses the national objective of elimination of slums and blight.

The Certifications section of this application uses the same language as the 1983-84 application.

B. Federal Statutes and Regulations

1. The Block Grants are administered through the office of HUD pursuant to Title I of the Housing and Community Development Act of 1974 (the HCD Act). As originally passed by Congress, the Act did not prohibit discrimination on the basis of handicap; however, it was amended effective October 1, 1981, to add such language. Omnibus Budget Reconciliation Act of 1981, Pub.L. 97-35, 95 STAT. 392 (1981).

The Act now requires grant recipients to comply with Section 504, 29 U.S.C. @
794, the Rehabilitation [**19] Act of 1973, as provided in 42 U.S.C. @ 5309(a). Section 504 prohibits discrimination against the handicapped in any program or activity receiving federal financial assistance and requires compliance with the Uniform Federal Accessibility Standards (UFAS) after August 1984.

2. The Architectural Barriers Act (the Barriers Act), 42 U.S.C. @ 4151, et seq., was passed in 1968 and subsequently amended. It requires that any facility constructed, leased or altered by the federal government or with the use of federal government funds be accessible to the physically handicapped. The Barriers Act provides standards for the design, construction and alteration of public buildings which are financed by federal funds, "if such building or facility is subject to standards for design, construction, or alteration issued under authority of the law authorizing such grant or a loan." 42 U.S.C. @ 4151(3).

[*1529] The legislative history of the Barriers Act indicates that it applies to grants or loans "for the purpose of financing . . . construction." The Senate Report states that the act was necessary to insure all public buildings constructed in the 'future with loans or grants from the federal government [**20] are designed and constructed in such a way that they will be accessible to and usable by the physically handicapped. S.Rep. No. 538, 90th Cong., 2d Sess. (1), Reprinted in 1968 U.S.CODE CONG.ADMIN.NEWS 3214, 3215.

The agency comments solicited by the Senate committee on Public Works also reflect the understanding that the Barriers Act applies to federal "grants or loans . . . for the purpose of financing the construction of public buildings." Id., at 3219, 3221. Congressional comments reflect that Senator Bartlett stated the Barriers Act "insures that all non-residential buildings constructed with federal funds would have to be accessible to the physically handicapped." 113 CONG.REC. S24133 (1967).

The House of Representatives, when considering the Senate Bill noted that "in making the legislative history we should make it clear that whenever tax dollars are used for constructing public buildings it [the Barriers Act] should apply." Id., at H23722 (statement of Representative Gray).

3. The Barriers Act provides for the Administrator of General Services to promulgate standards "for the design, construction, and alteration of buildings . . . to insure whenever possible [**21] that physically handicapped persons will have ready access to, and use of, such buildings." The regulations promulgated in response to this directive are the Uniform Federal Accessibility Standards found at 41 C.F.R. 101, et seq., which were adopted on August 2, 1984, by the General Services Administration and HUD. Construction which is subject to the Barriers Act and/or which is a " program or activity" subject to @ 504 must conform with UFAS.

4. The pertinent regulations, Part 41 of 28 C.F.R., define a recipient of federal financial assistance as "any 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 or a recipient, but excluding the ultimate beneficiary of the assistance." 41.3(d).

The regulations define "federal financial assistance" as "any grant, loan, contract . . ., 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 [**22] interest in or use of such property. . . ." The regulations prohibit discrimination against handicapped persons, and prohibit a recipient of federal financial assistance from affording "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," and from providing "different or separate aid, benefits, or services to handicapped persons." 41.51(iii) and (iv).

5. In 1988, Congress amended Section 504 by passing the Civil Rights Restoration Act of 1987, Pub.L. No. 100-259, 102 STAT. 28, 29 (1988). Section 2 of Public Law 100-259 provides that Congress finds that:

(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of . . . Section 504 of the Rehabilitation Act of 1973, . . .; and

(2) Legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institutionalized application of those laws as previously administered.

1988 U.S.CODE CONG. & ADMIN.NEWS, at page 3.

This bill added subsection (b) to 29 U.S.C. @ 794. In subsection (b), Congress defined [**23] program or activity as "all of the operations of -- (1)(A) a department, agency, special purpose district, or other instrumentality of a state or local government; or (B) the entity of such State or local government that distributes such assistance and [*1530] such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a state or local government."

The stated purpose of the statute is to "restore the broad scope of coverage and to clarify the application of . . . Section 504 of the Rehabilitation Act

of 1973 . . ." Pub.L. No. 100-258, 102 Stat. 28. Congressman Donald Edwards of California, the floor sponsor of the Restoration Act, stated that: "This bill applies to all pending cases. It is of great concern that it has taken this long to pass this legislation. I wish no cases had been lost because of this delay."

134 CONG.REC. H583 (daily ed. Mar. 2, 1988). During the floor debate to override President Reagan's veto of the Restoration Act, Senator Robert Packwood of Oregon stated that "all we have done is change the law back to what we thought it was. We have not expanded it beyond what we thought it was." 134 [**24] CONG. REC. S2735 (daily ed. Mar. 22, 1988). Senator Robert Stafford of Vermont, an original sponsor of Section 504, stated that the "institution-wide definition [was] originally intended by legislators." Id., at S2739.

C. Stadium Site Selection and Construction

1. In September 1980, the Pinellas Sports Authority, a body created by the Florida Legislature, targeted the St. Petersburg Sod Farm as the site for the Stadium project. Subsequently, in March 1982, the City site selection was reopene
because the Sod Farm site became unavailable.

Two mid-County sites and the Gas Plant site in downtown St. Petersburg were under consideration. On November 1, 1982, the St. Petersburg City Council offered to lease the 66 acre Gas Plant site to the Pinellas Sports Authority. On December 31, 1984, the Pinellas Sports Authority and the City Council approved the sale of an $ 85 million revenue bond to provide financing for Stadium construction.

2. On February 2, 1984, the City awarded the contract for design of the Stadium to architects Hellmuth, Obata and Kassabaum. On November 21, 1986, the City signed a contract to construct the stadium with Huber, Hunt and Nichols.

Thereafter, on January [**25] 5, 1987, construction on the Stadium began and it continued to the date of the motion for summary judgment. n2 During the course of the construction, there have been a number of change orders implementing design and construction alterations necessitated in the project. Some of the change orders were a direct result of the City's implementation of recommendations concerning handicap accessibility.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n2 The Court takes judicial notice that the Stadium was scheduled to and did officially open to the public on March 3, 1990, with the appearance of Kenny Rogers.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

3. The City began acquiring land in the Gas Plant area in 1980. The City last used Block Grant to acquire title to a parcel of land in the Gas Plant area on October 1, 1986. The City obtained title to one parcel of land on June 4, 1985, after a court entered an Order of Taking on the property pursuant to eminent domain proceedings. That court entered a final judgment on March 5, 1987, and the City paid for the property with revenue bond funds, but $ 25,000.00 of the $
32,500.00 in attorney's fees was ultimately paid from the 1987-88 Block Grant funds. No Block Grant funds were used to acquire or demolish the three parcels of [**26] land listed under the Gas Plant Redevelopment section on the 1988-89 Block Grant application. City revenue bond funds were used to acquire or demolish these parcels. The City currently receives Block Grant and other federal funds for other projects and it has used and continues to use Block Grant funds to service the debt on the Section 108 Loan Guarantee funds.

4. Here the parties appear to agree that the Stadium does not completely comply with the Uniform Federal Accessibility Standards. They state that the seating is not thereunder appropriately dispersed in the stadium and does not provide lines of sight comparable to those for all viewing areas as required by law. The number of [*1531] wheelchair seats is less than prescribed by (UFAS). The press area is only partially accessible to mobility impaired people

and the outfield bleachers are inaccessible. The Court has previously noted, footnote 1, that the joint-memorandum is contradictory. The parties state at their footnote 1 that the parties are not in agreement as to the compliance. It is the Court's position that the record is unclear as to whether or not the City was in compliance and the Court will leave the issue to the trial finder [**27] of fact.

5. Representatives of the City engaged in detailed discussions of the Stadium project with the Committee for Assistance to the Physically Impaired (CAPS) in a number of meetings starting on May 13, 1987. CAPI made several recommendations concerning the accessibility of handicapped individuals at these meetings. The City also hired a consultant, Frank M. Bosak, to advise it on handicap accessibility. He met with CAPI members and submitted a report making certain recommendations concerning handicap accessibility. The City adopted some, but not all, of these recommendations and incorporated them into stadium construction.

DISCUSSION

In the joint memorandum of law, the parties have defined the disputed legal issues and delineated their positions on each issue. The Court will address the issues as framed by the parties.

I. WHETHER FOR PURPOSES OF SECTION 504, THE "PROGRAM OR ACTIVITY" WAS THE ACQUISITION OF LAND, RELOCATION OF OCCUPANTS AND DEMOLITION OF EXISTING STRUCTURES OR REDEVELOPMENT ENCOMPASSING THE CONSTRUCTION OF THE STADIUM IN THE GAS PLANT AREA.

II. WHETHER, FOR THE PURPOSE OF SECTION 504 THE ACQUISITION AND PREPARATION OF THE STADIUM SITE IS A PROGRAM OR [**28] ACTIVITY DISTINCT FROM THE CONSTRUCTION OF THE STADIUM.

III. WHETHER THE CITY CONTINUES TO BE OBLIGATED UNDER SECTION 504 BECAUSE OF ITS RECEIPT OF CDBG FUNDS OR WHETHER ITS OBLIGATIONS STOPPED WHEN THE ACQUISITION, RELOCATION AND DEMOLITION OF THE LAND IN THE GAS PLANT AREA CEASED.

IV. WHETHER THE ARCHITECTURAL BARRIERS ACT IS APPLICABLE TO CONSTRUCTION WHICH IS NOT FEDERALLY FUNDED BUT WHICH IS LOCATED ON LAND ACQUIRED WITH FEDERAL CDBG FUNDS.

V. WHETHER BY PASSAGE OF THE CIVIL RIGHTS RESTORATION ACT OF 1988 CONGRESS CAN RETROACTIVELY CHANGE THE CITY'S OBLIGATIONS FOR CDBG FUNDS GRANTED PRIOR TO ITS ENACTMENT OR WHETHER IT MERELY CLARIFIED THE CITY'S EXISTING OBLIGATIONS.

VI. WHETHER THE CITY WAS OBLIGATED TO CHANGE THE DESIGN AND CONSTRUCTION OF THE STADIUM TO CONFORM TO UFAS STANDARDS AFTER THE PASSAGE OF THE CIVIL RIGHTS RESTORATION ACT OF 1988.

In addressing these issues the Court must resolve several questions regarding the applicability of the Federal standards to the construction of the Stadium. The first inquiry is whether or not under @ 504, prior to amendment, the construction of the Stadium was, or is, a "program or activity" receiving Federal financial assistance. [**29] If the Court determines it is, the second inquiry is unnecessary, because that would be determinative of the issue of whether or not Federal Accessibility Standards are applicable to the Stadium.

If the first inquiry is answered in the negative, the Court must then determine whether or not the amendment to @ 504, the Civil Rights Restoration Act, is retroactively applicable to the construction of the Stadium. Finally, is the question of the applicability of the Architectural Barriers Act. If the Court determines that either @ 504 or the Barriers Act is applicable adherence to the Federal Accessibility Standards is required.

[*1532] As to the first issue, whether or not the construction of the Suncoast Dome Stadium is within the ambit of the "program or activity" clause of Section 504 so as to require Defendants to comply with Federal standards as to handicapped accessibility to the stadium, Section 504 states, in relevant part:

(a) No otherwise qualified individual with handicaps . . . . shall, solely by reason of her or 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. [**30] . . .

Defendants assert that the Block Grant funds were solely for the purpose of acquisition, relocation of occupants and demolition of existing structures in the Gas Plant area and were not applicable to the entire redevelopment project, including the construction of the Stadium. Therefore, Defendants conclude the construction of the Stadium does not fall under the "program or activity" of Section 504, thereby requiring application of Federal standards to the Stadium

construction. Plaintiffs assert the opposite proposition.

It is the recipient of the federal funds to which Section 504 applies:

By limiting coverage to recipients, Congress imposes the obligations of @ 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to "receive" federal funds.

U.S. Dept. of Transp. v. Paralyzed Veterans of America, 477 U.S. 597, 106 S. Ct. 2705, 2711, 91 L. Ed. 2d 494 (1986). There is a difference between indirect aid to an intended recipient and an indirect benefit to a third party, not a recipient. In the Paralyzed Veterans case, the Court found that grants to airport operators to finance construction, runways, etc., did not make airlines recipients under @ 504, [**31] they were merely beneficiaries of the use of the aid by the airports.

Prior to the 1988 amendment to @ 504, effective March 22, 1988, the law relating to the definition of "program or activity" , was split. Various courts, including the United States Supreme Court indicated that the " program

or activity" of @ 504 was to be applied in a program specific manner and not on an institutionalized approach.

In enforcing a program specific requirements the courts said: It is insufficient for a plaintiff to simply show that some aspect or another of the relevant entity receives or has received some form of federal financial assistance. The private plaintiff must:

[Show] that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance.

Brown v Sibley, 650 F.2d 760, 169 (5th Cir. 1981). Receipt by a multiperson or multipurpose entity of federal financial assistance to be applied to specific programs and/or activities, will not "without more, bring all of those multiple programs or activities with the reach of section 504." Bachman v. American Society of Clinical Patholog ists, [**32] 577 F. Supp. 1257, 1263 (D.N.J. 1983); Grove City College v. Bell, 465 U.S. 555, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981).

Other courts took the view that the entire recipient entity was included in the "program or activity" requirement of @ 504. See, Arline v. School Board of Nassau County, 772 F.2d 759 (11th Cir. 1985), aff'd, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987).

In 1988, @ 504 was amended by the Civil Rights Restoration Act; wherein the Legislature moved to restore the "broad, institutionalized" application of @ 504. The amendment added 29 U.S.C. @ 794(b), defining program or activity as "all of the operations" of:

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

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

[*1533] There is no question that, beginning in 1979, the City received Federal financial assistance, through the Block [**33] Grants and the Loan Guarantee funds. These funds were, in part, utilized for the acquisition of land, relocation of occupants, and demolition in the Gas Plant Project. The goals of the Project included expansion of the employment and economic base of the city and encouragement and reinforcement of downtown development.

The facts, as stipulated by the parties in the joint memorandum, establish that the City made application for Block Grants as late as 1988-89. In that application the City indicated that the funds would be used for repayment of the Section 108 loan amounts (amounts employed to accelerate acquisition and relocation in the Gas Plant area). Additionally, the application indicated that the funds would be used to pay legal and appraisal fees for certain acquisition and demolition for the Gas Plant project, but the parties agree that Block Grant funds were not expended on those acquisitions.

The present location for the Stadium, located in the Gas Plant Project, was offered for lease to the Sports Authority November 1, 1982, and construction began on the Stadium on January 7, 1987. On December 31, 1984, the City Council and the Sports Authority approved the sale of a revenue [**34] bond for the construction.

The Court, having considered the pleadings and materials presented by both parties, finds persuasive the arguments of Plaintiffs. The Court must conclude that the construction of the Stadium was part and parcel of the Gas Redevelopment Project, which is a "program or activity" subject to the provisions of Section 504, 29 U.S.C. @ 794, the Rehabilitation of Act of 1973. In so finding, the Court cites with approval Plaintiffs' responsive memorandum of law, particularly pages 7, and 11 through 15.

Based on the conclusion that @ 504 is applicable to the Stadium construction, the Court need not determine whether or not the 1988 amendment, the Civil Rights Restoration Act, is to be retroactively applied. Nor, must the Court address the issue of the application of the Architectural Barrier Act, since the Barrier Act would require the same application of the Federal Accessibility Standards required by Section 504. The Court declines to address these two issues.

Several of the remaining issues raised by the joint-memorandum address Count II of the amended complaint, violation of Plaintiffs' due process and equal protection of the Fourteenth Amendment. The issues [**35] as framed by the parties are:

I. WHETHER, PURSUANT TO THE EQUAL PROTECTION CLAUSE, THE HANDICAPPED CONSTITUTE A PROTECTED CLASS.

II. WHETHER, PURSUANT TO THE EQUAL PROTECTION CLAUSE, ACCESS TO THE STADIUM IS A FUNDAMENTAL CONSTITUTIONAL RIGHT.

III. WHETHER, PURSUANT TO THE EQUAL PROTECTION CLAUSE, THE ACTIONS OF THE CITY IN THE DESIGN AND CONSTRUCTION OF THE STADIUM, WITHSTAND A RATIONAL BASIS ANALYSIS.

Defendants seek the dismissal of the equal protection claims of Count II of the amended complaint because they contend that Plaintiffs do not comprise a suspect class and do not allege violation of any fundamental right.

Where there is no fundamental constitutional right involved and the class is not a suspect class, the actions of state officials are constitutionally valid if there is a rational basis for the actions or classifications challenged. Dopico v. Goldschmidt, 518 F. Supp. 1161 (S.D.N.Y 1981). "Some particularly invidious distinctions are subject to more rigorous scrutiny." Zobel v. Williams, 457 U.S. 55, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982).

To withstand equal protection review, actions that distinguish between a discrete group and others must be rationally related to a legitimate [**36] governmental purpose. The governmental entity may not rely on a classification or distinction whose relationship to the alleged purpose is so attenuated as [*1534] to render the distinction arbitrary or irrational. City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Defendants seemingly assert that the rational basis for their actions here is the conservation of public resources, which may be a legitimate governmental interest. Dopico, 518 F. Supp. at 1179.

Having already determined that the City was obligated, pursuant to @ 504, to comply with the Federal Accessibility Standards in the design and construction of the Stadium, the question is whether the failure to do so was in violation of Plaintiffs' equal protection rights. The focus must be upon the validity of the governmental interest at the time of the planning and design of the Stadium, not on the City's interest at this time in conservation of funds by not having to rectify the alleged problems in the construction.

There is nothing before the Court, on this motion for partial summary judgment, that establishes a rational basis for the City's decision, at the time of inception and implementation [**37] of the Stadium design and construction, to segregate the handicapped. This is an issue to be addressed by the trial finder-of-fact.

The Court must agree with Defendants that Plaintiffs have not stated a claim for violation of any due process right under the Fourteenth Amendment. Plaintiffs apparently concede the point in their response to the motion for partial summary judgment as they do not address or oppose the contention.

Count I of the amended complaint asserts a claim for violation of 42 U.S.C. @ 1983. The issue regarding this claim is stated by the parties as:

I. WHETHER PLAINTIFFS CAN BRING A SECTION 1983 ACTION IF THE COURT DISMISSES THE FEDERAL STATUTORY AND CONSTITUTIONAL CLAIMS.

The Court's determination that Plaintiffs have constitutional and federal statutory claims to assert is dispositive of this issue. The motion for summary judgment on this issue will be denied.

Motion to Dismiss

The motion to dismiss is predicated on the assumption that the Court would grant Defendant's motion for partial summary judgment and dismiss the federal claims of the amended complaint. Defendants ask for the dismissal of pendant state claims, in that instance. The Court, having [**38] denied the motion for summary judgment, will deny the motion to dismiss.

At this time, the Court would take the opportunity to commend the parties in this action for the quality of their presentations, individually and jointly. The pleadings which the Court has reviewed are well-written and organized, giving the Court the assistance which facilitates the review and resolution of the issues presented. Accordingly, it is

ORDERED that the motion for oral argument be denied; that Plaintiffs' motion to strike Defendant Hellmuth, Obata & Kassabaum's motion for summary judgment be granted and Docket Nos. 72, 73, 74, and 76 be stricken from this file; that Defendant's motion for summary judgment as to the issue of the applicability of Section 504, 29 U.S.C. @ 794 be denied and the Clerk of the Court is directed to enter summary judgment in favor of Plaintiffs, stating that Section 504, 29 U.S.C. @ 794 is applicable to the construction of the Suncoast Dome Stadium; Defendant's motion for summary judgment as to Count II of the amended complaint be granted, in part, and denied, in part, and the due process claim of Count II be dismissed; in all other respects Defendants motion for partial summary [**39] judgment be denied; and that the motion to dismiss be denied.

DONE and ORDERED in Chambers, in Tampa, Florida, this 8th day of March, 1990.

Document Separator

NICKI AARON BONNER, Plaintiff, v. ARIZONA DEPARTMENT OF CORRECTIONS, SAMUEL LEWIS; TIM CROWLEY; JAVIER VEGA and JOHN DOES, Defendants

No. CIV 86-1771 PHX CLH

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

714 F. Supp. 420; 1989 U.S. Dist. LEXIS 6268

May 26, 1989, Decided

COUNSEL: [**1]

JOSEPH E. ABODEELY, Phoenix, Arizona, for Plaintiff.

LYNNE W. ABNEY, Assistant Attorney General, Phoenix, Arizona.

JUDGES: Charles L. Hardy, United States District Judge.

OPINIONBY: HARDY

OPINION: [*420] MEMORANDUM OPINION AND ORDER

CHARLES L. HARDY, UNITED STATES DISTRICT JUDGE

BACKGROUND

Bonner is an inmate at the Arizona State Prison. He is deaf, mute, and suffers from a severe progressive vision loss which results in increasingly narrow tunnel vision. Bonner filed suit pro se alleging that the failure of prison officials to provide him with a qualified interpreted constitutes a violation of Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against otherwise qualified handicapped individuals who wish to participate in programs receiving federal funds.

[*421] Bonner claims that his poor reading and writing skills prevent him from communicating his thoughts through writing or understanding others by reading their words via a telecommunications device provided to him by the prison officials. He claims that the inmate interpreters provided to him by the prison officials are unskilled, and that he can only understand them 50% of the time.

He also alleges violations of his constitutional rights to due process, equal protection, and the eighth [**2] amendment's prohibition against cruel and

unusual punishment. Bonner seeks injunctive relief and damages.

This court dismissed Samuel Lewis, Director of the Arizona Department of Corrections as a defendant and granted summary judgment in favor of the remaining prison officials. Bonner appealed, and the Ninth circuit reversed and remanded on two issues.

I. The Rehabilitation Act Claim

The Ninth Circuit held that Bonner must establish four elements in order to prove a Section 504 violation:

(1) that, as a deaf, blind, and mute plaintiff, he is a handicapped person under the Rehabilitation Act;

(2) that he is otherwise qualified;

(3) that the relevant program receives federal financial assistance; and

(4) that the defendants' refusal to provide qualified interpreter services impermissibly discriminates against him on the basis of his physical handicaps.

The court noted that while the first two elements were undisputed, the third and fourth elements raise genuine issues of material fact. The Rehabilitation Act claim was remanded to this court to determine whether the prison or its programs receive federal financial assistance.

This court directed the defendants (hereinafter [**3] referred to collectively as "the Department") to file an affidavit on the receipt of federal financial assistance and the plaintiffs have filed a response to the Department's affidavit on federal financial assistance. This court denied the Department's motion to strike plaintiff's response to the affidavit on federal financial assistance.

In its affidavit, the Department acknowledges receiving federal financial assistance. The Department also stipulates for the first time that "[t]he Arizona Department of Corrections will provide 'appropriate auxiliary aids' to plaintiff for any programs and activities that do receive federal financial assistance. See C.F.R. Section 42.503(f) (1988) (appropriate aids may include qualified interpreters and devices such as electronic readers and telephonic transcribers) [Department of Justice regulations implementing Section 504 of the Rehabilitation Act] ."

However, the Department argues that the federal financial assistance must have a nexus to the program or activity in which the handicapped individual seeks to participate in order to state a viable claim under Section 504. See

Henning v. Village of Mayfield Village, 610 F. Supp. 17, 19 (N.D. [**4] Ohio 1985). Since Bonner's complaint only seeks the aid of a qualified interpreter for prison counseling sessions, administrative or disciplinary hearings, medical treatments and diagnosis, and none of these programs receives direct federal financial assistance, the Department argues that its receipt of federal aid is unrelated to the programs and activities in Bonner's complaint. Consequently, the Department contends that Bonner does not have a viable claim under Section 504 since there is no nexus or connection between the Department's receipt of federal funds and the programs in which he seeks to participate.

Bonner contends that the recently enacted Civil Rights Restoration Act, which provides that a "program or activity" includes all of the operations of a state department or agency, overruled cases such as Henning v. Mayfield Village, and that the Department has effectively conceded its case by admitting that they are obligated to provide Bonner with a qualified interpreter for participation in any of its programs or activities that receive federal financial aid.

[*422] DISCUSSION

Section 504 of the Rehabilitation Act, 29 U.S.C.A. Section 794 (West. Supp. 1988), provides:

[**5]

No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . .

IN Grove City College v. Bell, 465 U.S. 555, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984), the Supreme Court held that Title IX's prohibition against sex discrimination in "any education program or activity receiving federal financial assistance" did not require institution-wide compliance as a condition of receiving federal grant money, but only mandated compliance by the specific program or activity receiving the federal aid in question. In Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 104 S. Ct. 1248, 79 L. Ed. 2d 568 (1984), the Supreme Court held that the Rehabilitation Act's prohibition of discrimination against the handicapped was also limited "to the specific program that receives federal funds." Id. at 636, 104 S. Ct. at 1255.

In general, courts have read the legislative history behind the Rehabilitation Act to suggest that Congress intentionally gave broad scope to the term " federal financial assistance" in Section [**6] 504. See Arline v. School Bd. of Nassau County, 772 F.2d 759 (11th Cir. 1985), aff'd, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987). In particular, the Eleventh Circuit has argued that "the legislative history of the 1974 amendments is replete with notations indicating that Section 504 was intended to encompass programs receiving federal financial assistance of any kind." Jones v. Metropolitan

Atlanta Rapid Transit Authority, 681 F.2d 1376, 1379-80 (11th Cir. 1982). While payments for obligations incurred by the federal government as a market participant do not constitute "federal assistance," Hingson v. Pacific Southwest Air, 743 F.2d 1408, 1414 (9th Cir. 1984), any payments made by the government without such a legal obligation would subject a program or employer to the requirements of Section 504. Arline, 772 F.2d at 762. In addition, once federal money is deposited into a general fund, all activities paid for out of that fund become subject to Section 504. Id. at 763.

On March 22, 1988, Congress enacted the Civil Rights Restoration Act of 1987, Pub.L. No. 100-259, 102 Stat. 28 (codified at 29 U.S.C. Section 794(b)(1)(A) (Supp. 1989)) The Restoration Act amended Section 504 of the [**7] Rehabilitation Act in part by defining the term "program or activity" as "all the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government." Under this revised definition of program or activity, the Department's admission that Bonner is entitled to "appropriate auxiliary aids" for any programs and activities that do receive federal financial assistance means that he would be entitled to "appropriate auxiliary aids" for participation in all of the operations of the Department of Corrections regardless of which specific program receives federal funds.

The Department notes that the Civil Rights Restoration Act was passed on March 22, 1988, long after Bonner initiated this suit, and argue that the Act should not be applied retroactively. So far, only one federal district court has examined the question of whether Congress intended the Civil Rights Restoration Act to be applied retroactively to cases that were pending at the time of its passage.

In a well-reasoned opinion, which included an exhaustive review of the legislative history behind the Civil Rights Restoration Act, the District Court for the Eastern District [**8] of New York held that the Act should be applied retroactively. Leake v. Long Island Jewish Medical Center, 695 F. Supp. 1414 (E.D.N.Y. 1988), aff'd, 869 F.2d 130 (2nd Cir. 1989). Noting that the express purpose of the statute was to "restore the broad scope of the coverage and to clarify the application of . . . Section 504 of the Rehabilitation Act of 1973," the Leake court concluded that Congress' intention [*423] to correct what it believed to be an incorrect judicial interpretation by the Supreme Court in Darrone and Grove City required a retroactive application of the legislation.

This court adopts the persuasive reasoning of Leake v. Long Island Jewish Medical Center and applies the Restoration Act retroactively. Plaintiff's suit under Section 504 should be allowed to go forward.

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 [**9] federal funds.

The Department now has two choices. It can treat its admission that Bonner is entitled to "appropriate auxiliary aids" for those specific programs that do receive financial aid as a general admission that Bonner is entitled to such aids for all of its programs or activities, in which case summary judgment will

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be granted in Bonner's favor. n1 The only other alternative is for the Department to stand by their denial that Bonner is unable to effectively communicate his thoughts or understand others through use of either the telecommunications device or prison inmate interpreters provided by the Department. 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 use of the telecommunications device and inmate interpreters, then no discriminination could have occurred. See Bonner, 857 F.2d at 563.

n1 As the Department has acknowledged, the United States Department of Justice has promulgated regulations under Section 504 which apply to correctional facilities receiving federal financial assistance. The regulations require those facilities to ". . . provide appropriate auxiliary aids to qualified handicapped persons with impaired sensory, manual, or speaking skills where refusal to make such provision would discriminatorily impair or exclude the participation of such persons. . . .Such auxiliary aids may include brailled and taped materials, qualified interpreters, readers, and telephonic devices." 28 C.F.R. Section 42.503(f) (1988) (emphasis added). Plaintiff's amended complaint has specifically identified certain prison programs in which he needs the assistance of a qualified interpreter including, but not limited to, counseling, educational programs, vocational programs, medical care and

psychiatric treatment. [**10]

II. Existence of a Due Process Liberty Interest in the Department's Regulations Governing Placement in Protective Lockdown, and Removal From the Honor Dorm and Disciplinary Procedure

The Ninth Circuit also remanded the issue of whether statutes and regulations governing Bonner's placement in protective lockdown create a liberty interest in remaining within the general prison population, and whether statutes and regulations governing placement in and removal from the honor dorm create a liberty interest. Where a liberty interest is involved, due process requires prison officials to inform the prisoner of the charges against him and permit him to present his views. Toussaint v. McCarthy, 801 F.2d 1080, 1100 (9th Cir. 1986). If the statutes and regulations governing Bonner's placement in protective lockdown and removal from the honor dorm do create a liberty interest, "a genuine issue of material fact exists regarding whether the denial of a qualified sign language interpreter prevented Bonner from understanding the charges against him or presenting his views." Bonner, 857 F.2d at 565. If the statutes and regulations do not create liberty interests, summary judgment in favor [**11] of the defendant on this issue is appropriate. Id.

In Hewitt v. Helms, 459 U.S. 460, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1953), the Supreme Court found that a Pennsylvania statute created a liberty interest in remaining within the general prison population through the use of "mandatory language in connection with requiring specific substantive predicates" to the placement of prisoners in administrative detention. However, prison regulations do not create a constitutionally [*424] protected liberty interest where they leave classification procedures to official discretion. Baumann v. Arizona Department of Corrections, 754 F.2d 841, 845 (9th Cir. 1985).

The regulations governing the procedural requirements for classification hearings and disciplinary hearings are contained in Arizona Official Compilation, Administrative Rules and Regulations, Title V, "Corrections." The regulations governing removal from the honor dorm are governed by Arizona Department of Corrections Post Order No. 500.3, Rule No. 5.3, promulgated under the authority of A.R.S. 31-201.01.

A. Due Process Liberty Interest in Classification Hearings

A committee within an Arizona prison conducts Classification reviews. The regulations require [**12] that "[a] Classification hearing will be scheduled at six (6) month intervals." Ariz. Admin. Comp. R5-1-207(A)(1). An inmate is entitled to notice to prepare for the hearing. R5-1-207(B). Hearing procedures provide that the "inmate shall be afforded an opportunity to provide the committee with a relevant oral or written statement during the hearing" and that the "inmate will be verbally informed" of the committee's recommendation.

R5-1-207C(4) and (5).

However, Ariz. Admin. Comp. R5-1-206, "Initial classification and reclassification overrides," provides:

The Director, or his designee, may establish ratings that are higher or lower than any rating designated by the initial Classification instrument or the reclassification instrument. If, in some circumstances, the Director or his designee determines, in his sole discretion, that adherence to the procedures established by this Chapter may jeopardize the welfare or security of inmates, Department of Corrections staff or the public, he may, in those circumstances, decline to follow those procedures.

R5-1-206 was adopted as a permanent rule effective December 11, 1986, the exact same date that R5-1-207 was adopted as a permanent rule. [**13] R5-1-206 can only be interpreted as giving the director sole discretionary power to abandon the procedural requirements outlined in R5-1-207.

B. Due Process Liberty Interest in Removal from the Honor Dorm

So long as the conditions of his confinement do not violate constitutional norms, Bonner has no constitutionally derived liberty interest in assignment to a particular part of the prison. Meachum v. Fano, 427 U.S. 215, 224-25, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451 (1976). However, a liberty interest may exist if any statutory or regulatory enactment sufficiently restricts prison officials' ability to transfer inmates. Hewitt, 459 U.S. at 471-72, 103 S. Ct. at 871. Although not formally promulgated as a regulation, an explicit written policy statement may create a protected interest. Baumann, 754 F.2d at 844.

There is no indication that the Department's Post Order governing removal from the honor dorm is governed or controlled by the specific classification procedures found in R5-1-202 to 207. The procedural requirements governing removal from the honor dorm are independent of the classification procedures that would have entitled an inmate to consideration for housing in the honor [**14] dorm in the first place. The discretionary language found in R5-1-206 merely permits the director to decline to follow the classification procedure. It does not give him the authority to decline to follow the separate procedure which governs an inmate's removal from the honor dorm. Rule 5.3 of Post Order No. 500.3 lists the reasons for which an inmate can be removed from the honor dorm, which include conviction of major and/or minor disciplinary infractions. Rules 5.3.3 and 5.3.4 state the circumstances under which an inmate "will be seen by the Honor Dorm Review Committee," while Rule 5.3.3.3 provides for an appeal of a decision of the Honor Dorm Review Committee.

The Department argues that "[t]he Honor Dorm regulations make it clear that the program is a privilege, and not an entitlement or right. Selection is highly

discretionary." While Bonner clearly had [*425] no entitlement to being assigned to the honor dorm in the first place, once the privilege was conferred, the regulations provided him with specific due process rights governing his removal from the honor dorm. While selection to the honor dorm may be "highly discretionary," the regulations expressly provide that removal from [**15] the honor dorm is not highly discretionary.

Bonner is correct that Post Order 500.3 constitutes an official policy pronouncement containing substantive standards and criteria that must be met prior to an inmate's removal from the honor dorm. Because the procedural guidelines governing an inmate's removal from the honor dorm "used language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed," the regulations created a constitutionally protected liberty interest. Hewitt, 459 U.S. at 471-472; see also Baumann v. Arizona Department of Corrections, 754 F.2d 844 (9th Cir. 1985); Parker v. Lane, 688 F. Supp. 353 (N.D.Ill. 1988) (prison classification regulations using mandatory language established state-created constitutionally protected liberty interest in removal from honor dorm).

C. Due Process Liberty Interest in Disciplinary Procedure

Bonner alleges that the application of the disciplinary hearing procedures without the use of a qualified sign language interpreter infringed upon a protected liberty interest. He alleges that at each of the disciplinary hearings, which resulted in his removal from the honor dorm [**16] and in his being found guilty of other infractions, he was not afforded a sign language interpreter and that he was consequently denied his right to due process.

The regulations governing inmate disciplinary hearings are found in Ariz. Admin. Comp. R5-1-601 to 606. R5-1-601 provides in pertinent part that "[t]hroughout the disciplinary process the individual prisoner's basic constitutional rights will be observed and discipline will be accomplished with dignity, reason and humaneness."

The regulations further provide the following specific, mandatory requirements, involving communication with prisoners suspected of disciplinary violations, which must be followed by department staff members and officials:
R5-1-603. Procedures for administration of discipline

B. Formal disposition of violations. Any staff member who observed a violation or is made aware by another staff member of a violation which is serious enough to be handled in a formal manner will follow the following procedures:

1. . . . The prisoner will be verbally informed that he is being reported, unless security considerations dictate otherwise, and within 24 hours of the incident will be given a written [**17] copy of the alleged rule

violation(s). If an investigation is necessary to determine either the identity of the alleged violator or the extent of his involvement in the incident, the prisoner will be given written notice of the alleged violations within 24 hours after the investigation is completed.

Ariz. Admin. Comp. R5-1-603 (emphasis added).

This is only one example of the mandatory nature of procedural rules governing the administration of discipline. The regulations are replete with requirements that "the decision must be reviewed;" or that "[t]he Coordinator of Discipline will then discuss the case with the offending prisoner;" or that "the Coordinator of Discipline will interview the offending prisoner;" or that "inmates charged with minor rules violations are entitled to a hearing within seven working days."

To the extent that their application resulted in Bonner's removal from the honor dorm, the unmistakably mandatory character of the language of the regulations creates a constitutionally protected due process liberty interest under the Supreme Court's holding in Hewitt.

To require a deaf, mute, and vision-impaired inmate to navigate through this [**18] legal miasma without a qualified interpreter [*426] certainly would not comport with the department's stated goal of accomplishing discipline "with dignity, reason and humaneness." Ariz. Admin. Comp. R5-1-601.

ORDERS

IT IS ORDERED granting the defendants' motion for summary judgment on Bonner's claim that he has a constitutionally protected due process liberty interest in remaining in the general prison population by avoiding protection lockdown.

IT IS FURTHER ORDERED denying defendants' motion for summary judgment on Bonner's claim that he has a protected liberty interest in remaining in the honor dorm, and that he has a due process liberty interest in the presence of a qualified sign language interpretation at all stages in the prison's disciplinary procedure.

IT IS FURTHER ORDERED denying the defendants' motion for summary judgment on Bonner's Rehabilitation Act claim.

DATED this 26th day of May, 1989.

Document Separator

David E. MOORE, an individual, Plaintiff-Appellee, v. SUN BANK OF NORTH FLORIDA, N.A., a Florida corporation, Defendant-Appellant

No. 88-4018

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

923 F.2d 1423; 1991 U.S. App. LEXIS 1690; 54 Fair Empl. Prac. Cas. (BNA) 1598; 55 Empl. Prac. Dec. (CCH) P40,534

January 25, 1991

SUBSEQUENT HISTORY: Petition For Rehearing and Suggestion For Rehearing En Banc Granted, Opinion Reported at 1992 U.S. App. LEXIS 2219.

PRIOR HISTORY:
[**1]
Appeal from the United States District Court for the Middle District of Florida; D.C. Docket No. 87-00617-Civ-J-16.

DISPOSITION: Affirmed.

JUDGES: Hatchett and Clark, Circuit Judges, and Hill, Senior Circuit Judge. Hill, Senior Circuit Judge, dissenting.

OPINIONBY: CLARK

OPINION: [*1424] CLARK, Circuit Judge

This case presents the question whether a national bank's participation in the Small Business Administration's (SBA) guaranteed loan program constitutes receipt by the bank of federal financial assistance pursuant to Section 504 of the federal Rehabilitation Act. n1 The district court, relying upon distinctions between provisions in the Rehabilitation Act and other legislation governing remedies for anti-discrimination and upon cases in this circuit interpreting aspects of the Rehabilitation Act, held that appellant, Sun Bank, was "covered" by the Act and liable for employment discrimination against a handicapped person. We affirm.

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n1 29 U.S.C. @ 794.

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FACTS

In July, 1987, appellee, David E. Moore, filed a complaint seeking relief under section 504 of the Rehabilitation Act. n2 Appellee [**2] contends that after being hospitalized for surgery and treatment of a brain tumor, he was, after returning to work, subjected to a continual reduction in authority and responsibility by appellant, Sun Bank, and was eventually terminated by appellant. In his complaint, he claims that appellant [*1425] violated section 504 when it limited his authority and eventually fired him solely because of his handicap, cancer. Appellee also states a pendent state law claim for intentional infliction of emotional distress.

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n2 Subsequent to the filing of this action, Congress enacted the Americans with Disabilities Act of 1990, Pub.L. 101-336, 104 Stat. 327 (1990), the purpose of which is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Pub.L. 101-336, 104 Stat. 329, @ 2(b)(1). Title I of the Act contains a general prohibition of discrimination against handicapped persons in the terms and conditions of their employment. Id., Sec. 102(a). The prohibition applies to employers of 25 or more employees within industries affecting commerce. Id., Sec. 101(5). Section 501(b) makes clear that Congress did not intend the Americans with Disabilities Act to effect a change in the breadth of enforcement under the Rehabilitation Act or any other federal, state, or local law protecting the rights of handicapped individuals. The Act becomes effective two years after the date of enactment, July 26, 1990. Id., Sec. 108.

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[**3]

Section 504 provides in pertinent part:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, 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.... n3

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n3 29 U.S.C. @ 794.

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Is Sun Bank's participation in the Small Business Administration's guaranteed loan program a "program or activity receiving Federal financial assistance"?

The SBA is a federal agency that operates pursuant to the direction of the President. n4 Congress appropriates funds from the United States Treasury to be used to guarantee up to ninety percent of the loans made by lending institutions participating in the SBA's program. Thus, the purpose of the program is to allow lending institutions to make loans to small businesses with virtually no risk of loss. n5 Through this program, Sun Bank provided loans to small businesses and, on at [**4] least one occasion during appellee's employment, received a direct reimbursement from the SBA following the default of a guaranteed loan. Participation by banks in the guaranteed loan program is voluntary.

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n4 15 U.S.C. @ 633.

n5 See @ 15 U.S.C. 631(a), 636(a).

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STATUTORY BACKGROUND

Appellant Sun Bank argues that its participation in the SBA guaranteed loan program does not subject it to coverage under Section 504 of the Rehabilitation Act because contracts of insurance or guaranty are excluded from the definition of federal financial assistance. In light of the fact that the Act previously set forth verbatim does not exclude such contracts of insurance or guaranty from the meaning of Federal financial assistance, appellant's argument necessarily relies upon inferring from other sources congressional intent to do so.

At the risk of unduly lengthening this opinion, we begin our consideration of this issue with a brief overview of several anti-discrimination statutes enacted in 1964 and since. The first major legislation [**5] was the Civil Rights Act of 1964 which included prohibitions against discrimination in voting practices (Title I), prohibitions against employment discrimination (Title VII), nondiscrimination in federally assisted programs (Title VI), and others. We focus here on Title VI because appellant urges us to incorporate part of that title into the Rehabilitation Act. The applicable language is as follows:

Sec. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Sec. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601.... n6

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n6 Pub.L. 88-352, Title VI, @ 601, 78 Stat. 252 (1964) (current version at 42 U.S.C. @@ 2000d, 2000d-1) (emphasis added).

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[**6]

In an amendment to the Higher Education Act of 1965, Congress in 1972 enacted Title IX to prohibit sex discrimination. The comparable provisions are as follows:

Sec. 901. (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....

Sec. 902. Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a [*1426] contract of insurance or guaranty, is authorized and directed to effectuate the provisions of Section 902.... n7

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n7 Pub.L. 92-318, Title IX, @ 901, 902, 86 Stat. 373, 374 (1972) (current version at 20 U.S.C. @@ 1681, 1682) (emphasis added).

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In the same title, Congress prohibited discrimination against the blind in programs receiving Federal financial assistance:

Sec. 904. No person in the United States shall, on the ground [**7] of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity....

Sec. 905. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty. n8

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n8 Pub.L. 92-318, Title IX, @ 904, 905, 86 Stat. 375 (1972) (current version at 20 U.S.C. @@ 1684, 1685) (emphasis added).

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In 1975, Congress prohibited age discrimination in the following legislation:

Sec. 303. Pursuant to regulations prescribed under section 304, and except as provided by section 304(b) and section 304(c), no person in the United States shall, on the basis of age, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

Section 304(a).

* * * * * *

(4) ... T]he head of each Federal department [**8] or agency which extends Federal financial assistance to any program or activity by way of grant, entitlement, loan, or contract other than a contract of insurance or guaranty, shall transmit to the Secretary. n9

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n9 Pub.L. 94-135, Title III, @ 303, 304, 89 Stat. 728 (1975) (current version at 42 U.S.C. @@ 6102, 6103) (emphasis added).

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Each of these statutes excluded recipients of federal financial assistance who receive benefits from contracts of insurance or guaranty. Our research has disclosed no statute, rule, or decisional law that has defined "contract of insurance or guaranty."

The Vocational Rehabilitation Act was amended in 1973 in many respects, including a prohibition of discrimination against the handicapped. The statute, as originally enacted, provided as follows:

Sec. 504. No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination [**9] under any program or activity receiving Federal financial assistance. n10

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n10 Pub.L. 93-112, Title V, @ 504, 87 Stat. 394 (1973) (applicable version, including 1986 amendments, at 29 U.S.C. 794 (West Supp.1990)).

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Congress, in this legislation, did not include any section comparable to section 602 of Title VI, section 902 or 905 of Title IX, or section 304(a)(4) of the Age Discrimination Act.

Realizing that the 1973 statute, i.e., section 504, failed to provide any enforcement mechanism, Congress in 1978 amended section 504 by adding language as reflected in the note below. n11 Additionally, Congress [*1427] enacted section 505(a)(2), on which appellant Sun Bank relies in urging that Congress included in the Rehabilitation Act a provision that excluded contracts of insurance or guaranty. Section 505(a)(2) provides in pertinent part:

[**10]

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act. n12

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n11 29 U.S.C. @ 794 (1978) reads as follows:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

A 1986 amendment to the Act made only technical changes. See Pub.L. 99-506, Title I, @ 103(d)(2)(B), Title X, @ 1002(e)(4), 100 Stat. 1810 (1986). The current version of section 504, including amendments not relevant here, appears

at 29 U.S.C.A. @ 794(a)-(c) (West Supp.1990).

n12 Pub.L. 93-112, Title V, @ 505, as added Pub.L. 95-602, Title I, @ 120, 92 Stat. 2982 (1978) (current version at 29 U.S.C. @ 794a(a)2) (1978).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

We cannot accept the contention that the "remedies, procedures, and rights" language in section 505(a)(2) incorporated the language of section 602 of Title VI (42 U.S.C. 2000d-1), excluding "a contract of insurance or guaranty" from the definition of Federal financial assistance.

Appellant argues in its brief:

Contracts of insurance of guaranty are also excluded from the definition of federal financial assistance by specific Congressional action. In 1978, Congress amended Section 504 to incorporate the "remedies, procedures and rights" of Title VI. 29 U.S.C.A. Section 794a(a)(2) (West 1985 & Supp.1988). [**11] Title VI, like other anti-discrimination legislation, contains an express exclusion of contracts of insurance or guaranty within a procedural provision of the statute. Therefore, under the 1978 amendment, the language excluding contracts of insurance or guaranty is incorporated within Section 504 of the Rehabilitation Act. Moreover, the legislative history of the 1978 amendments demonstrates that the regulation excluding contracts of insurance or guaranty was meant to be codified as specific statutory practice. n13

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n13 Appellant's Brief at 4-5.

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First, it is clear that the Rehabilitation Act does not, on its face, exclude contracts of insurance or guaranty. Further, we have carefully studied the legislative history of the 1978 amendments and find nothing to support appellant's contention that incorporation of the phrase "remedies, procedures, and rights" found in the legislative history was intended to include the limitations contained in Title VI (section 602). Appellant Sun Bank makes the foregoing argument based upon [**12] the following statement from Senate Report No. 95-890 dated May 15, 1978:

Subsection (a)(2) of the new section makes available the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 to any person aggrieved by any act or failure to act by any recipient of Federal assistance or any Federal provider of Federal assistance under section 504 of the Rehabilitation Act of 1973.

It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practice as a specific statutory requirement.

Our rejection of appellant's argument is based upon the proposition that Congress in 1964 (Title VI), in 1972 (Title IX), and in 1975 (Age) enacted statutes prohibiting discrimination in programs receiving federal financial assistance and each time expressly excluded contracts of insurance and guaranty. During this same era, Congress, in 1973 and 1978, passed legislation affecting the handicapped and did not exclude such contracts. Appellant asks us to insert language [**13] in the Act that Congress failed to include. This we are not empowered to do.

As this court reasoned in Arline v. School Board, n14 we would be "acting beyond our authority to read into section 504 limitations which Congress chose not to [*1428] establish when it clearly could have done so." n15 The question, in Arline, was whether "Federal financial assistance" in section 504 included impact aid. We reasoned that "since impact aid does not fall within any specifically delineated exception to the statute, it must be defined as 'federal financial assistance' in order to give effect to the broad legislative intent expressed in section 504." n16

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n14 772 F.2d 759 (11th Cir.1985), aff'd, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987).

n15 Id. at 762 n. 8.

n16 Id. at 763 n. 9. See also Richerson v. Jones, 551 F.2d 918, 928 (3d Cir.1977) (quoting General Electric Co. v. Southern Constr. Co., 383 F.2d 135, 138 n. 4 (5th Cir.1967)) ("Where a statute with respect to one subject contains a given provision, the omission of such a provision from a similar statute is significant to show a different intention existed.").

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[**14]

Support for our position is found in Consolidated Rail Corp. v. Darrone. n17 In that case, the district court had relied upon Trageser v. Libbie Rehabilitation Center, Inc., n18 which had held that section 505(a)(2) of the Rehabilitation Act incorporated into that Act the limitation found in section 604 of Title VI. This is the same argument made by Sun Bank, except that the limitation urged here is found in section 602, rather than section 604, of Title

VI. The Supreme Court in Consolidated Rail rejected this argument, reasoning:

It is clear that @ 504 itself contains no such limitation. Section 504 neither refers explicitly to @ 604 nor contains analogous limiting language; rather, that section prohibits discrimination against the handicapped under "any program or activity receiving Federal financial assistance." And it is unquestionable that [**15] the section was intended to reach employment discrimination. Indeed, enhancing employment of the handicapped was so much the focus of the 1973 legislation that Congress the next year felt it necessary to amend the statute to clarify whether @ 504 was intended to prohibit other types of discrimination as well.... n19

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n17 465 U.S. 624, 104 S. Ct. 1248, 79 L. Ed. 2d 568 (1984).

n18 590 F.2d 87 (4th Cir.1978), cert. denied, 442 U.S. 947, 99 S. Ct. 2895, 61 L. Ed. 2d 318 (1979).

n19 465 U.S. at 632, 104 S. Ct. at 1253 (footnote and citations omitted).

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The Court further stated that

language as broad as that of @ 504 cannot be read in isolation from its history and purposes.... In these respects, @ 504 differs from Title VI in ways that suggest that @ 504 cannot sensibly be interpreted to ban employment discrimination only in programs that receive federal aid the "primary objective" of which is to promote employment....

In contrast, the primary goal of the Act is to increase employment of the handicapped, see supra, at 1253 and n. 12. However, Congress chose to ban employment discrimination against the handicapped, not by all employers, but only by the Federal Government and [**16] recipients of federal contracts and grants. As to the latter, Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a quid pro quo for the receipt of federal funds. Cf. 118 Cong.Rec. 32305 (1972) (remarks of Sen. Javits). But this decision to limit @ 504 to the recipients of federal aid does not require us to limit that section still further, as petitioner urges. n20

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n20 Id. at 632 n. 13, 104 S. Ct. at 1253-54 n. 13.

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The district court in denying relief to Sun Bank relied heavily upon Jones v. Metropolitan Atlanta Rapid Transit Authority. n21 That decision presented the same issue and factual pattern as Consolidated Rail and presaged the outcome of that case. The following comments from our earlier opinion are relevant to our decision and guide our thinking:

[**17]

Section 504 of the Rehabilitation Act specifically prohibits discrimination against qualified handicapped people in "any program or activity receiving Federal [financial] assistance. ..." 29 U.S.C.A. @ 794. On its fact, therefore, the [*1429] Section applies to programs receiving federal financial aid of any kind.

* * * * * *

In 1978, Congress again amended the Rehabilitation Act and added Section 505, Pub.L.No. 95-602, 92 Stat. 2955 (1978). The section provides that the "remedies, procedures, and rights" of an aggrieved party are found in title VI of the Civil Rights Act of 1964. Significantly, Congress did not simply state that suits under Section 504 of the Rehabilitation Act were controlled by Title VI. Instead, Congress made clear that only the "remedies, procedures, and rights" of Title VI were incorporated into the Rehabilitation Act. Section 604, as a substantive restriction on standing, does not constitute a right, remedy or procedure. Thus, under the plain meaning of the language in Section 505, Section 604 of the Civil Rights Act was not incorporated into the Rehabilitation Act.

* * * * * *

More specifically, the Conference Report to the 1978 Amendments acknowledges that the Rehabilitation [**18] Act extends to any recipient of federal financial assistance. H.Con.R. No. 1780, 95th Cong., 2d Sess. (1978), reprinted in U.S.Code Cong. & Ad. News 7375, 7404 (Section 505 insures that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 would be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance....") (emphasis added). Furthermore, the discussion of Section 505 in the Conference Report was located in a subsection titled "Attorneys' Fees and Remedies." The title of an act or subsection can be used to help interpret an ambiguous statute. Russ v. Wilkins, 624 F.2d 914, 911 (9th Cir.1980). It is reasonable to conclude that the title of this subsection indicates that Congress was adopting the section to provide benefits and remedies for an aggrieved party. On the other hand the restrictions found in Section 604 cannot be construed as either a benefit or a remedy. n22

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n21 681 F.2d 1376 (11th Cir.1982), cert. denied, 465 U.S. 1099, 104 S.Ct. 1591, 80 L.Ed.2d 123 (1984).

n22 681 F.2d at 1379-81.

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The court in Jones recognized [**19] that the 1978 amendments to the Rehabilitation Act, by incorporating the remedies, rights, and procedures of Title VI, "intended to expand rather than contract the applicability of the Rehabilitation Act." n23 As Senator Stafford explained, the 1978 amendments to the Rehabilitation Act allow "the rehabilitation program to grow and serve more handicapped individuals and provide these individuals with greater opportunities to maximize their potential." n24 And, although Title VI and section 504 are similar in language and purpose, we must give effect to their differences. n25

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n23 Id. at 1381 n. 13.

n24 124 Cong. Rec. S30311 (daily ed. Sept. 20, 1978).

n25 See North Haven Board of Educ. v. Bell, 456 U.S. 512, 530, 102 S. Ct. 1912, 1922, 72 L. Ed. 2d 299 (1982) ("For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them.").

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Neither the legislative history nor incorporation of the rights, remedies, or procedures of Title VI recognize [**20] such a limitation on the rights of the disabled to be free of discrimination in the terms of their employment. Therefore, absent evidence of congressional intent to limit the meaning of federal financial assistance in section 504, particularly given evidence of congressional awareness of the potential scope of that language, we must conclude that Congress intended section 504 to apply broadly to institutions receiving federal financial assistance.

ADMINISTRATIVE REGULATIONS

Appellant also argues that this court should defer to regulations promulgated by Health, Education, and Welfare (HEW), which exclude contracts of insurance or guaranty from the definition of "Federal financial assistance." 45 C.F.R. @ 84.3(h) provides in pertinent part that "'Federal financial assistance' means any grant, loan, [or] contract (other than a procurement contract or a contract of insurance or guaranty).... " Inclusion of the limitation on federal financial

assistance [*1430] within the agency regulations distinguishes this case from Jones and Consolidated Rail Corp., in which the regulatory provisions in question, consistent with the language of the statute and with legislative intent, called for a [**21] broad reading of "Federal financial assistance." However, because we find HEW's application of section 504, insofar as it pertains to the insurance or guaranty contract exclusion, to be inconsistent with congressional intent, we decline to accept the agency's interpretation.

In 1977, the President designated HEW as the agency responsible for coordination and implementation of section 504. n26 On January 13, 1978, the final regulations contemplated by the Executive Order were published by the Department. These regulations contained the exclusion for guaranty or insurance contracts. n27 In the comments accompanying these final regulations, HEW noted that it had retained the exclusion issued in the proposed regulations, despite criticism that "programs whose only federal assistance is in the form of federal loan guarantees, such as [FDIC] and [FHA] programs," would be exempt from the statute. n28

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n26 Executive Order 11914.

n27 See 45 C.F.R. @ 84.3(h).

n28 43 Fed.Reg. 2432. On November 2, 1980, the President transferred authority for coordinating section 504 from HEW, then the Department of Health and Human Services, to the Department of Justice (DOJ). On August 11, 1981, the DOJ adopted the HEW rules without change. 46 Fed.Reg. 40686. The current version of the regulations is found at 28 C.F.R. @ 41.3(e).

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The agency's reason for retaining the exclusion under section 504 is significant. Critics of the regulations argued that because section 504, unlike Title VI and Title IX, contained no statutory exemption for contracts of insurance or guaranty, exclusion of such contracts in the regulations implementing section 504 would be inconsistent with congressional intent. To this, the agency responded,

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. n29

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n29 45 C.F.R. @ 84, Appendix A, subpart a (comments on 45 C.F.R. @ 84.3(h)).

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While it is true that courts generally give deference to the interpretation given a statute by the agency charged with its administration, n30 "the traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." n31 We have noted, above, that the intent of Congress is clear from the plain meaning of the statute.

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n30 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778, 2780, 81 L. Ed. 2d 694 (1984).

n31 Board of Governors, FRS v. Dimension Financial Corp., 474 U.S. 361, 368, 106 S. Ct. 681, 686, 88 L. Ed. 2d 691 (1986).

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Even if, as appellants argue, congressional intent has not been "unambiguously expressed," n32 we still must ask whether the agency regulations are a "reasonable interpretation" n33 of the intent of Congress. As the Court in Chevron explained,

[**24]

If ... the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. ather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. n34

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n32 Chevron, 467 U.S. at 843, 104 S.Ct. at 2781.

n33 Id. at 844,c 104 S.Ct. at 2782.

n34 Id. at 843, 104 S.Ct. at 2781-82.

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The agency, in implementing the statute, relies on the absence of specific legislative history regarding the insurance or guaranty [*1431] contract exclusion and on section 504's incorporation of the "remedies, procedures, and rights" set forth in Title VI. However, as set forth above, the plain language of section 504, the failure of Congress to amend the Rehabilitation Act to exclude contracts of insurance or guaranty, and the clearly [**25] expressed intent of Congress in providing broad remedy for handicapped discrimination in programs receiving "Federal financial assistance" belie such an interpretation. We conclude, as did the Supreme Court in Consolidated Rail Corp., that "it would be anomalous to conclude that the section 'designed to enhance the ability of handicapped individuals to assure compliance with [@ 504], ... silently adopted a drastic limitation on the handicapped individual's right to sue federal grant recipients for employment discrimination."

Finally, we note that pursuant to Department of Justice regulations, each agency is to promulgate regulations defining, among other terms, the meaning of Federal financial assistance. n35 Although the regulations promulgated by the individual agencies cannot utilize definitions inconsistent with the Justice Department's coordinating regulations, n36 the regulations promulgated by the Small Business Administration, in fact, contain no insurance/guaranty contract exclusion. They define federal financial assistance to include "grants and loans of Federal funds," the "grant or donation of Federal property and interest in property," and the "detail of Federal [**26] personnel." 13 C.F.R. @ 113.2(a). In separately defining federal financial assistance under Title VI, the SBA regulations promulgated pursuant to that title, consistent with the language of the statute, exclude contracts of insurance or guaranty from the definition of financial assistance. n37 We find that the SBA's implementation of section 504 and Title VI, as it pertains to the inclusion or exclusion of insurance or contracts within the meaning of "Federal financial assistance," is consistent with the distinct language of each of these statutes and with statutory intent.

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n35 28 C.F.R. @ 41.4(c)(1) (1990).

n36 Id.

n37 13 C.F.R. @ 112.2(c).

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On the other hand, the regulations promulgated by the Department of Health, Education, and Welfare, and subsequently adopted by the Department of Justice, significantly depart from congressional intent with respect to the guaranty/insurance contract exclusion. Therefore, for the reasons stated above, we hold that those regulations are invalid with respect to that portion [**27] excluding programs receiving federal financial assistance in the form of contracts of insurance or guaranty from section 504 coverage.

APPELLANT AS "RECIPIENT" OF FEDERAL FINANCIAL ASSISTANCE

Having found that contracts of insurance or guaranty constitute federal financial assistance within the meaning of section 504, we now must determine whether Sun Bank, as a participant in the SBA guaranteed loan program, is a "recipient" of federal funds. The district court held that Sun Bank received federal assistance because, in the event that a small business defaults on a guaranteed loan, the SBA directly reimburses Sun Bank. We agree.

By its terms, the scope of section 504 is limited to the "program or activity" that "receiv[es] federal financial assistance." The Supreme Court, in United States Dept. of Trans. v. Paralyzed Veterans of America, n38 held that section 504 protection is triggered only by "receipt" of, and not "benefit" from, federal aid. n39 Appellant argues that receipt of profits from SBA guaranteed loans does not subject Sun Bank to coverage under section 504 of the Rehabilitation Act, as Sun Bank is a mere beneficiary of federal funds, not a recipient. The "recipient" [**28] under the underlying grant statute, Aid to Small Businesses, n40 [*1432] appellant contends, is the small business. This follows from the purpose of that Act, which is to "aid and assist small business concerns." n41 Nowhere, Sun Bank continues, does the statute refer to any form of assistance to financial institutions such as Sun Bank.

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n38 477 U.S. 597, 106 S. Ct. 2705, 91 L. Ed. 2d 494 (1986).

n39 Id. at 604, 106 S.Ct. at 2710.

n40 15 U.S.C.A. @ 631 et seq. (West 1976 & Supp.1988).

n41 Id. at @ 631(b).

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Contrary to appellant's contention, under the terms of the underlying grant statute, federal funds are directly reimbursed to the lending institution under the SBA guaranteed loan program upon default by the borrower. Indeed, while appellee was employed by Sun Bank, reimbursement, as we have noted, was made

directly to the bank through the SBA fund. n42 The lender, as recipient of federal financial assistance, is willing to make what otherwise might be a high risk loan. Thus, funds appropriated by Congress [**29] under the terms of the Act are disbursed, upon default, to the bank. n43

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n42 Cf. Paralyzed Veterans, 477 U.S. at 605, 106 S.Ct. at 2711 ("Congress has made it explicitly clear that these funds are to go to airport operators. Not a single penny of the money is given to the airlines. Thus, the recipient for purposes of @ 504 is the operator of the airport and not its users.").

n43 Appellant improperly relies on Paralyzed Veterans in support of its argument that it is not a recipient of federal funds. In concluding that Sun Bank is only a beneficiary of federal assistance under the Small Business Act, appellant considers only Sun Bank's receipt of interest and profits from disbursement of loans to small businesses by the bank and, on this basis, concludes that it is a mere beneficiary. See Paralyzed Veterans, 477 U.S. at 606-07, 106 S.Ct. at 2711-12 ("While Grove City stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal coverage follows the aid past the recipients to those who merely benefit from the aid."). Because Sun Bank obtains federal funds through default reimbursements made directly to the bank from Treasury monies, we have no trouble concluding that Sun Bank receives federal financial assistance and is, therefore, subject to the provisions of section 504. "The recipient is the intermediary entity whose nondiscriminatory participation in the federally assisted program is essential to the provision of benefits to the identified class which the federal [grant] statute is designed to serve." See Bob Jones University v. Johnson, 396 F. Supp. 597, 601 n. 15 (D.S.C.1974), aff'd mem., 529 F.2d 514 (4th Cir.1975).

"In reaching this conclusion, we need not address whether Sun Bank, by receiving interest and profits earned on SBA loans which it would not otherwise earn, is an indirect recipient, rather than a mere beneficiary, of Federal Financial Assistance."

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Moreover, under the rationale in Grove City College v. Bell, n44 should the bank choose not to bear the costs of providing employment for the handicapped as a quid quo pro for the receipt of federal funds, it is free to terminate its participation in the guaranteed loan program. "Congress enters into an arrangement in the nature of a contract with the recipient of the funds: the recipient's acceptance of the funds triggers coverage under the

nondiscrimination provision." n45 Congress thus has imposed the obligation of section 504 upon Sun Bank as a "recipient" who is "in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds." n46

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n44 465 U.S. 555, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984).

n45 Paralyzed Veterans, 477 U.S. at 605, 106 S.Ct. at 2711.

n46 Id. at 606, 106 S.Ct. at 2711.

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CONCLUSION

After careful review of this issue, we remain unconvinced that Congress intended to incorporate into section 504 of the Rehabilitation Act the [**31] restrictive meaning of federal financial assistance urged on us by appellant Sun Bank. Likewise, because the regulations promulgated by HEW, in incorporating the insurance or guaranty contract exclusion within section 504, are based on an impermissible construction of section 504, we decline to follow them.

In reaching this decision, we give effect to the plain meaning of section 504 and the remedial purpose of the Act as embodied in the legislative history. The exclusion of contracts of insurance or guaranty from the meaning of federal financial assistance is a substantive limitation, not embraced within that term by incorporation through section 505 of the Rehabilitation Act of the "remedies, procedures, and rights" of Title VI. Thus, while we acknowledge that Congress [*1433] "patterned" section 504 after Title VI and Title IX, we agree with this court's prior understanding, in Jones v. Metropolitan Atlanta Rapid Transit Authority, of this oblique reference; section 504 was written with the same "sweeping language" n47 as Title VI. "However, the reference does not indicate an intent to incorporate the strictures of Title VI into the Rehabilitation Act. " n48 We, therefore, give effect [**32] to the differences in scope of these sections, and Congress's reasons for those differences, in defining " federal financial assistance. "

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n47 Jones, 681 F.2d at 1372.

n48 Id.

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Sun Bank, through participation in the SBA's guaranteed loan program, is a "program or activity receiving Federal financial assistance" and is thereby amenable to suit under section 504. We, therefore, AFFIRM the decision of the district court denying appellant's motion for summary judgment. In so concluding, we express no opinion as to the merits of appellee's claim.

AFFIRMED.

DISSENTBY: HILL

DISSENT: Hill, Senior Circuit Juge, dissenting.

In my view, (and as the appellants note), Section 504 of the federal Rehabilitation Act, 29 U.S.C. @ 794, represents yet another instance where congressional intent has not been "unambiguously expressed." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984). I, of course, sympathize with the majority's concern that we avoid inserting exclusionary language [**33] in a statute when elected lawmakers failed to do so. Nonetheless, my review of Senate Report No. 95-890, (May 15, 1978), convinces me that Congress did indeed intend for the limitations governing financial assistance in Section 602 of Title VI, 29 U.S.C. @ 794a(a)(2) to apply to the assistance specified in the Rehabilitation Act as well.

The Senate Report states as follows:

Subsection (a)(2) of the new section makes available the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 to any person aggrieved by any act or failure to act by any recipient of federal assistance under Section 504 of the Rehabilitation Act of 1973.

It is the committee's understanding that the regulations promulgated by the Department of Health, Education and Welfare with respect to procedures, remedies, and rights under Section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practice as a specific statutory requirement.

A. Exclusionary Language in Title VI.

The Senate Report, in my view, at least, specifically adopts the limitations on federal financial assistance detailed in Section 602 of Title VI. The majority's opinion, [**34] however, emphasizes that in Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 635, 104 S. Ct. 1248, 1255, 79 L. Ed. 2d 568 (1984), the Supreme Court rejected a litigant's argument that "Congress

intend[ed] to enact the 'primary objective' requirement of @ 604 [of Title VI] into the Rehabilitation Act when it amended that Act in 1978." The majority reasons that since the Supreme Court elected not to incorporate Title VI's Section 604 into the Rehabilitation Act, it would similarly elect not to incorporate Title VI's Section 602.

Section 604 of Title VI authorizes no action under the title "except where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. @ 2000d-3. As I see it, the Supreme Court in Consolidated Rail simply found it "unnecessary to extend Title VI more generally to ban employment discrimination, as Title VII comprehensively regulates such discrimination." Consolidated Rail, 465 U.S. at 632, n. 13, 104 S.Ct. at 1253 n. 13. No such rationale, however, supports the majority's decision in this case. The exclusionary language at issue here would limit [*1434] Section 504; it would not as in the Consolidated Rail case, expand [**35] its language into areas already duplicated by other statutes. In my view, the Senate Report plainly supports our incorporation of Title VI's exclusionary language into Section 504, and nowhere suggests that we limit its incorporation to selected segments of the statute.

B. Administrative Regulations.

I agree with the majority that an agency's interpretation of a statute need not necessarily reflect congressional intent. In my view, however, the language of the Senate Report actually endorses "the regulations promulgated by the Department of Health, Education and Welfare." n1 As the Report makes plain, the regulations, at least "with respect to procedures, remedies and rights under Section 504[,] conform with those promulgated under Title VI." (emphasis supplied). The Report, in short, accepts the regulations as a legitimate and appropriate source of authority in their interpretation of Section 504, and I see no reason why we should disregard that authority now.

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n1 As the majority notes, the Department of Justice has adopted the HEW regulations without revision. See 46 Fed.Reg. 40686. The current version of these regulations is now at 28 C.F.R. @ 41.3(e).

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CONCLUSION

For these reasons, although I acknowledge that the issue is not entirely free from doubt, I would reverse the decision of the district court which denies the appellant's motion for summary judgment.

Document Separator

GENE H. ARLINE, Plaintiff-Appellant, v. THE SCHOOL BOARD OF NASSAU COUNTY; and CRAIG MARSH, Individually and as Superintendent of Schools of Nassau County, FL, Defendants-Appellees

Nos. 83-3754, 84-3307

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

772 F.2d 759; 39 Fair Empl. Prac. Cas. (BNA) 9; 38 Empl. Prac. Dec. (CCH) P35,612

September 30, 1985

PRIOR HISTORY: Appeals from the United States District Court for the Middle District of Florida.

COUNSEL: Gene H. Arline, Pro Se, 1426 West 24th Street, Jacksonville, Fl 32209; Steven H. Malone, P.O. Box 960, St. Petersburg, FL 33704, for Appellant.

Brian T. Hayes, 245 Washington Street, Monticello, FL 32344, for Appellee.

Brian T. Hayes, 245 East Washington Street, Monticello, FL 32344, for Appellant.

Philip J. Padovano, P.O. Box 873, Tallahassee, FL 32302; Steven H. Malone, P.O. Box 960, St. Petersburg, FL 33704, for Appellee.

OPINIONBY: VANCE

OPINION: [*760] Before VANCE and ANDERSON, Circuit Judges, and HENLEY , * Senior Circuit Judge.

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* Honorable J. Smith Henley, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

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VANCE, Circuit Judge:

In enacting the Rehabilitation Act of 1973, Congress designed a comprehensive federal program aimed at integrating the handicapped into this society and affording them greater access to its benefits. One of the enforcement mechanisms of that Act is the private right of action n1 which arises out of its antidiscrimination provision. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. @ 794, provides that:

No otherwise qualified handicapped individual . . . 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 . . .

In the appeal before us the plaintiff, a third grade teacher who was fired from her job solely because of her susceptibility to tuberculosis, alleges that her dismissal violated section 504. Our consideration of her claim requires us to construe the meaning of three essential terms in section 504, namely, "handicapped individual," "otherwise qualified" n2 and "federal financial assistance."

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n1 This court has concluded that section 504 creates a private right of action. Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1377 n.1 (11th Cir. 1982), cert. denied 465 U.S. 1099, 104 S. Ct. 1591, 80 L. Ed. 2d 123 (1984).

n2 The regulations promulgated under section 504 have limited the broad scope of the phrase "otherwise qualified" to cover handicapped persons who would be qualified for a specific job if given "reasonable accommodation" by the employer. See 45 C.F.R. @ 84.3(k)(1). For further discussion, see part IV infra.

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I

Mrs. Gene Arline first contracted tuberculosis in 1957 at the age of fourteen, after which the disease went into remission. In 1966 she was hired as an elementary school teacher in Nassau County, Florida, and did her job competently for thirteen years. Arline then suffered three relapses of tuberculosis, one in 1977 and two in 1978. After her third relapse, the School Board dismissed Arline from her job.

After being denied relief in state administrative proceedings, Arline brought suit in federal court alleging that her dismissal constituted a violation of section 504 of the Rehbilitation Act. n3 She contended that [*761] her susceptibility to tuberculosis made her a "handicapped individual" within the meaning of the Rehabilitation Act, and that the school board therefore violated section 504 because it had fired her even though she was not "otherwise qualified if given reasonable accommodation." Arline's first theory was that her handicap created no barrier at all to her continued employment because the risk that she would infect her students was so minimal. The decision to dismiss her because of it was thus unreasonable and discriminatory. In the alternative, she claimed that even if nonsusceptibility to tuberculosis was a necessary physical qualification for teaching small children, the school district should have offered her "reasonable accommodation" in the form of an administrative job or a
temporary position teaching less susceptible persons such as older students or adults until she could obtain certification in areas outside elementary education. n4

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n3 The plaintiff also brought a claim under 42 U.S.C. @ 1983, alleging that she was denied due process under the fourteenth amendment. We reject this argument on the grounds articulated by the district court in its oral opinion: The plaintiff had at least one hearing and then a second hearing before the school board, then had a hearing before the Board of Education, State Board of Education, and then the matter was appealed pursuant to the administrative practices act of the State of Florida, chapter 120 of the Florida Statute, and the First District Court of Appeal ruled against her. In doing so, the Court of Appeal discussed the contract issue that was involved there and gave an interpretation of the contract provision, which provided that . . . the contract was continuing unless the individual who had executed the contract was unable to perform duties because of illness. . . . I see no denial of due process, either procedural or substantive with regard to that decision or the action of the school board of Nassau County in that respect.

n4 The district court found that the school board had a policy which permitted an individual to work out of field or out of certification for a period of time while he was attempting to obtain certification in that field.

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Along with medical evidence to support her claims, Arline introduced evidence that the school system received two forms of federal assistance. The first course of federal funds was Title I of the Elementary and Secondary Education Act, 20 U.S.C. @@ 2701-2854, n5 which provided monies to schools attended by significant numbers of children from low-income families. Although those funds were segregated from the general budget and used to pay only Title I teachers' salaries and purchase only Title I program supplies, she pointed out that her job entailed significant involvement with the Title I program in the form of day-to-day conferrals with Title I teachers about those of her students who were involved in the program. The second form of federal funding was "impact aid," which is provided to school systems whose populations have been substantially enlarged by the attendance of federal employees' children, but which have reduced tax revenues due to the presence of federally-owned property in the district. 20 U.S.C. @ 237. Although such funds constituted only a small portion of the school system's budget, n6 the defendants conceded that it was added to the school system's general education fund, from which teachers' salaries were paid.

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n5 The Title I program has now been superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. @@ 3801-3876.

n6 Testimony by the school board's superintendent established that in 1978-79 the system received $39,000 in impact aid, or approximately 0.3 percent of the entire school budget.

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After trial, the district court issued an oral opinion which found for the defendants on all counts. First, the court found that a contagious disease such as tuberculosis is not a "handicap" within the meaning of the Rehabilitation Act. As to her contention that she should have been given another position, the court concluded that Arline lacked the qualifications to teach outside of elementary education. In any case, the court held, the school board had no obligation to afford Arline alternative positions because it had an overriding duty to protect the public from contagious diseases. n7 Finally, the court concluded that [*762] neither the Title I funding nor the impact aid met the "federal financial assistance" requirement of section 504. with regard to the Title I money, the court stated that Arline was not a beneficiary of the funds because she was "not employed for purposes of Title I or in the Title I program . . ." As for the impact aid, the court concluded that it did not constitute "federal financial assistance" within the meaning of section 504.

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n7 The court did not make clear whether it believed that the absence of such an obligation on the part of the school board resulted from its conclusion that tuberculosis is not a handicap; or whether, assuming that tuberculosis is a handicap, her susceptibility to it precluded Arline from being a person "otherwise qualified" for any teaching position; or finally, whether the school board's duty to afford "reasonable accommodation" did not extend to affording the relief she requested.

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II

Because of its jurisdictional implications, we first consider whether the defendant received any "federal financial assistance" within the meaning of section 504. We need not address the effect of the Title I funding, for we find that the impact aid given to the defendants qualifies as "federal financial assistance" under section 504.

As this court noted in Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1379 (11th Cir. 1982), cert. denied, 465 U.S. 1099, 104 S. Ct. 1591, 80 L. Ed. 2d 123 (1984), "on its face . . . [section 504] applies to programs receiving federal financial aid of any kind" (emphasis supplied). n8 See also Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 104 S. Ct. 1248, 1253, 79 L. Ed. 2d 568 (1984). Where the language of a statute is not ambiguous and does not lead to absurd results, the job of the courts is to apply it as written.

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n8 Congress' failure to limit the scope of section 504 with any qualifying language was not an oversight, as evidenced by the contrast between that provision and Title VI of the Civil Rights Act of 1964, 42 U.S.C. @@ 2000d-1 to -6, an analogous civil rights statute which Congress clearly had in mind during the passage of the Rehabilitation Act and its amendments. See S.Rep. No. 1297, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S.Code Cong. & Ad.News 6373, 6390. Title VI prohibits race discrimination in employment. Section 604 of Title VI, 42 U.S.C. @ 2000d-3, limits the enforcement of anti-race discrimination provisions of Section 601 to those situations in which "a primary objective of the Federal financial assistance is to provide employment." Section 504 includes neither the "primary objective" limitation nor any other. See Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 104 S. Ct. 1248, 1253-54, 79 L. Ed. 2d 568 (1984). We would be acting beyond our authority to read into section 504 limitations which Congress chose not to establish when it clearly could have done so.

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The court below concluded and the defendants now contend, however, that the application of the statute is not so straightforward as its language would suggest. First, they find ambiguity in the term "federal financial assistance," and argue that the nature of federal impact aid is such that it could not have been within Congress' contemplation as a means of triggering the enforcement provision in section 504. Defendants' rationale is that impact aid is, as a matter of definition, not "assistance." They posit that it is more analogous to land taxes than to federal assistance since it is calculated on the basis of federal ownership of land and serves as a substitute for tax payments that the school system would receive had the land in its area been privately owned. We agree that when the federal government makes payments for obligations incurred as a market participant such payments do not constitute "federal assistance." See e.g., Hingson v. Pacific Southwest Airlines, 743 F.2d 1408, 1414 (9th Cir. 1984) (payments under contracts to carry mail); Jacobson v. Delta Airlines, 742 F.2d 1202, 1209 (9th Cir. 1984) (same), cert. dismissed, 471 U.S. 1062, 105 S. Ct. 2129, 85 L. Ed. 2d 493 (1985). See also Darrone, 465 U.S. at , 104 S.Ct. at 1256 n. 19. We must, however, reject the defendants' analogies to obligatory tax payments as fatally flawed. The indisputable fact is that the federal government's exemption from local taxes left it with no legal obligation to give impact aid. Its choice to assist local entities that happen to bear particularly heavy burdens because of this exemption renders its assistance no less a subsidy than any other form of aid that it dispenses. As such, it is federal financial assistance within the board meaning that Congress intentionally gave the term in section 504. n9

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n9 As the fifth circuit recently explained in its exhaustive analysis of the legislative history of both section 504 and the analogous civil rights statutes expressly incorporated by it, Congress' "single overriding purpose" was to ensure that the funds of the United States were not used to support discriminatory practices. United States v. Baylor University Medical Center, 736 F.2d 1039, 1042-43 (5th Cir. 1984), cert. denied, 469 U.S. 1189, 105 S. Ct. 958, 83 L. Ed. 2d 964 (1985). To this end, Congress intentionally gave broad scope to the term "federal financial assistance" in section 504. As this court pointed

out in Jones, "the legislative history to the 1974 amendments is replete with notations indicating that Section 504 was intended to encompass programs receiving federal financial assistance of any kind . . . ." 681 F.2d at 1379-80. Recognizing the overall goal involved, the Supreme Court has rejected attempts to read limitations into the term which are not apparent on the fact of section 504. Darrone, 465 U.S. at , 104 S.Ct. at 1253-55. See also Grove City College v. Bell, 465 U.S. 555, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984) (interpreting "federal financial assistance" under Title IX). We too conclude that since impact aid does not fall within any specifically delineated exception to the statute, it must be defined as "federal financial assistance" in order to give effect to the broad legislative intent expressed in section 504.

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[*763] We also find no merit in defendants' argument that the plaintiff failed to show that the impact aid funded a "program or activity" in which she was employed. Under their theory, it was not sufficient for plaintiff to show that the impact funds were non-earmarked monies which were deposited into the school board's general revenue fund to be used as it saw fit and that her salary was paid out of that fund. They argue that she must also show that the impact monies were actually used to fund her salary, since "the School Board might have elected to use those funds to pay for a program which would have had to be eliminated if the impact funds had been cut off." This argument strains credulity. Such a theory would impose on the plaintiff the impossible burden of tracing money that is virtually untraceable under accounting procedures which commingle funds in a general account before outlays are made. It also misconceives the relevant "program" in this case. We hold that the relevant "program" with regard to these non-earmarked general revenue funds is the entire school system. Once the federal money was deposited into its general fund, all activities paid for out of that fund became subject to section 504.

III

We must next determine whether tuberculosis constitutes a "handicap" within the meaning of the Rehabilitation Act. The district court concluded that it did not, explaining that "it's difficult for this court to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person . . . ." We look first to the language of the statute in deciding whether the court has given a proper construction to the term. n10 Second, we take guidance from the construction given by the agency entrusted with the statute's enforcement. Regulations promulgated by the Department of Health and Human Services, 45 C.F.R. @ 84.3, give further definition to all of the relevant terms of section 504. n11

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n10 29 U.S.C. @ 706(7)(B) states that:
Subject to the second sentence of this subparagraph, the term "handicapped individual" means . . . any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

n11 45 C.F.R. @ 84.3(j)(2) provides:

(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 psychological 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 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.

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[*764] The language of these provisions in every respect supports a conclusion that persons with contagious diseases are within the coverage of section 504. As the record in this case makes clear, a person with tuberculosis is, when afflicted with the disease, one who "has a physical or mental impairment which substantially limits . . . major life activities," 29 U.S.C. @ 706(7)(B); 45 C.F.R. @ 84.3(j)(2)(i)(A), since the disease can significantly impair respiratory functions as well as other major body systems. Even when not directly affected by tuberculosis, Arline falls within the coverage of section 504 because she "has a record of such an impairment," 45 U.S.C. @ 84.3(j)(2)(iii), and "is regarded as having such an impairment," 45 U.S.C. @ 84.4(j)(2)(iv), by her employer. When a fact pattern falls so neatly within the statutory and regulatory framework, and when coverage would so clearly serve to promote Congress' intent to reduce instances of unthinking and unnecessary discrimination against those who are the focus of the statute's concern, we would be hard pressed to find an exemption without further legislative direction.

As far as we can tell, there is no such legislative direction. Though the district court apparently thought it illogical to conclude that Congress would have placed contagious diseases within the definition of "handicaps," there is no objective evidence to support this conclusion. Neither the regulations nor the statutory language give any indication that chronic contagious diseases are to be excluded from the definition of "handicap." To the extent that the statute and regulations express any intent to limit the scope of section 504, Congress' failure to exclude contagious diseases from coverage when it specifically excluded alcoholism and drug abuse implies that it harbored no similar disapproval about them. We would as a general matter be reluctant to create an exemption where there is not a scintilla of evidence that Congress had any intention of doing so. We are especially reluctant in a situation where, as here, identifying an exemption would free recipients of federal funds from any duty even to consider whether reasonable accommodation could be made to those afflicted with contagious diseases. Such a result would, in our view, subvert Congress' intent to encourage recipients of federal funds to make decisions about the employability of those with physical or mental impairments only after a careful and informed weighing of the costs involved in accommodating the tasks at issue to their capabilities. This case, we believe, is precisely the kind in which that weighing process should have been made. We turn next to the district court's conclusion that the school board did in fact give Arline proper consideration.

IV

The law has recognized that not every handicapped individual can be integrated into every aspect of society in a cost-efficient manner. The regulations promulgated pursuant to section 504 therefore limit its applicability to situations where the handicapped individual would be "otherwise qualified" if given "reasonable accommodation." See Southeastern Community College v. Davis, 442 U.S. 397, 410-13, 99 S. Ct. 2361, 2369-70, 60 L. Ed. 2d 980 (1979); 45 C.F.R. @@ 84.3(k)(1), 84.12. While legitimate physical qualifications may be essential to the performance of certain jobs, see 442 U.S. at 406-07, 99 S.Ct. at 2367, both that determination and the determination of whether accommodation is possible are fact-specific issues. The court is obligated to scrutinize the evidence before determining whether the [*765] defendant's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive

reactions grounded in ignorance or capitulation to public prejudice. See, e.g., Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983); New York State Association for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979). In this case, the district court made no findings resolving the numerous factual disputes as to whether the risks entailed in retaining Arline in her elementary school position precluded her from having the necessary physical qualifications for the job, whether the same would be true if she were transferred to a position teaching less susceptible individuals, or whether the costs involved in accommodating her would place undue burdens on the school system. n12 Rather, it simply concluded that the school board was exempt from any duty whatever to weight the actual costs and risks involved in accommodating Arline because of an overriding "duty to the public it serves." Section 504 by its existence establishes that such a duty cannot be used to shield an entity from liability for making decisions which "arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program." Southeastern Community College, 442 U.S. at 412, 99 S.Ct. at 2370. We therefore remand this case for further findings n13 as to whether the risks of infection precluded Mrs. Arline from being "otherwise qualified" for her job and if so whether it was possible to make some reasonable accommodation for her in that teaching position, in another position teaching less susceptible individuals, or in some other kind of position in the school system. n14

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n12 We recognize the outcome in this case, as in Title VII cases may depend on the allocation of burdens of persuasion or production. See Doe v. New York University, 666 F.2d 761, 776-77 (2d Cir. 1981); Prewitt v. United States Postal Service, 662 F.2d 292, 307-10 (5th Cir. Unit A 1981). Because neither party has briefed this issue, however, we decline to address it.

n13 The court may at its option hold further evidentiary hearings if it deems them necessary. See also 29 C.F.R. @ 1613.704 (discussing factors for consideration in determining "reasonable accommodation"); Prewitt, 662 F.2d at 309 (same).

n14 Defendants' cross-appeal alleges error in the court's refusal to grant them attorneys' fees as prevailing parties under 29 U.S.C. @ 794a(b). We affirm this aspect of the court's holding.

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FED FN A35

ROSALIE GLANZ, executrix of the estate of Raymond Vadnais, Plaintiff v. DR. DAVID M. VERNICK, DR. MICHAEL MILLER, BETH ISRAEL CORPORATION, and BETH ISRAEL HOSPITAL, Defendants

Civil Action No. 89-0748-MA

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

756 F. Supp. 632; 1991 U.S. Dist. LEXIS 1380

February 5, 1991, Decided

COUNSEL: [**1]

Harvey A. Schwartz, Schwartz, Shaw & Griffith, Boston, Massachusetts.

Claudia Hunter, Bloom and Buell, Boston, Massachusetts.

JUDGES: A. David Mazzone, United States District Judge.

OPINIONBY: MAZZONE

OPINION: [*634] MEMORANDUM AND ORDER

DAVID MAZZONE, UNITED STATES DISTRICT JUDGE

In April, 1989, plaintiff's decedent, Raymond Vadnais, brought this suit alleging discrimination in violation of @ 504 of the Rehabilitation Act of 1973 (the "Act"), 29 U.S.C. @ 794, along with two state-law claims. Mr. Vadnais claimed that defendant Dr. Vernick, a staff member at Beth Israel Hospital, refused to perform elective ear surgery on him because Mr. Vadnais had tested positive for Human Immunodeficiency Virus (HIV), associated with Acquired Immune Deficiency Syndrome (AIDS). Mr. Vadnais claimed to have suffered severe pain in his right ear, which pain was prolonged because of the defendants' failure to perform surgery and disappeared only when surgery was performed elsewhere.

On March 14, 1990, Mr. Vadnais died of AIDS-related illnesses. The motion of plaintiff, executor of the estate of Mr. Vadnais, to be substituted as a party plaintiff pursuant to Fed. R. Civ. P. 25(1) was allowed. Prior to Mr. Vadnais's death, defendants had filed motions for summary judgment. Those [**2] motions were stayed to allow defendants to file a motion to dismiss on the ground that the federal cause of action abated with Mr. Vadnais's death. That motion was denie in part, and the executor was allowed to maintain this suit to seek compensatory, but not punitive, damages. Glanz v. Vernick, 750 F. Supp. 39 (D.

Mass. 1990). The case is now before me on the summary judgment motions.

The allegations in the complaint can be briefly summarized as follows. In December, 1986, defendant Dr. Vernick saw Mr. Vadnais at the Ears, Nose, and Throat Clinic (the "ENT Clinic") at Beth Israel Hospital and treated him for severe pain in the right ear, at first by prescribing antibiotics and ear drops. In January, 1987, Dr. Vernick diagnosed a perforation in Mr. Vadnais's right ear and, at Mr. Vadnais's third visit, recommended surgery to repair the perforation. After Mr. Vadnais agreed to undergo surgery, Dr. Vernick learned that Mr. Vadnais was infected with HIV and in March, 1987, informed Mr. Vadnais that he would not perform the operation. The ear condition persisted, causing severe pain and discomfort, while Mr. Vadnais continued the ineffective use of antibiotics and ear drops.

In August, [**3] 1988, Dr. Yale Berry, unaware of Mr. Vadnais's HIV status, performed the surgery, curing Mr. Vadnais's ear problem. Subsequently, Mr. Vadnais brought this lawsuit seeking to enjoin defendants from denying him any further surgical procedures. Mr. Vadnais also sought compensatory damages for the pain and suffering and emotional distress caused by the delay in receiving corrective surgery, along with punitive damages and attorney's fees. As mentioned above, only the action for compensatory damages survived Mr. Vadnais's death.

II

Count I of the complaint charges that Dr. Vernick, Beth Israel Hospital, and Beth [*635] Israel Corporation (the latter two hereinafter referred to collectively as "Beth Israel"), by refusing to perform surgery, unlawfully discriminated against Mr. Vadnais because of his handicap, HIV seropositivity, in violation of @ 504 of the Rehabilitation Act. Count II alleges a separate violation of @ 504 against the Beth Israel defendants for failure "to adequately educate, train and supervise" staff regarding HIV and AIDS infection. Amended Complaint para. 88.

Section 504 states in pertinent part that "no otherwise qualified handicapped individual in the United States . shall, [**4] 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 . . . ." 29 U.S.C. @ 794.

The defendants do not dispute that HIV-positive status is a "handicap" within the meaning of the Act. In fact, several district courts and the Department of Justice have found that it does qualify. See Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 714 F. Supp. 1377, 1385 n. 4 (E.D. La. 1989), aff'd, 909 F.2d 820 (5th Cir. 1990). Nor do defendants contest that a private cause of action for compensatory damages is available under @ 504. While the First Circuit has

never squarely addressed the issue, see Hurry v. Jones, 734 F.2d 879, 886 (1st Cir. 1984) (finding no need to reach the question); Ciampa v. Massachusetts Rehabilitation Comm'n, 718 F.2d 1 (1st Cir. 1983) (assuming without deciding that damages are available under @ 504), there is ample authority for the conclusion that compensatory damages are available. See Miener v. Missouri, 673 F.2d 969, 973-74 (8th Cir.) (collecting cases finding an implied right of action under @ 504), [**5] cert. denied, 459 U.S. 909, 74 L. Ed. 2d 171, 103 S. Ct. 215 (1982); see also Gelman v. Department of Educ., 544 F. Supp. 651 (D. Colo. 1982) (concluding that compensatory damages, but not punitive damages, are available under @ 504).

Rather, the defendants argue that summary judgment is appropriate for several other reasons. Dr. Vernick argues that summary judgment should be allowed in his favor because Mr. Vadnais was not "otherwise qualified" for surgery, as required by @ 504, and because Dr. Vernick does not "receive Federal financial assistance." The Beth Israel defendants argue as to Count I that they never treated the patient, had no control over Dr. Vernick's medical decisions, and cannot be held vicariously liable for his actions. As to Count II, they argue that there is no liability under @ 504 for failure to train.

Summary judgment may be granted to a moving party if there is "no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The facts must be viewed in the light most favorable to the non-moving party. Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). Summary judgment cannot be issued if there exist any factual issues that need [**6] to be decided before the legal issued can be. Rossy v. Roche Prods., Inc., 880 F.2d 621, 624 (1st Cir. 1989).

A. "Receiving Federal Financial Assistance"

Plaintiff contends that Beth Israel is a " program or activity receiving Federal financial assistance" within the meaning of @ 504 by virtue of the fact that it receives Medicare and Medicaid payments. The Act defines " program or activity" as "an entire corporation, partnership, or other private organization, or entire sole proprietorship -- . . . (ii) which is principally engaged in the business of providing . . . health care . . . ." 29 U.S.C. @ 794(b)(3)(A). Beth Israel's ENT Clinic is clearly a " program or activity" as defined in this provision. Whether such a program qualifies as a "receiving Federal financial assistance" within the meaning of @ 504 solely because its medical services are paid for by Medicaid presents a pure question of law. The parties cite only once case that has met this issue head on. In United States v. Baylor Univ. Medical Center, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. 1189, 83 L. Ed. 2d 964, 105 S. Ct. 958 (1985), [*636] the Fifth Circuit held that the receipt of Medicare and Medicaid payments by a hospital triggered [**7] the coverage of @ 504. The Fifth Circuit found that legislative history establishes conclusively that Medicare and Medicaid were intended to constitute

federal financial assistance for the purposes of Title VI, and that the scope and effect of @ 504 were intended to be identical to those of Title VI. Id. at 1042-45. The Fifth Circuit also noted that this result accords with longstanding Department of Health and Human Services interpretation of @ 504, id. at 1047, and is equally compelled by the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984). Baylor Univ., 73
F.2d at 1046. I agree with the Fifth Circuit's reasoning and hold that a hospital's receipt of Medicare or Medicaid payments for its services qualifies as receiving federal financial assistance within the meaning of @ 504.

It is undisputed that Mr. Vadnais presented himself to the ENT Clinic and that the Clinic referred him to Dr. Vernick, a staff physician. Beth Israel, not Dr. Vernick, billed Mr. Vadnais for the services provided at the ENT Clinic, and Beth Israel received Medicaid reimbursement for those services. Thus, summary judgment for the defendants cannot be granted on the [**8] ground that the alleged discrimination did not occur in a program receiving federal assistance.

Defendants also assert that the alleged discrimination did not occur in a federally funded program because the procedure that Mr. Vadnais underwent was an elective procedure, and elective surgery is not covered by Medicaid. Whether the particular procedure is covered, however, is irrelevant. If the ENT Clinic is a program or activity for the purposes of @ 504, then it cannot discriminate against any handicapped individuals, regardless of whether they receive Medicaid benefits or not. Grove City College, 465 U.S. at 571 n. 21; Baylor Univ., 736 F.2d at 1047-48.

Beth Israel further argues that, despite the fact that Mr. Vadnais was a patient of the hospital, that the hospital billed him, and that it received Medicaid payments for the treatment he received at the ENT Clinic, Mr. Vadnais was Dr. Vernick's patient, not Beth Israel's. Beth Israel cites Massachusetts case law for the proposition that a hospital cannot be held liable for the actions of its doctors. The cited cases, however, establish that a hospital can be vicariously liable for the actions of its doctors -- the question [**9] of liability is simply decided under the principles of agency law. The test for vicarious liability is whether the hospital exercised any power or control over the professional conduct of the treating physician. Kelley v. Rossi, 395 Mass. 659, 662, 481 N.E.2d 1340, 1342-43 (1985); Kapp v. Ballantine, 380 Mass. 186, 195, 402 N.E.2d 463, 469 (1980).

The plaintiff has presented evidence that, with regard to treatment of HIV-positive and AIDS patients, the hospital does exercise control over its physicians. The hospital employs an "AIDS coordinator," Dr. Cotton, who testified in her deposition that the hospital staff has "very clear directives" not to refuse care to AIDS patients. Once alerted to Mr. Vadnais's medical record, Dr. Cotton in fact contacted Dr. Vernick to determine whether he had

improperly refused treatment to Mr. Vadnais. Moreover, the facts that the hospital does the billing and that Dr. Vernick receives a salary from the hospital for resident teaching tend to reinforce the conclusion that he was a hospital employee, rather than an independent contractor, at least for the purposes of treating Mr. Vadnais. This factual evidence is enough to preclude summary judgment [**10] on the ground that the hospital is not liable for Dr. Vernick's actions.

Moreover, the courts that have considered the question have determined that vicarious liability is appropriate in an action brought under @ 504. Bonner v. Lewis, 857 F.2d 559, 566-67 (9th Cir. 1988); Patton v. Dumpson, 498 F. Supp. 933, 942-44 (S.D.N.Y. 1980). In addition to noting that respondeat superior is consistent with the regulations promulgated under @ 504, the district court in Patton enunciated strong [*637] policy reasons for its decision to permit vicarious liability:

The application of respondeat superior to @ 504 suits would be entirely consistent with the policy of that statute, which is to eliminate discrimination against the handicapped. The justification for imposing vicarious liability on employers for the acts of their employees is well-known. It creates an incentive for the employer to exercise special care in the selection, instruction and supervision of his employees, thereby reducing the risk of accidents. In the absence of a Congressional directive to the contrary, this court can assume only that Congress intended the judiciary to use every available tool to eliminate discrimination [**11] against the handicapped in federally funded programs.

Id. at 943. Thus, it is appropriate to hold Beth Israel responsible for the actions of its medical staff in complying with the Rehabilitation Act, even without a finding of power or control.

The question still remains whether Dr. Vernick himself can be held liable for allegedly discriminating against Mr. Vadnais in Beth Israel's federally funded program. The plaintiff argues that the doctor should be held liable because he conducts a personal medical practice in which he treats Medicare and Medicaid patients -- sometimes at Beth Israel Hospital -- and bills them through his personal Medicare provider number.

The Supreme Court's decision in Grove City College indicates that application of the anti-discrimination provisions of civil rights legislation for programs receiving federal financial assistance must be program-specific. In Grove City College the Court held that because of its participation in the BEOG program, the college's financial aid program -- but not the entire institution -- was subject to the provisions of Title IX. The application of 504 in this case must thus be limited to the relevant program receiving [**12] federal funds in the form of Medicare or Medicaid payments. Dr. Vernick participates in at least two distinct "programs": his private medical practice, in which he personally

receives federal funds for treating some patients, and Beth Israel's ENT Clinic, in which he is employed in a resident teaching capacity. The latter is the relevant program in the case at bar.

If Dr. Vernick is to be held personally liable in this case, then, it must be solely on the basis of his participation in Beth Israel's federally funded program. Dr. Vernick relies on United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 91 L. Ed. 2d 494, 106 S. Ct. 2705 (1986), for the proposition that @ 504 applies only to those who actually "receive" federal funds, whether directly or indirectly, rather than those who are merely intended beneficiaries. Id. at 606-07. In distinguishing between airport operators, which receive federal assistance, and commercial airlines, which merely benefit from the effects of such assistance, the Court in Paralyzed Veterans stressed the contractual nature of the Rehabilitation Act: "By limiting coverage to recipients, Congress imposes the obligations of @ 504 upon those who are in a position [**13] to accept or reject those obligations as part of the decision whether or not to 'receive' federal funds." Id. at 606.

In his resident teaching position at Beth Israel, Dr. Vernick clearly is not in a position to accept or reject federal assistance. While it can be argued that Dr. Vernick can elect not to work at Beth Israel, he cannot be held to the requirements of @ 504 for choosing to work at a federally funded hospital any more than a commercial airline can be subjected to its provisions for choosing to operate out of federally funded airports. Accordingly, Dr. Vernick cannot be held liable under the Act for his participation in Beth Israel's federally funded program.

As to Count II of the complaint, Beth Israel is correct to assert that nothing in the Rehabilitation Act indicates that @ 504 imposes liability for "failure to train," and the plaintiff has produced no authority to the contrary. Moreover, given my decision that Beth Israel can be held [*638] directly liable under @ 504 for the acts of its employees, liability for failure to train them is superfluous.

B. "Otherwise Qualified"

The defendants also base their motion for summary judgment on the ground that Mr. Vadnais [**14] was not "otherwise qualified" for elective ear surgery. They argue that it is proper for a doctor to consider a patient's handicap in determining whether a patient is qualified for surgery. On the basis of this argument, they conclude that Mr. Vadnais was not "otherwise qualified" for surgery because his HIV disease increased his risk of infection, and, furthermore, that the court should defer to the doctor's determination that it was in his patient's best interest to postpone surgery.

The defendants cannot be faulted for considering Mr. Vadnais's handicap in

determining whether he was "otherwise qualified" for surgery. In School Bd. v. Arline, 480 U.S. 273, 287-89, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987), the Supreme Court held that the defendant school board could consider the risks posed by the plaintiff's contagious disease (tuberculosis) in determining whether she was otherwise qualified to teach school. It follows that, in the present case, the defendants can take into account the risks imposed -- both on the patient and on themselves -- by the prospect of surgery on an HIV-positive patient. Of course, if they properly conclude that there are risks, they must also consider whether it is possible to make [**15] reasonable accommodations to enable the patient to undergo surgery despite those risks. See Id. at 287-88 & n. 17.

As the Court made clear in Arline, the "otherwise qualified" determination requires an individualized inquiry and appropriate findings of fact. Id. at 287. With respect to the defendants' assertions about the risks of surgery, the facts are in dispute. The defendants contend that surgery was postponed because Dr. Vernick thought that Mr. Vadnais was "AIDS positive," because the proposed ear surgery was elective, and because it would pose significant risks to the patient. In addition, they offer Dr. Berry's statement in his deposition that he would not have performed the surgery had he known that Mr. Vadnais had AIDS. The plaintiff offers the contradicting evidence that Mr. Vadnais was HIV-positive and had not yet been diagnosed as having AIDS when surgery was refused. Moreover, Dr. Vernick in answers to interrogatories and Dr. Berry in his deposition stated that they do not consider HIV seropositivity alone as a disqualifying factor for surgery. Based on the evidence that the plaintiff has produced, facts are certainly available to warrant the conclusion that [**16] Mr. Vadnais was "otherwise qualified" for surgery. Moreover, the defendants have not produced any evidence that reasonable accommodations could not have been made.

There is some merit to the argument that the court should defer to a doctor's medical judgment. Cf. Arline, 480 U.S. at 288 ("courts normally should defer to the reasonable medical judgments of public health officials" when conducting "otherwise qualified" inquiry). Accepting this argument at face value, however, would completely eviscerate @ 504's function of preventing discrimination against the disabled in the healthcare context. A strict rule of deference would enable doctors to offer merely pretextual medical opinions to cover up discriminatory decisions. The evidentiary approach to @ 504 cases discussed in Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981), properly balances deference to soundmedical opinions with the need to detect discriminatory motives. The plaintiff must first make out a prima facie case that he was otherwise qualified for surgery, and only then does the burden shift to the defendant to show that the plaintiff's handicap made him unqualified. Id. at 1387; [**17] Leckelt, 714 F. Supp. at 1385. The plaintiff, however, must still be given an opportunity "to prove either that the reason given by defendants is a pretext or that the reason . . . 'encompasses unjustified

consideration of the handicap itself.'" [*639] Id. at 1385 (citing Pushkin, 658 F.2d at 1387) (emphasis added).

In sum, because the receipt of Medicare and Medicaid payments brings Beth Israel's ENT Clinic within the scope of @ 504, and because there are genuine issues of material fact surrounding the "otherwise qualified" inquiry, summary judgment on the @ 504 claim is inappropriate.

III

Count III of the complaint alleges a violation of the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, @ 11I, against Dr. Michael Miller, another Beth Israel doctor, who treated Mr. Vadnais for his HIV illness. The plaintiff alleges that, when told that Mr. Vadnais had scheduled ear surgery at the Massachusetts Eye and Ear Infirmary, Dr. Miller threatened to disclose Mr. Vadnais's HIV-positive status to the prospective surgeon. In Massachusetts, health-care providers are prohibited from disclosing patients' HIV status without first obtaining specific consent from the patient for [**18] each requested release. Mass. Gen. Laws ch. 111, 70F. Plaintiff seeks money damages under the Civil Rights Act for Dr. Miller's alleged interference with Mr. Vadnais's "right not to reveal his HIV status." Amended Complaint para. 92. Count IV presses a cause of action against the Beth Israel defendants directly under ch. 111, @ 70F, for permitting unauthorized disclosure of decedent's medical records.

The only basis for this court's entertaining these state law claims is its power to assume pendent jurisdiction over claims that "derive from a common nucleus of operative fact" with the federal claims that are properly before the court. United Mine Workers v. Gibbs, 383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966). Of course, the fact that judicial power to hear state-law claims exists does not require the court to exercise jurisdiction. While the defendants have not objected to this court's assumption of jurisdiction, on the facts and issues before me, I find that there are more reasons than not to refrain from the exercise of that power.

First, the state-law claims at issue here present novel questions of state law on which the state courts have not yet had much opportunity to comment. Rather than [**19] speculate on how the Massachusetts courts would likely treat the relationship of the HIV confidentiality statute to the Civil Rights Act, it would be preferable to permit the state courts to decide these issues in the first instance.

Second, while the facts giving rise to the state-law claims are related to those giving rise to the federal claim, the two incidents were separate and would not appear to involve much, if any, overlapping testimony. Thus, the interests in judicial economy, convenience, and fairness to the litigants that

often justify pendent jurisdiction are not strongly implicated here.

Third, Dr. Miller, the principal defendant in these state-law claims, is not named in any claim that is independently cognizable in federal court. To decide the claim against him would require the court to assume pendent-party jurisdiction. Recent Supreme Court decisions indicate that assumption of pendent-party jurisdiction requires a searching analysis of the jurisdictional statute on which the case is based, and that for this purpose, jurisdictional statutes are to be narrowly construed. See Finley v. United States, 490 U.S. 545, 549-50, 104 L. Ed. 2d 593, 109 S. Ct. 2003 (1989).

Finally, the dismissal of these [**20] state-law claims would not prejudice the plaintiff, as the statute of limitations has not yet run on either claim. The events that are the alleged basis for liability took place in January, 1988. The statute of limitations for Civil rights claims is three years, Mass. Gen. Laws ch. 260, @ 5B, while the applicable limitation for a suit commenced under the confidentiality statute is four years. Id. @ 5A. Neither had elapsed when Mr. Vadnais died in March, 1990; thus, the plaintiff executrix has until March, 1992, to commence this action for the benefit of the decedent's estate. Id. @ 10.

For the reasons stated above, I will dismiss these state-law claims without prejudice [*640] so that they can be brought in the more appropriate forum.

ORDER

The summary judgment motion of Beth Israel Hospital and Beth Israel Corporation is DENIED with respect to Count I and ALLOWED with respect to Count II. Defendant Dr. Vernick's motion for summary judgment is ALLOWED. Counts III and IV are DISMISSED without prejudice.

Because there is no longer any just reason to retain him as a party in this case, Fed. R. Civ. P. 54(b), judgment is entered in favor of defendant Dr. Miller. This dismissal is without [**21] prejudice to the plaintiff's state-law claims.

ORDER OF JUDGMENT AND DISMISSAL

In accordance with this Court's Memorandum and Order dated February 5, 1991, allowing in part the defendants' motion for summary judgment, it is hereby ORDERED:

Summary judgment for defendants Beth Israel Hospital and Beth Israel Corporation is denied as to Count One, and allowed as to Count Two. Dr. Vernick's motion for summary judgment is allowed. Counts Three and Four of the complaint are dismissed without prejudice. Pursuant to Fed. R. Civ. P. 54(b), judgment is entered in favor of Dr. Miller without prejudice to the plaintiff's state law claims.

JACOB A. MASS, Plaintiff, v. MARTIN MARIETTA CORPORATION, a Maryland corporation, Defendant.

Civil Action No. 90 N 1786

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

805 F. Supp. 1530; 1992 U.S. Dist. LEXIS 16807; 60 Empl. Prac. Dec. (CCH) P41,926

October 27, 1992, Decided
October 27, 1992, Filed

COUNSEL: [**1] For Plaintiff: Benjamin Sachs, Esq., Law Office of Kathleen Mullen, P.C., 733 East 8th Avenue, Denver, CO 80203.

For Defendant: John R. Webb, Esq. and Edwin P. Aro, Esq., Holme Roberts & Owen, 1700 Lincoln Street, Suite 4100, Denver, CO 80203. Karen M. Barry, Esq., Associate General Counsel Legal Department, Martin Marietta Corporation, Mail Stop D.C. 1010, Post Office Box 179, Denver, CO 80201.

JUDGES: NOTTINGHAM

OPINIONBY: BY THE COURT; EDWARD W. NOTTINGHAM

OPINION: [*1532] MEMORANDUM OPINION AND ORDER

NOTTINGHAM, Judge

Plaintiff Jacob Mass is a black man who is physically handicapped with insulin-dependent diabetes mellitus. Plaintiff worked for Defendant Martin Marietta Corporation at its Waterton Plant in Colorado from February 1987 until he was discharged in June 1989. Plaintiff alleges that he was racially harassed at work. After he reported the racial harassment, he says, defendant retaliated by placing him on an unfair performance improvement plan and eventually discharging him on the pretext that his performance was subpar. Plaintiff also claims that he was refused overtime work and discharged because of [*1533] his race and handicap. His complaint asserts four claims for relief: (1) a title VII claim for racial [**2] discrimination, racial harassment, and retaliation; (2) a claim under 42 U.S.C.A. @ 1981 (West 1981) for discriminatory discharge; (3) a Rehabilitation Act claim alleging discrimination on account of his handicap; and (4) a state law claim for outrageous conduct. Jurisdiction is based on 28 U.S.C.A. @@ 1331, 1343, 1367 (West Supp. 1992) (federal question, civil rights, supplemental jurisdiction).

The matter is now before the court on four separate motions filed by defendant. These motions raise the following issues: (1) whether the Civil Rights Act of 1991 should be applied retroactively to a complaint first filed prior to the Act and thereafter amended to assert rights and remedies available under the Act; (2) whether plaintiff is entitled to a jury and punitive damages as part of his title VII claim; (3) whether plaintiff is entitled to maintain a section 1981 claim for discriminatory discharge; (4) whether plaintiff's retaliation claim is reasonably related to the allegations of racial discrimination and harassment contained in the administrative charges he filed with the Colorado Civil Rights Commission [hereinafter "CCRC"]; [**3] (5) whether plaintiff has met his burden of producing evidence that defendant receives federal financial assistance -- an essential element of plaintiff's Rehabilitation Act claim; and (6) whether a reasonable jury could conclude that defendant's conduct was outrageous. I conclude as follows: (1) the Civil Rights Act of 1991 does not apply retroactively; (2) plaintiff is not entitled to a jury or punitive damages as part of his title VII claim; (3) section 1981 does not permit a claim for discriminatory discharge; (4) plaintiff's retaliation claim is not reasonably related to plaintiff's discrimination and harassment claims; (5) plaintiff has failed to produce evidence from which a reasonable jury could conclude that defendant receives federal financial assistance; and (6) there is a genuine issue of material fact as to whether defendant's conduct was outrageous.

FACTS

In February 1987, plaintiff was employed as a radiographic inspector at defendant's Waterton Plant in Colorado, which manufactures space vehicles and is part of defendant's Astronautics Group. In late fall 1988, plaintiff took time off from work to receive medical care related to [**4] his diabetes. On January 16, 1989, plaintiff was cleared by his doctor to work overtime. Plaintiff alleges that, between January and June 1989, he was refused overtime work because of his handicap and race.

Between September 1988 and March 1989, according to plaintiff, he was subjected to racial harassment. Plaintiff claims that defendant's employees made several racial remarks, including calling him a "dumb fucking nigger." Plaintiff maintains that several racially derogatory jokes were photocopied and left on his desk. Plaintiff alleges that, despite his complaints about the racial comments and jokes, defendant took no action. Defendant responds by asserting that it investigated the incidents of racial harassment and found plaintiff's complaints to be unfounded.

In early 1989, defendant evaluated plaintiff's performance and gave him a marginal rating. Plaintiff claims this was done in retaliation for his complaints about racial harassment and because he is black. Defendant responds that plaintiff received a low rating because of his poor work performance,

excessive absenteeism, and excessive phone use. Plaintiff was placed on a performance improvement plan (PIP) for 90 days for [**5] the purpose of giving him an opportunity to improve his rating. Plaintiff claims that the PIP was discriminatory and unreasonably harsh. According to defendant, plaintiff's work did not improve under the PIP and plaintiff was told in June that he had one week to improve his work substantially. Because plaintiff's work did not improve, defendant terminated plaintiff's employment effective June 23, 1989.

Plaintiff thereafter filed a charge with the CCRC, which investigated the matter and forwarded its findings to the Equal [*1534] Employment Opportunity Commission [hereinafter "EEOC"]. In July 1990, the EEOC notified plaintiff of his right to sue. Plaintiff filed his complaint in this case on October 5, 1990. On January 20, 1992, with leave of court, plaintiff filed an amended complaint, alleging the same four claims, but asserting entitlement to the newly-enacted rights and remedies available under the Civil Rights Act of 1991.

ANALYSIS

I. RETROACTIVITY OF THE CIVIL RIGHTS ACT OF 1991

Defendant moves to dismiss plaintiff's amended complaint "insofar as it relies on the application of the Civil Rights Act of 1991." Defendant's Motion to Dismiss Amended Complaint (filed [**6] Feb. 10, 1992). In response, plaintiff urges that the Civil Rights Act of 1991 should be applied retroactively to his claims. All of the allegedly discriminatory conduct described in both the complaint and the amended complaint occurred before November 21, 1991, the date on which President Bush signed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) [hereinafter "the Act"].

The Act makes several important changes to section 1981 and title VII. Section 101(b) of the Act expands the scope of section 1981 to include essentially all forms of racial discrimination in the making, performance, enforcement, and termination of contracts, overturning the limitations judicially imposed on section 1981 by Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989). The Act also expands liabilities and remedies available under title VII. Under the law existing before passage of the Act, title VII authorized only equitable remedies, including backpay and reinstatement. Jackson Pool Mortgage Co., 868 F.2d 1178, 1181 n.4 (10th Cir. 1989); [**7] 42 U.S.C.A. @ 2000e-5(g) (West 1981). A plaintiff was not entitled to demand a jury trial under title VII, Snider v. Circle K Corp., 923 F.2d 1404, 1407 (10th Cir. 1991), or to recover compensatory or punitive damages, Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1443 (10th Cir. 1988). Before the Act was signed, neither section 1981 nor title VII permitted an award of expert witness fees to the prevailing party. West Virginia Univ. Hosps., Inc. v. Casey, 113 L. Ed. 2d 68, 111 S. Ct. 1138, 1139 (1991). Now, under section 102

of the Act, a plaintiff can request a jury trial and, within certain specified limitations, recover compensatory and punitive damages from an employer. Section 113 allows an award of expert witness fees in both title VII and section 1981 actions. Plaintiff's amended complaint seeks to take advantage of all these changes.

In determining whether the Act applies retroactively, I must look initially to congressional intent. DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1392 (10th Cir. 1990), cert. denied, 112 L. Ed. 2d 860, 111 S. Ct. 799 (1991). [**8] Congressional intent is determined primarily from the "plain" language of the Act and, secondarily, from the Act's legislative history. See id. at 1385-88. I will first consider the language of the Act.

A. Language of the 1991 Act

Section 402 is the Act's general provision defining its "effective date." Section 402(a) states: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Section 402(a) itself is of no real assistance in divining congressional intent because it does not indicate whether the Act, once it takes effect, should have an effect on pending cases which involve strictly pre-Act conduct. McLaughlin v. New York, 784 F. Supp. 961, 968 (S.D.N.Y. 1992). It likewise does not say whether the "effect" of the Act is to be an effect on subsequent cases or an effect on subsequent conduct. Section 402(a) is ambiguous by omission.

Other provisions of the Act shed little light on the issues left unresolved by section 402(a). Section 402(b) exempts from the Act certain disparate impact cases and was intended to prevent application of [**9] the Act to specific litigation involving the Wards Cove Packing Company. One other [*1535] section of the Act specifies when that section is to have effect. Section 109(c) (dealing with employment in a foreign country) expressly indicates that the amendments made by section 109 "shall not apply with respect to conduct occurring before" the Act's effective date.

One might argue that, because sections 402(b) and 109(c) were expressly made prospective, the negative implication of these two sections is that the remaining sections of the Act should be applied retroactively. E.g., Davis v. City & County of San Francisco, 1992 WL 251513 at *13 (9th Cir. Oct. 6, 1992). Relying on the canon of statutory construction according to which a statute is construed so as to avoid rendering one part inoperative or redundant, the Davis court noted that sections 402(a) and 109(b) would be redundant if other sections of the Act were generally held to be prospective in operation. Consequently, the court decided that other sections of the Act should apply to all "prior conduct not barred by the applicable statutes of limitations." Id. at *14.

While this argument has some allure, I decline to adopt [**10] it for two reasons. First, it relies exclusively upon a single technique for discerning congressional intent -- a rule of statutory construction -- and ignores considerable evidence that Congress recognized the potential redundancy of sections 402(b) and 109(c) and yet deliberately chose to muddle remaining retroactivity issues, leaving its clouded handiwork to the courts for resolution. Various legislators disagreed, for example, about what implication, if any, could be drawn from section 402(b). Compare 137 Cong. Rec. S15,966 (daily ed. Nov. 5, 1991) (statement of Sen. Durenberger) ("Some may attempt to argue at a later date that [section 402(b)] creates an inference that the bill, in general, is retroactive. . . . That is the wrong conclusion to draw. . . .") and id. at S15,953 (technical correction submitted by Sen. Dole) ("Absolutely no inference is intended or should be drawn from the language of this amendment to section 402 that the provisions of the Act or the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act.") with id. at S15,963 (statement of Sen. Kennedy) ("adoption of [section 402(b)] makes it more [**11] likely that the restorations in the act will apply to all cases except the Wards Cove case itself"). In light of these disparate statements, I doubt that the existence of sections 109(c) and 402(b) demonstrates the intent of Congress that the Act's other provisions should apply retroactively. I find it more plausible to believe that, while Congress was able to muster agreement concerning the specific "prospective only" provisions reflected in sections 402(b) and 109(c), it was simply unable to agree on the application of other parts of the Act. Fray v. Omaha World Herald Co., 960 F.2d 1370, 1377 (8th Cir. 1992); West v. Pelican Management Servs. Corp., 782 F. Supp. 1132, 1136 (M.D. La. 1992) (specific prospective sections 109[c] and 402[b] do not compel conclusion that remaining provisions should be applied retroactively; Congress was just "securing 'additional assurances' against retroactive effect").

There is a second argument cautioning against the conclusion that sections 402(b) and 109(c), by negative implication, demonstrate the retroactivity of the Act's other provisions. When Congress is really able to muster a [**12] majority view concerning retroactivity, it does not leave the matter to negative implication. Congress certainly knows how to express its intent that a statute be applied retroactively. See, e.g., The Black Lung Benefits Act, 30 U.S.C.A. @ 945(a)(1) and (c) (West 1986) (applies to claims "pending on" or "denied on or before" the effective date of the act); The Federal Home Loan Act, 12 U.S.C.A. @ 1439a (West Supp. 1992) (funds deposited pursuant to the statute shall be available "retroactively as well as prospectively. . . ."), cited in Smith v. Petra Cablevision Corp., 793 F. Supp. 417, 422 (E.D.N.Y. 1992). Just a year earlier, section 15(a)(4) of the proposed Civil Rights Act of 1990 unambiguously provided that the section permitting jury trials, compensatory and punitive damages "shall apply to all proceedings pending on or commenced after the date of the enactment of this Act." Id. [*1536] at 422. The 1991 Act contains none of this clear direction. Examining the language of the Act does

not resolve the question of whether it should be applied retroactively. I must therefore [**13] examine the Act's legislative history.

B. Legislative History of the Act

A review of the legislative history reveals that "Congress was anything but clear on whether the Act would apply to pending cases." Hansel v. Public Serv. Co. of Colo., 778 F. Supp. 1126, 1136 (D. Colo. 1991). Supporters and sponsors of the Act strongly disagreed on the issue of retroactivity, although they were in final agreement that the Act should not be applied retroactively to foreign employment (section 109(c]) or to the extended litigation in Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989) (section 402[b]). See Legislative History, 137 Cong.Rec. S15950-15968 (Nov. 5, 1991). See also Hansel, 778 F. Supp. at 1136-37; Petra Cablevision, 793 F. Supp. at 422-25 (thoroughly discussing the Act's legislative history).

In 1990, President Bush vetoed a precursor of the Act, the Civil Rights Act of 1990, in part because of the 1990 act's specific retroactivity provision. Petra Cablevision, 793 F. Supp. at 422. [**14] Congress was unable to override the veto. The next year's attempt to draft an acceptable version of the Act contained a provision specifying prospective only application. This provision was deleted by the House. Id. at 422 n.8, citing 137 Cong. Rec. H3834-02, @ 14 (daily ed. June 4,1991). From this legislative history, "one could conclude that the [Act] was left purposefully vague in an attempt to secure passage." Joyner v. Monier Roof Tile, Inc., 784 F. Supp. 872, 877 (S.D. Fla. 1992).

It is, however, not necessary to merely suppose this fact. Congress could not marshal a majority on either view on the application of the Act. To garner sufficient votes for passage, Congress simply decided not to decide. legislators admittedly abandoned to the courts the onerous job of determining how the Act should be applied. Senator Kennedy declared, "It will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment." 137 Cong. Rec. S15,485 (daily ed. Oct. 30, 1991). Senator Danforth and others made similar announcements. See id. at S15,483. Instead of determining [**15] the proper application of the Act, legislators debated and disagreed on how case law would affect the subsequent application of an act deliberately left vague. Petra Cablevision, 793 F. Supp. at 424. See Fray, 960 F.2d at 1380 ("Congress deliberately left the Act retroactivity-neutral, reserving the issue for the courts to decide.") (Heaney, J., dissenting); McLaughlin, 784 F. Supp. at 969 ("Congress was purposefully ambiguous" on retroactivity). There is thus no congressional "intent" on retroactivity that can be discovered either through analysis of the Act's language or its legislative history. I therefore turn to the case law concerning statutory retroactivity. See DeVargas, 911 F.2d at 1388.

C. Judicial Presumptions Concerning Retroactivity

The case law concerning retroactivity reflects a tension between two decisions of the Supreme Court, Bradley v. School of Richmond, 416 U.S. 696, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974), and Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988). [**16] Bradley stands for the rule that, absent congressional intent to the contrary, a new statute is to be applied retroactively, unless "manifest injustice" wilt result. Bradley, 416 U.S. at 711, 94 S. Ct. at 2016. In apparent conflict is Bowen, which is supported by a long line of cases for its holding that "retroactivity is not favored in the law . . . . [New statutes] will not be construed to have retroactive effect unless their language requires this result." Bowen, 488 U.S. at 208, 109 S. Ct. at 471.

Not surprisingly, this conflict has split the circuits. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 110 S. Ct. 1570, 108 L. Ed. 2d 842 (1990) (Scalia, J., concurring). The majority of the [*1537] Supreme Court declined to reconcile this conflict in Kaiser Aluminum. The Bradley-Bowen conflict has been identified and endlessly analyzed by nearly all courts which have struggled to resolve issues concerning the Act's retroactivity. I need not rehash the debate here. The Tenth Circuit has determined that Bowen is the better rule. DeVargas, 911 F.2d at 1390. [**17] Accordingly, I apply the presumption that an act of Congress has no retroactive effect "unless a contrary intent appears." DeVargas, 911 F.2d at 1392, citing Kaiser Aluminum, 110 S. Ct. at 1588 (Scalia, J., concurring); Bowen, 488 U.S. at 209, 109 S. Ct. at 471. Having found no clear congressional intent that the Act applies retroactively, I presume, under DeVargas, that the Act is to be applied only prospectively.

D. Meaning of the Term "Retoractive"

To say that the Act applies only prospectively does not fully answer the questions presented by this case, because it is not entirely clear what the words "retroactive" and "prospective" mean. Does the Act apply (1) to pending cases filed before the effective date of the Act which are based entirely on conduct that occurred before the effective date? (2) To pending cases filed before the effective date which are based entirely on conduct that occurred before the effective date, where plaintiff seeks to file an amended complaint after the effective date? (3) To cases filed after the effective date of the Act which are [**18] based entirely on conduct that occurred before the effective date? (4) To cases filed after the effective date of the Act which are based on a course of conduct that straddles the effective date? If one looks to the time of the conduct to determine whether the Act is to be applied retroactively, then application of the Act in each of these four situations would involve some degree of retroactivity. If one looks solely to the date on which the action was filed, then only the first and second situations involve retroactive application of the Act.

Because application of the Act in the first situation would entail retroactivity under either the "time of conduct" analysis or the "time of filing" analysis, I have followed other decisions in this district and concluded that the DeVargas presumption prohibits application of the Act in this situation. Gray v. City & County of Denver, Civil Action No. 91-N-1479, Order and Memorandum of Decision (D. Colo. Mar. 24, 1992). Accord, e.g., Hansel v. Public Serv. Co. of Colo., 778 F. Supp. 1126 (D. Colo. 1991) (Babcock, J.); Golightly-Howell v. Oil, Chemical and Atomic Workers Int'l Union, 788 F. Supp. 1158 (D. Colo. 1992) [**19] (Carrigan, J.); Guillory-Wuerz v. Brady, 785 F. Supp. 889 (D. Colo. 1992) (Arraj, J.). A number of circuit courts have come to the same conclusion. Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992); Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992). Contra, Davis v. City & County of San Francisco, 1992 WL 251513 at *13.

Several judges in this district have also addressed the second situation -- where plaintiff, having filed the original complaint before the Act's effective date, seeks to file an amended complaint asserting rights made available by the Act. In each of these decisions, the court denied plaintiff's request to file an amended complaint to assert new claims under the Act. See Burchfield v. Derwinski, 782 F. Supp. 532 (D. Colo. 1992) (Finesilver, C.J.); Vickerman v. International Business Machines Corp., Civil Action No. [**20] 91-Z-225, Order (D. Colo. Oct. 22, 1992) (Weinshienk, J.); Vaughan v. US WEST Communications, Inc., Civil Action No. 90-S-2238, Order (D. Colo. Feb. 5, 1992) (Sparr, J.); Fief v. Zellerbach Paper Co., Civil Action No. 90-M-1799, Memorandum Opinion and Order (D. Colo. Jan. 31, 1992) (Matsch, J.). Reasoning that both the conduct and the filing of the original complaint occurred before the effective date, these decisions make no distinction between the first and second situations.

This near-uniformity dissipates when courts confront the question of whether to apply the Act in the third situation -- where [*1538] the conduct occurs before the effective date of the Act but filing occurs after. A paradigmatic case is Judge Babcock's decision in Great American Tool & Mfg. Co. v. Adolph Coors Co., Inc., 780 F. Supp. 1354 (D. Colo. 1992). Having held in Hansel, 778 F. Supp. at 1136-37, that the Act would not be applied to a case pending on the effective date, Judge Babcock held in Great American Tool that the Act would be applied to a case filed four days after the effective date. Great American Tool, 780 F. Supp. at 1355. [**21] Hansel and DeVargas were both distinguished on the ground that each decision "addressed only whether a new statute would apply to a pending action." Id. Accord, Herrera v. Humana of Aurora, Inc., Civil Action No. 92-S-14, Order (D. Colo. June 11, 1992) (Sparr, J.) (retroactive application of the Act allowed where conduct occurred pre-enactment but filing occurred after effective date).

Using a "time of conduct" analysis, Judge Matsch reached the contrary conclusion in Moore v. Hughes Aircraft Co., Inc., Civil Action No. 92-M-1264, Memorandum Opinion and Order (Aug. 5, 1992). Accord, Scherzer v. Midwest Cellular Tel. Co., 1992 WL 214972 (D. Kan. Aug. 10, 1992); Crumley v. Delaware State College, 1992 WL 142243 (D. Del. June 11, 1992). In holding that the Act should not be "applied retroactively to conduct occurring before its enactment," Judge Matsch relied on the appellate decisions in Vogel, Fray, and Uncle Ben's. He also observed that this result is consistent with the position of the EEOC, the administrative agency charged with administering the statute. But see Davis v. City & County of San Francisco, 1992 WL 251513 at *18 (outlining Ninth [**22] Circuit's reasons for not deferring to the EEOC).

A review of the authorities suggests that the "time of conduct" analysis, not the "time of filing" analysis, is consistent with the philosophy behind the rule that statutes are to be treated as prospective in operation. That philosophy is not always clearly-stated. Justice Scalia has suggested that the rule reflects a "realistic assessment of legislative intent" when the legislature has been silent and that it has "timeless and universal human appeal." Kaiser Aluminum, 110 S. Ct. at 1586 (Scalia, J., concurring) (citing extensively to Greek, Roman, English, and American authorities). This means, I assume, that the rule is rooted in a basic notion concerning fairness and justice: there is something unjust about enacting a new rule of law and then applying that rule to punish (or, civilly, impose liability for) past conduct which was legal before the law was passed. See id. at 1587; Mozee, 963 F.2d at 935-36. A crucial aspect of this notion is that a person who engages in such conduct is also entitled to know the scope of punishment or liability [**23] which the law imposes upon this conduct. Before a person is subject to punishment or liability, he should have a reasonable chance to consider what the law requires (if he cares to inform himself) and to know the extent of punishment or liability imposed for this conduct. In criminal cases this notion of justice is embodied in the Ex Post Facto Clause; in civil cases it is reflected in the less sacrosanct presumption against retroactivity.

If this is a reasonably accurate distillation of the philosophy supporting the rule that statutes should operate prospectively only, then the "time of conduct" analysis is the one which furthers that philosophy. The first, second, and third situations described at the beginning of this discussion -- where all of the conduct at issue occurs before the effective date of the Act -- call for application of the rule. Although I need not decide the question in this case, the fourth situation -- where a course of conduct spans the effective date -- may also call for application of the rule, since such a result gives the parties the chance to conform their conduct to the Act and avoids the administrative nightmare of trying the same case under two sets [**24] of laws. All of this should be true whether the suit is filed before or after the effective date (or whether, as here, plaintiff seeks to amend a complaint in a pending lawsuit). Application of the Act should not depend on "the fortuitous or strategic moment

when suit is filed in federal court." Crumley, 1992 WL 142243 at *11. The time [*1539] of filing, or the time of amendment to a previous filing, should be irrelevant.

E. The Distinction Between Substantive and Procedural Provisions

I cannot conclude my analysis of the retroactivity question without discussing another rule of statutory analysis mentioned in DeVargas and relied on by some courts when dealing with the Act's retroactivity. In deciding that Bowen's presumption against retroactivity, rather than Bradley's contrary presumption, should apply in the Tenth Circuit, the DeVargas court drew support from another "venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." DeVargas, 911 F.2d at 1393, quoting Bennett v. New Jersey, 470 U.S. 632, 639, 105 S. Ct. 1555, 1560, 84 L. Ed. 2d 572 (1985) [**25] [hereinafter the "substantive-prospective" rule]. Relying on the substantive-prospective rule, Judge Babcock has held that the provisions of the Act which resurrect section 1981 claims buried by Patterson and which permit compensatory and punitive damages are "substantive" provisions which do not apply to a case where the conduct at issue occurred before the Act's effective date. Smith v. Colorado Interstate Gas Co., 794 F. Supp. 1035, 1038-39 (D. Colo. 1992). Judge Babcock concludes, however, that the section of the Act authorizing an award of expert fees is procedural and can thus be applied retroactively to such conduct. Id. at 1039.

I decline to plunge into the quicksand of a substantive-prospective analysis for several reasons. First and foremost, such an analysis will undoubtedly produce prolonged disputation, confusion, and uncertainty as the lower federal courts undertake a section-by-section analysis of the Act to determine whether a particular provision is "substantive" or "procedural." To confirm this expectation, one need only look at the provisions that Judge Babcock reviewed in Colorado Interstate Gas. [**26] Some courts have agreed with his conclusion that the section authorizing compensatory and punitive damages is substantive. See Scherzer v. Midwest Cellular Tel. Co., 1992 WL 214972 at *10 ("section 102 of the Act, by exposing a defendant to compensatory and punitive damages, substantially impacts the rights of a defendant as they existed prior to enactment of the Act"); Crumley, 1992 WL 142243 at *10. Other courts, for reasons which seem equally plausible, have concluded that the section permitting compensatory and punitive damages is procedural: it expands the remedies available, but it does not change the basic definition or nature of the proscribed conduct. See Jaekl v. Equifax Mktg. Decisions Sys., Inc., 1992 WL 143725 at *3-4 (E.D. Va. June 26, 1992). A similar division is also developing concerning the section of the Act authorizing jury trials. Compare id. (permitting a jury trial) and and King v. Shelby Medical Ctr., 779 F. Supp. 157 (N.D. Ala. 1991) ("trial by jury or trial by court is purely and simply a 'procedural' question") with Van Meter v. Barr, 778 F. Supp. 83, 84 (D.D.C.

1991) ("A right [**27] to seek compensatory damages in a jury trial against the United States is a major substantive provision").

A second reason for avoiding the substance/procedure quagmire is that the philosophy behind the presumption in favor of prospective operation of a statute quickly fades from sight as courts advance equally-plausible reasons for their characterization of a particular provision as "substantive" or "procedural." Assuming that philosophy to be a sound one, then it is best served by applying the Bowen presumption without any substance/procedure gloss. True, the underlying legality of the conduct has not changed: intentional discrimination was illegal both before and after passage of the Act. See Jaekel, 1992 WL 143725 at *3 (pointing out that the Act, while expanding remedies, did not illegalize conduct which was previously legal). That, however, does not end the analysis. An analogy may be made to criminal law, where the same philosophy is reflected in the Ex Post Facto Clause: the law may impose a legal norm by illegalizing the possession of drugs. Changing the penalty for simple possession to mandatory life imprisonment would not change that underlying legal [*1540] norm, but [**28] there is no doubt that applying the new penalty to conduct occurring before the change would violate the Ex Post Facto Clause. The point, for both civil and criminal cases, is that a person may properly evaluate his conduct according to consequences which the law imposes on that conduct. If the law changes those consequences, by way of imposing compensatory damages, punitive damages, or increased litigation costs (expert witness fees, for example), a person ought to have the chance to re-evaluate and change his conduct before the consequences are visited upon him. The changes found in the Act, taken together, enlarge liability for violating the Act. Applying the Act prospectively and denying plaintiff's request for compensatory damages, punitive damages, and expert witness fees avoids a result which is contrary to the basic notion of fairness and justice underlying the rule that legislation should be presumed to operate prospectively.

By applying the Act prospectively to exclude plaintiff's request for compensatory and punitive damages, I necessarily limit plaintiff's recovery to the type of equitable relief which was available before the Act. As a consequence, plaintiff is not entitled [**29] to a jury trial. See Crumley, 1992 WL 142243 at *10 (plaintiff not entitled to jury because striking the compensatory and punitive damages claim left plaintiff with only equitable remedies); Scherzer, 1992 WL 214972 at *9 (same). I therefore deny plaintiff's request for a jury trial under the Act.

Finally, while I agree with Judge Babcock that the Tenth Circuit's footnoted discussion in Arnold v. Maynard, 942 F.2d 761, 762 n.2 (10th Cir. 1991), supports Judge Babcock's retroactive application of a provision found to be "procedural," Smith v. Colorado Interstate Gas Co., 794 F. Supp. at 1038, I do not think Arnold, compels that result. In Arnold, the court considered the retroactivity of a recent amendment to a venue statute. Although the court

ultimately decided it did not have to reach the issue, it also noted, in dicta, that statutes affecting jurisdiction and procedure apply to pending actions. Especially since the discussion was dicta, I do not read Arnold as requiring me to engage in a separate substantive-prospective analysis in addition to, or after, applying the Bowen presumption. [**30]

Under the law existing prior to passage of the Civil Rights Act of 1991, plaintiff's amended complaint does not state any additional claims for relief. Plaintiff is also not entitled to any additional remedies available under the Act. Because the claims and remedies asserted in plaintiff's amended complaint all assume retroactive application of the Act, I strike plaintiff's amended complaint. See Fed. R. Civ. P. 12(f). The litigation will proceed on the original complaint, and I will analyze the remaining issues as they relate to each of plaintiff's four claims for relief, applying law existing prior to the Act.

II. PLAINTIFF'S TITLE VII CLAIM

Defendant moves to strike the jury demand for this claim. Plaintiff admits that there is no right to a jury trial for claims brought solely under title VII. Plaintiff's Response to Defendant's Motion to Strike and for Partial Dismissal at 32 (Filed Dec. 27, 1990); Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1443 (10th Cir. 1988). Plaintiff argues that when litigation involves both title VII and section 1981 claims, a jury is allowed to decide the factual issues common to both claims. Since I [**31] later conclude that there is no claim under section 1981, I reject this argument. The jury demand is stricken from plaintiff's title VII claim.

Defendant moves to strike punitive damages for this claim. Punitive damages are not permitted under title VII. Pearson v. Western Elec. Co., 542 F.2d 1150, 1152 (10th Cir. 1976); Sanchez v. Philip Morris Inc., 774 F. Supp. 626, 630 (W.D. Okla. 1991). Plaintiff's arguments are contrary to controlling precedent. Plaintiff's claim for punitive damages under title VII is therefore stricken.

Defendant moves for partial summary judgment on the grounds that plaintiff is precluded from arguing retaliation as [*1541] a basis for his title VII claim. Before bringing a judicial claim, plaintiff must exhaust his administrative remedies by filing his claims with the EEOC or state agency. 42 U.S.C.A. @ 2000e-5(b) and (c) (West 1981). Although plaintiff fled a charge with the state agency (CCRC), defendant claims that plaintiff's charge did not contain the claim for retaliation which appears in plaintiff's complaint. See Brief in Support of Defendant's Motion for Partial [**32] Summary Judgment, ex. D (filed July 9, 1991) (copy of the charge filed with the CCRC [hereinafter "the charge"]). Plaintiff's complaint alleges that he complained to his supervisor about the racial harassment and that he was placed on a performance improvement plan "in retaliation for his making complaints." Complaint PP 20, 23. In the charge, plaintiff simply complains he was "subjected to racial

comments which management was aware of but did nothing to Stop." Brief in Support of Defendant's Motion for Partial Summary Judgment, ex. D. A retaliation claim is based on two facts: that plaintiff reported the illegal conduct and that defendant retaliated. Neither fact is even arguably alleged in plaintiff's charge. The charge only states claims for racial harassment, discrimination because of race, and discrimination because of plaintiff's handicap.

Of course, plaintiff is entitled to bring his claim for retaliation if it is found to be "reasonably related" to the discrimination and harassment claims contained in the charge. See Brown v. Hartshorne Pub. School Dist. No. 1, 864 F.2d 680, 682 (10th Cir. 1988) (quoting Oubichon v. North Am. Rockwell Corp., 482 F.2d 569, 571 [**33] [9th Cir. 1973]). In testing whether a claim is reasonably related to the charge, the court looks at the investigation that can reasonably be expected to grow out of the underlying charge. Brown, 864 F.2d at 682. Plaintiff argues that the CCRC investigation did in fact uncover evidence of this retaliation. Plaintiff's Response to Defendants Motion for Partial Summary Judgment at 9-10 (filed July 30, 1991). I disagree. The notice issued by the CCRC after its investigation includes a statement from a witness that supervisors "go after anyone who has crossed them or is disliked." Complaint, ex. B P 9. His statement, however, does not demonstrate the CCRC's discovery of evidence that plaintiff had in fact complained, and therefore, had in fact "crossed" management. Although an investigation of charges based on racial discrimination and harassment might include an investigation of any claims based on retaliation, such an investigation cannot reasonably be expected to include an investigation of retaliation claims.

There is a recognized distinction between claims based on retaliation and claims based on discrimination. See Malhotra v. Cotter & Co., 885 F.2d 1305, 1312 (7th Cir. 1989) [**34] ("retaliation and discrimination are separate wrongs"); Steffen v. Meridian Life Ins. Co., 859 F.2d 534, 545 (7th Cir. 1988). Courts have held that a retaliation claim is reasonably related to the original charge when the retaliatory acts occur after the charge is filed. For example, a claim that defendant retaliated after plaintiff filed the EEOC charge would be regarded as reasonably related to the charge itself. Brown, 864 F.2d at 682; Nealon v. Stone, 958 F.2d 584, 590 (4th Cir. 1992). Such a rule makes sense: plaintiff could not have included the retaliation claim in the original charge, since the retaliatory acts had not yet occurred. This rationale does not apply when the retaliatory acts occurred before the charge was filed. Several courts have concluded that a retaliation claim is not reasonably related to a discrimination claim when the allegedly-retaliatory acts occurred prior to filing the charge. See Steffen, 859 F.2d at 545; Jensen v. Board of County Comm'rs, 636 F. Supp. 293, 300 (D. Kan. 1986); Tucker v. Harley Davidson Motor Co., 454 F. Supp. 738, 742 (E.D. Wis. 1978). [**35] I agree. I therefore conclude that plaintiff's retaliation claim is not reasonably related to the claims contained in the charge. Plaintiff has failed to exhaust his administrative remedies with respect to his retaliation claim, and defendant is

entitled to summary [*1542] judgment on plaintiff's title VII retaliation claim.

III. PLAINTIFF'S SECTION 1981 CLAIM

Both parties agree that claims for racial harassment or for discrimination based on a handicap are not actionable under section 1981. See Plaintiff's Response to Defendant's Motion to Strike and for Partial Dismissal at 6-7 (filed Dec. 27, 1990). Plaintiff nonetheless contends that discriminatory termination is actionable under section 1981. Recent controlling authority is to the contrary. In Trujillo v. Grand Junction Regional Ctr., 928 F.2d 973, 976 (10th Cir. 1991), the Tenth Circuit held that section 1981 does not permit a claim for discriminatory discharge. See also Patrick v. Miller, 953 F.2d 1240, 1251 (10th Cir. 1992). The Trujillo decision is based on the Supreme Court decision in Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), [**36] which is the applicable law prior to the Civil Rights Act of 1991. See Trujillo, 928 F.2d at 975-76. Plaintiff's second claim for relief is therefore dismissed.

IV. PLAINTIFF'S REHABILITATION ACT CLAIM

Plaintiff's third claim for relief asserts violations of section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. @ 794 (West Supp. 1992). Section 504 prohibits corporations that receive federal financial assistance from discriminating against individuals on the basis of a physical handicap. According to defendant, plaintiff has not shown that defendant receives federal assistance. 'An entity receives financial assistance when it receives a subsidy." DeVargas, 911 F.2d at 1382. If the government intends only to compensate defendant for goods and services received, then there is no subsidy, even if the compensation exceeds fair market value. Id.

Plaintiff has produced evidence that defendant received "hundreds of millions of dollars" in federal funds pursuant to contracts with various government agencies. Plaintiff's Response to Defendant's Supplemental Motion for Partial Summary Judgment [**37] at 4, ex. A (filed Nov. 14, 1991) [hereinafter Plaintiff's Response]. Plaintiff has also produced evidence that defendant used government equipment in manufacturing goods furnished to the government under those contracts. Plaintiff's Response, ex B. This evidence, plaintiff argues, supports the conclusion that defendant receives federal financial assistance. Plaintiff relies on cases involving hospitals that receive Medicare and Medicaid payments from the government. Bowen v. American Hosp. Ass'n, 476 U.S. 610, 624 n.9, 106 S. Ct. 2101, 2111, 90 L. Ed. 2d 584 n.9 (1986) (expressly declining to review the Court of Appeals' assumption that receipt of Medicare or Medicaid payments constituted federal financial assistance); United States v. Baylor Univ. Medical Ctr., 736 F.2d 1039, 1044-49 (5th Cir. 1984), cert. denied, 469 U.S. 1189, 105 S. Ct. 958, 83 L. Ed. 2d 964 (1985) (concluding that receipt of

Medicare or Medicaid payments constituted federal financial assistance). These cases can be distinguished on their facts. When the government provides Medicare or Medicaid payments to a hospital, it receives no goods or services [**38] in return. In contrast, the payments made by the government to defendant are part of a contract under which the government receives goods and services. I conclude that DeVargas, not Bowen or Baylor University Medical Center, supplies the applicable rule. I also note that this result is consistent with the definition of "federal financial assistance" used in federal regulations. That definition specifically excludes procurement contracts. See 14 C.F.R. @ 1251.102(f) (1992) (NASA regulation); 32 C.F.R. @ 56.3(b) (1991) (Department of Defense regulation).

As the party opposing defendant's motion for summary judgment, plaintiff has the burden of producing evidence on all essential elements of his claim. I find no authority that either payment pursuant to a contract or use of government-owned property (or both together) constitute "federal financial assistance." I find this evidence wholly insufficient to support the conclusion that the government intended to subsidize defendant. No reasonable jury could conclude that defendant receives financial assistance. See Anderson v. Liberty [*1543] Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986). [**39] I therefore grant defendant's motion for summary judgment on plaintiff's Rehabilitation Act claim. Defendant's motion to dismiss this claim is denied as moot.

V. PLAINTIFF'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

In its motion to dismiss, defendant argues that this claim is preempted by the Colorado Workers' Compensation Act. If plaintiff is eligible for compensation under the Workers' Compensation Act, then he cannot maintain a private tort action for the same injury. In re Question Submitted by United States Court of Appeals for the Tenth Circuit, 759 P.2d 17, 21 (Colo. 1988). The act provides compensation for injuries "arising out of and "in the course of employment." Colo. Rev. Stat. @ 8-41-301 (1990 Supp.) (formerly the Workmen's Compensation Act, Colo. Rev. Stat. @ 8-52-102 [1986 Repl. Vol.]); In re Question, 759 P.2d at 19-24. Neither parry disputes that the injury occurred in the course of employment.

The issue is whether plaintiff has alleged facts showing that the injury did not "arise out of plaintiff's employment. "An injury arises out of employment if it would not have occurred but for [**40] the fact that the conditions and obligations of the employment placed claimant in the position where he was injured." In re Question, 759 P.2d at 20 (quoting 1 Larson, Workmen's Compensation Law @ 6.50, at 3-6 [1985] [emphasis in original]). An injury arises out of employment if a "neutral force" causes the injury. Younger v. Denver, 810 P.2d 647, 649 (Colo. 1991) (en banc); In re Question, 759 P.2d at 20. A neutral force is one that is not specifically targeted at the plaintiff and not

"distinctly associated with the employment." Younger, 810 P.2d at 649. See Stamper v. Hiteshew, 797 P.2d 784, 786 (Colo. Ct. App. 1990), cert. denied, 1990 Colo. LEXIS 635 (Colo. 1990).

Whether an injury arises out of employment depends on the facts and circumstances of each case. In re Question, 759 P.2d at 20. Colorado courts have refused to dismiss tort claims where plaintiff has alleged that defendant's acts were specifically targeted at plaintiff. Stamper v. Hiteshew, 797 P.2d at 785-86 [**41] (evidence of sexual harassment directed specifically at plaintiff was sufficient to show that injury did not arise out of employment); Patel v. Thomas, 793 P.2d 632, 636-37 (Colo. Ct. App. 1990) (trial court erred in dismissing claim where plaintiff alleged sexual harassment directed at plaintiff); cf. In re Question, 759 P.2d at 25-26 (evidence that a sexual attack was not specifically directed at plaintiff established that injury did "arise out of" employment). In reviewing the sufficiency of a claim, the complaint must be liberally construed, Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974), and allegations assumed to be true. Neitzke v. Williams, 490 U.S. 319, 326-27, 109 S. Ct. 1827, 1832, 104 L. Ed. 2d 338 (1989). Dismissal of a claim is improper unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim for relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); Morgan v. Rawlins, 792 F. 2d 975, 978 (10th Cir. 1986). [**42] Plaintiff alleges that he was verbally abused and subjected to numerous racial and ethnic jokes. Complaint P 4. Construing the complaint liberally, plaintiff may be able to prove that the harassment was directed specifically at him. If plaintiff provides this evidence, then plaintiff may be entitled to seek relief outside the Workers' Compensation Act. See Stamper, 797 P.2d at 785-86; Patel, 793 P.2d at 636-37. Accordingly, I cannot dismiss the claim.

Defendant also moves for summary judgment on the grounds that defendant's conduct is not outrageous as a matter of law. For the purpose of the motion, plaintiff agreed to defendant's statement of undisputed material facts. Defendant's Brief in Support of Motion for Partial Summary Judgment at 2-4 (filed July 9, 1991); Plaintiff's Response to Defendants Motion for Partial Summary Judgment at 1 (filed July 30, 1991). The facts show that co-workers told racial jokes. One co-worker used the term "dumb fucking nigger" at least twice in plaintiff's presence. [*1544] Two racially derogatory written items were placed at plaintiff's desk; one derogatory cartoon was circulated among [**43] workers. Contrary to defendant's assertion, plaintiff alleges that supervisors made racial and derogatory remarks, and has provided some evidence of those remarks. Plaintiff's Response to Defendant's Motion for Partial Summary Judgment at 2; Complaint P 18.

The tort of intentional infliction of emotional distress requires "extreme and outrageous" conduct. Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753, 756 (Colo. 1970). To be outrageous, the conduct must "go beyond all possible bounds

of decency." Id. Since there is no dispute of material fact, defendant is entitled to judgment only if no reasonable jury could find the conduct to be outrageous. See Fed R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253, 106 S. Ct. 2505, 2512-13, 91 L. Ed. 2d 202 (1986). See also Bauer v. Southwest Denver Mental Health Ctr., Inc., 701 P.2d 114, 118 (Colo. Ct. App. 1985). Although discharge from employment, without more, is not outrageous conduct, plaintiff has produced evidence of racial harassment in addition to his discharge. See Grandchamp v. United Air Lines, Inc., 854 F.2d 381, 384 (10th Cir. 1988), [**44] cert. denied, 489 U.S. 1080, 103 L. Ed. 2d 838, 109 S. Ct. 1534 (1989).

Defendant relies on Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379 (10th Cir. 1991). Because Daemi involves Oklahoma law, it is not binding; nor do I find that case persuasive. In Daemi, the Tenth Circuit upheld the district court's conclusion that mere insults would not support a claim for intentional infliction of emotional distress. However, plaintiff's evidence in this case could support a finding that the racial comments were not "mere insults" but rather an intentional pattern of harassment. Viewing the evidence in the light most favorable to plaintiff, I find that a reasonable jury could find defendant's conduct to be outrageous. I therefore deny summary judgment on this claim. See Anderson v. Liberty Lobby, Inc., 477 U.S. at 252, 106 S. Ct. at 2512.

Defendant moves to strike all tort damages if the section 1981 claim and intentional infliction of emotional distress claims are dismissed. See Defendant's Motion to Strike and for Partial Dismissal P 4 (filed Dec. 27, 1990). Because I decline to dismiss the intentional [**45] infliction of emotional distress claim, I decline to strike all claims for tort damages. It is therefore

ORDERED as follows:

(1) Defendant's motion to dismiss plaintiff's claims applying the Civil Rights Act of 1991 is granted, and plaintiff's amended complaint is hereby stricken;

(2) Defendant's motion to strike plaintiff's demand for a jury and punitive damages for plaintiff's title VII claim is granted;

(3) Defendant's motion for summary judgment on plaintiff's title VII retaliation claim is granted;

(4) Defendant's motion to dismiss plaintiff's section 1981 claim is granted;

(5) Defendant's motion for summary judgment on plaintiff's Rehabilitation Act claim is granted; and

(6) Defendant's remaining motions are denied.

Dated this 27 day of October, 1992.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

MARIA Y. JAMES v. MARVIN T. RUNYON, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE

CIVIL ACTION NO. 92-2262

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1992 U.S. Dist. LEXIS 19131

December 7, 1992, Decided
December 9, 1992, Filed; December 10, 1992, Entered

DISPOSITION: [*1] It is hereby ORDERED that the Motion is GRANTED for the reasons outlined in the preceding Memorandum and Judgment is entered in favor of the Defendant and against the Plaintiff in no amount.

COUNSEL: For MARIA Y. JAMES, PLAINTIFF: LANIER E. WILLIAMS, P.O. BOX 28828,

PHILADELPHIA, PA 19151-0828, USA.

For ANTHONY M. FRANK, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,
DEFENDANT: CHARLES F. KAPPLER, U.S. POSTAL SERVICE, P.O. BOX 8601, FIELD COUNSEL/LABOR LAW, PHILADELPHIA, PA 19197-0120, USA. ROBERT L. SAWICKI, SPECIAL AUSA, OFF OF FIELD, LEGAL SVCS, POSTAL SERV., 615 CHESTNUT ST. P.O. BOX 8601, 15TH ST., PHILA, PA 19197-0170, USA. MAURA A. JOHNSTON, U.S. POSTAL SERVICE, OFFICE OF FIELD LEGAL SERVICES, 615 CHESTNUT STREET, P.O. BOX 8601, PHILA, PA 19197-0170, USA. CHARLES F. KAPPLER, U.S. POSTAL SERVICE, 615 CHESTNUT STREET, P.O. BOX 8601, PHILA, PA 19197-0120, USA.

JUDGES: JOYNER

OPINIONBY: J. CURTIS JOYNER

OPINION: MEMORANDUM AND ORDER

JOYNER, J.

By way of the motion now pending before the Court, the Defendant postmaster general asks that summary judgment be entered in his favor and against the Plaintiff with respect to her complaint which seeks compensatory damages and attorney's fees as the result of Plaintiff's allegedly improper termination from her postal service employment. For the reasons enumerated below, the motion is granted and final judgment in no amount is hereby entered in favor of the

Defendant.

According to the allegations contained in the parties' pleadings, this action arose on August 7, 1990 when the Defendant gave Maria James notice that her employment was being terminated due to her alleged failure to meet the physical requirements of her job. n1 As of that date, the Plaintiff had been employed by the U.S. Postal Service for nearly four years as a mail distribution clerk and Multi-Position Letter Sorter Machine operator at its facility at 30th and Market [*2] Streets in Philadelphia, Pennsylvania. On April 6, 1990, the Plaintiff suffered multiple insect bites to various parts of her body while working at the Philadelphia postal facility, which caused her to seek medical attention at the Postal Service Facility's medical department. Following an examination by the post office medical officer, Ms. James' insect bites were found to be occupational in nature and she was referred to V.C. Graves, M.D., a dermatologist for further evaluation and treatment. The Plaintiff first saw Dr. Graves on April 19, 1990; a skin biopsy was taken and Ms. James was diagnosed as suffering from a severe adverse reaction and hypersensitivity to the insect bites and Dr. Graves directed her to refrain from working entirely to enable her condition to settle down. n2 She was eventually permitted to return to light duty work on April 30, 1990 in areas where she would not be exposed to paper and dust.

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n1 Plaintiff's actual termination date, according to the August 7, 1990 notice, was thirty days from the date on which she received her removal notice.

n2 Although Plaintiff did return to work on April 25, 1990 at a manual letter case, she quit after some 5 1/2 hours because her biopsy sutures were irritating her and because the case was dirty and hadn't been inspected by a safety and health inspector pursuant to her request.

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[*3]

On June 11, 1990, Ms. James underwent a fitness for duty examination with Dr. Evangelista, the postal service medical officer. After reviewing the biopsy report and a letter from Dr. Graves, Dr. Evangelista concluded that the Plaintiff had a sensitivity to dust and insect bites. Based in large part upon the findings of Drs. Graves and Evangelista, the postal service determined that Ms. James was not physically able to perform the job for which she had been hired and she was therefore issued the Notice of Removal on August 7, 1990.

The Plaintiff, who was at all times relevent to this case a member of the American Postal Workers Union, AFL-CIO and therefore subject to the union's collective bargaining agreement with the U.S. Postal Service, then applied for

disability/worker's compensation benefits through the Office of Worker's Compensation Programs. The claim was subsequently accepted by the OWCP as an occupational disease claim and Ms. James was paid wage loss benefits for the period covering July 12, 1990 to May 2, 1992. In addition, Ms. James began pursuing her remedies for administrative relief in August, 1990 by filing a request for EEO counseling. At the conclusion of counseling [*4] in December, 1990, she filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that the Postal Service had discriminated against her by terminating her employment on the basis of her physical handicap (hypersensitivity to insect bites). The matter was ultimately heard by Administrative Law Judge Arthur M. Colby on December 23, 1991 and, on December 30, 1991, Judge Colby issued his decision finding no evidence of discrimination on the basis of physical handicap. n3 On March 26, 1992, the Postal Service issued its final decision affirming and adopting Judge Colby's findings and determination and notifying the Plaintiff of her right to sue. Plaintiff thereafter filed her complaint commencing the instant lawsuit on April 17, 1992 under the Rehabilitation Act of 1973, 29 U.S.C. @ 701, et. seq. alleging that the Defendant discriminated against her on the basis of her physical handicap in that instead of accomodating her by taking adequate steps to ensure that she could perform her job in a reasonably insect free environment or by transferring her to another job which provided her with reasonably limited exposure to insects, it terminated [*5] her employment.

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n3 Although Plaintiff's initial EEOC complaint also alleged that she had been improperly terminated on the basis of age and reprisal (for a prior, unrelated EEO complaint) in addition to physical handicap, Ms. James evidently dropped her age and reprisal discrimination claims before the matter was presented to the Administrative Law Judge.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In support of the motion which is now before the Court, the Defendant argues that he is entitled to the entry of judgment in his favor as a matter of law because the Plaintiff simply cannot make out even a prima facie case of handicap discrimination with regard to her removal.

The principles to be applied in resolving summary judgment motions are firmly established in Fed.R.Civ.P. 56(c), which states, in pertinent part, that "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [*6] the moving party is entitled to a judgment as a matter of law . . ." It is in this manner that a motion for summary judgment mandates that the courts look beyond the bare allegations of the pleadings to determine if they have

sufficient factual support to warrant their consideration at trial. Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C. Cir. 1988), cert. denied, 488 U.S. 825, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988). See Also: Aries Realty, Inc. v. AGS Columbia Associates, 751 F. Supp. 444 (S.D. N.Y. 1990).

Generally speaking, the party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In considering a motion for summary judgment, [*7] the court must view the facts in the light most favorable to the non-moving party and all reasonable inferences from the facts must be drawn in favor of that party as well. United States v. Kensington Hospital, 760 F.Supp. 1120 (E.D. Pa. 1991); Schillachi v. Flying Dutchman Motorcycle Club, 751 F.Supp. 1169 (E.D. Pa. 1990). Summary judgment may not be granted, though, if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed. Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368 (3rd Cir. 1991); Santiago v. Temple University, 739 F.Supp. 974 (E.D. Pa. 1990).

This does not mean, however, that a non-movant may rest upon the allegations contained in his or her pleadings in defense of a summary judgment motion. See, e.g.: Allen v. Denver Public School Board, 928 F.2d 978 (10th Cir. 1991). To the contrary, Fed.R.Civ.P. 56(e) reads:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations [*8] or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate shall be entered against the adverse party."

Clearly then, in the face of a properly-supported motion, the non-movant must also produce evidence and delineate specific facts demonstrating that there is a genuine issue for trial. See: Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In this case, the Defendant is accused of violating Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. @ 794. That section provides, in relevant part:

@ 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations

(a) Promulgation of rules and regulations

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, [*9] be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . . .

(b) " Program or activity" defined

For the purpose of this section, the term " program or activity" means all of the operations of-

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government;. . . .

In light of the fact that the handicap discrimination laws only protect "qualified handicapped persons", it is axiomatic that in order to make out a case under section 504 of the Rehabilitation Act, 29 U.S.C. @ 794, a plaintiff must prove (1) that he or she is a "handicapped individual" under the Act; (2) that she is "otherwise qualified" for the position sought; (3) that she was excluded from the position sought solely by reason of her handicap, and (4) that the program or activity in question receives federal financial assistance or is an activity or program conducted by an Executive agency or the U.S. Postal Service. [*10] Strathie v. Department of Transportation, 716 F.2d 227, 230 (3rd Cir. 1983); Santiago v. Temple University, supra, 739 F.Supp. at 979; Perez v. Philadelphia Housing Authority, 677 F. Supp. 357, 359 (E.D. Pa. 1987). The threshold question then, is to determine whether the Plaintiff is a handicapped individual "as defined by the statute, a question best answered by a case-by-case determination. Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986); Jasany v. United States Postal Service, 755 F.2d 1244, 1248 (6th Cir. 1985).

A handicapped person, for purposes of the relevant portions of the Rehabilitation Act means any one "who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such an impairment or is regarded as having such an impairment." 29 C.F.R. @ 1613.702(a); 29 U.S.C. @ 706(8)(B). "Major life activities" are defined in 29 C.F.R. @ 1613.702(c) as "functions, such as caring for one's self, performing manual tasks, walking, [*11] seeing, hearing, speaking, breathing, learning and working." To have a "record of such an impairment" is to have "a history of or been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. @ 1613.702(d). Finally, to be "regarded as having such an impairment" means that one "(1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as

constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments [defined in @ 1613.702(b)] but is treated by an employer as having such an impairment." 29 C.F.R. @ 1613.702(e).

Also relevant to the inquiry into whether or not a particular plaintiff is handicapped within the meaning of the Act are the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access and the individual's job expectations and training. Forrisi v. Bowen, supra, 794 F.2d at 933, [*12] citing Jasany v. United States Postal Service, also supra, at 1249.

Once the plaintiff establishes a prima facie case of handicap discrimination by proving each of the foregoing elements, the burden of producing credible evidence shifts to the employer to show that the challenged criteria are job related and required by business necessity and that reasonable accomodation is not possible. If the plaintiff fails to establish a prima facie case, it is unnecessary to address the question of reasonable accomodation. Id., at 1249-1250; Sisson v. Helms, 751 F.2d 991, 993 (9th Cir. 1985); Daubert v. United States Postal Service, 733 F.2d 1367, 1369-1370 (10th Cir. 1984); Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1387 (10th Cir. 1981).

Finally, if the employer presents credible evidence that the physical requirements are job related and that reasonable accomodation is not possible or practicable or would place an undue burden on the employer, the burden of proof again shifts back to the plaintiff to present persuasive evidence that other selection criteria without a similar [*13] discriminating effect would also serve the employer's legitimate interests in efficient and trustworthy workmanship and that accomodation may in fact reasonably be made. Sisson v. Helms, supra, at 993; Strathie v. Department of Transportation, supra, at 230. See Also: Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981).

In viewing the instant action in the context of all of the above-referenced principles, we first find that the Plaintiff has not met her obligation to produce evidence and specific facts such as would tend to show that there is a genuine issue for trial. Although Plaintiff did file a reply to Defendent's motion, that reply merely asserted that she was unable to formulate a specific response thereto because she had not yet received answers to the Interrogatories and a Request for Production of Documents which she had forwarded to Defendant on October 16, 1992. Obviously, this Court does not find this to be a sufficient response to the pending motion, particularly in light of the fact that a scheduling order was entered in this matter on July 15, 1992 directing [*14] the completion of all discovery by November 16, 1992.

The inadequacy of Ms. James' response notwithstanding, in viewing the record evidence produced by the Postal Service in the light most favorable to Plaintiff, we remain unable to discern the existence of a genuine issue as to any material fact concerning Plaintiff's handicapped status and can thus reach no other conclusion but that Defendant is entitled to the entry of judgment in his favor as a matter of law on this issue. To be sure, the nature of Ms. James' purported handicap is a hypersensitive adverse reaction to insect bites, specifically paper mites. As a result of these reactions, she has been advised to refrain from working in areas containing paper and dust. However, throughout the Plaintiff's testimony before the Administrative Law Judge, she never stated or indicated that she was at all limited as a result of this condition in caring for herself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working in any position other than as a mail distribution clerk with the post office. There is likewise nothing in the record to suggest that the postal service in any way considered or treated [*15] the Plaintiff as having a physical or mental impairment which substantially limited one or more of her major life activities. n4

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n4 On the contrary, as the testimony of Una Aytch and Frances Miller, Plaintiff's former supervisors and Dianne Milkewicz, a post office injury compensation specialist before ALJ Colby clearly indicates, the postal service expressly did not consider or treat Maria James to be a handicapped person. (See: Exhibit "E" to Defendant's Motion for Summary Judgment, pp.73-76, 124-126).

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In addition, according to her own testimony, the Plaintiff has a bachelor's degree from St. Joseph's University in Business Administration and has had some additional training in the fields of sales, accounting and purchasing. She is currently employed part-time as a market research interviewer in Philadelphia. (See Exhibit "E" to Defendant's Summary Judgment Motion pp. 10-11); Plaintiff's response to Defendant's Interrogatory No. 9). Based upon all of the foregoing then, this Court concludes that the existing record [*16] in this case clearly establishes that Ms. James is not a handicapped person within the meaning of Section 504 of the Rehabilitation Act and thus no liability can be imputed against the Defendant for her removal from her postal service employment. n5 Inasmuch as there is insufficient evidence to make out a prima facie case of handicap discrimination, we see no need to address the question of whether reasonable accomodation of the Plaintiff's condition was possible or should have been made by the postal service. Defendant's summary judgment motion is therefore granted by virtue of the attached order.

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n5 It should be noted that the Court has treated and considered the transcript of the December 23, 1991 hearing before the Administrative Law Judge in the same manner as though it was a deposition.

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ORDER

AND NOW, this 7th day of , 1992, upon consideration of Defendant's Motion for Summary Judgment, it is hereby ORDERED that the Motion is GRANTED for the reasons outlined in the preceding Memorandum and Judgment is [*17] entered in favor of the Defendant and against the Plaintiff in no amount.

BY THE COURT:

J. CURTIS JOYNER, J.

Elizabeth M. Smith, Plaintiff, v. Lake City Nursing Home, City of Lake City, Richard Abraham, and Donna Van Loon, Defendants

Civ. No. 3-90-486

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

771 F. Supp. 985; 1991 U.S. Dist. LEXIS 12612; 56 Fair Empl. Prac. Cas. (BNA) 1350; 6 BNA IER CAS 1598

August 30, 1991, Decided

JUDGES: [**1]

Robert G. Renner, United States District Judge.

OPINIONBY: RENNER

OPINION: [*985] MEMORANDUM AND ORDER

ROBERT G. RENNER, UNITED STATES DISTRICT JUDGE

BACKGROUND

This motion for summary judgment raises the issues of whether the acceptance of workers compensation or the failure to exhaust administrative remedies bars recovery for disability discrimination under Section 504 of the Rehabilitation Act, 29 U.S.C. @ 794.

At a hearing on this motion on August 23, 1991, Jeff M. Zalasky represented the defendants City of Lake City, Lake City Nursing Home, Robert Abraham, and Donna Van Loon. Joseph D. Vass appeared on behalf of the plaintiff, Elizabeth M. Smith.

Lake City Nursing Home employed Elizabeth Smith as a licensed practical nurse. The City of Lake City is a municipality in Minnesota which owns, manages, and operates [*986] the nursing home. The individual defendants, Richard Abraham and Donna Van Loon, were, respectively, the City Administrator and the Administrator of the nursing home.

In May of 1988, Smith slipped while cleaning a bathroom in the nursing home. The resultant injuries limited her ability to work. From December through March of 1990, she could perform only very light duties for only one hour per day or less.

In March of 1990, defendants excused [**2] plaintiff from work so that she could devote full attention to an intensive rehabilitation program. Because of her progress, plaintiff's Qualified Rehabilitation Consultant, physical therapist, and physician recommended that Smith return to her job on a phased schedule with some work restrictions. According to this plan, Smith would work four hours per day during her first week back, six hours per day in the second week, and eight hours per day thereafter.

Defendants refused to accommodate the recommended work restrictions. Plaintiff contends that all parties involved, including the defendants and their insurer, regarded this decision as effectively terminating her employment. Defendants maintain that Smith's employment did not end until she resigned, and that she did so without making use of the grievance procedure available under her collective bargaining agreement.

Smith has received and continues to receive compensation pursuant to Minnesota's Workers Compensation Act ("WCA") Minn.Stat. @ 176.001 et seq. This compensation includes a portion of the difference between her former salary and the salary she presently earns as a receptionist for a chiropractor's office.

Smith [**3] attempted to file a charge with the Minnesota Department of Human Rights, but it was dismissed for lack of jurisdiction. She then filed this action. Count One of the complaint states a claim under Section 504 of the Rehabilitation Act for failure to reasonably accommodate her disability. Count Two seeks relief under 42 U.S.C. @ 1983 for deprivation of property without due process of law.

Defendants' Motion for Summary Judgment challenges both of these claims on the grounds that they are barred by the exclusive remedy clause of the WCA and that Smith has failed to exhaust her administrative remedies. In addition, defendants deny that they deprived Smith of any property interest without providing all the process that was due.

DISCUSSION

I. Workers Compensation as the Exclusive Remedy

The exclusive remedy provision of Minnesota's Workers Compensation Act states, in part:

The liability of an employer by this chapter is exclusive and in place of any other liability to such employee, . . . or other person entitled to recover damages on account of such injury or death.

Minn.Stat. @ 176.031. The Minnesota Supreme Court has ruled that this provision precludes any liability for [**4] disability discrimination under the Minnesota Human Rights Act. Karst v. F.C. Hayer Co., Inc., 447 N.W.2d 180 (Minn. 1989).

Defendants argue that the exclusive remedy provision in the Minnesota WCA precludes liability under federal law as well. They begin by analyzing the relevant statutes to show that federal law does not preempt state civil rights law.

The remedies for disability discrimination are those "set forth in Title VI of the Civil Rights Act of 1964." 29 U.S.C. @ 794a(a)(2). On the issue of preemption, the Civil Rights Act of 1964 provides:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field on which any such title operates to the exclusion of state laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of state law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. 2000h-4.

In applying this provision, the Court of Appeals for the Eighth Circuit has explained [*987] that "Congress intended the federal antidiscrimination system to defer to state systems where possible." [**5] Swenson v. Management Recruiters International, Inc., 858 F.2d 1304 (8th Cir. 1988), cert. denied 493 U.S. 848, 110 S. Ct. 143, 107 L. Ed. 2d 102 (1989).

Plaintiff argues that the Supremacy Clause prevents state interference with federal civil rights remedies. The United States District Court for the District of Wisconsin reached this conclusion where an employer argued that the Wisconsin Workers Compensation Act precluded liability under Section 504. Byrne v. Board of Education, School District of West Allis-West Milwaukee, 53 FEP Cases (E.D.Wisc. 1989).

Defendants attempt to distinguish this case by noting that Minnesota provides far more relief to injured workers than does Wisconsin. They maintain that the Minnesota WCA is a sufficient remedy for disability discrimination.

Several courts have held that the exclusive remedy clauses of state workers compensation statutes cannot bar claims under federal civil rights laws. Rosa v. Cantrell, 705 F.2d 1208 (10th Cir. 1982); Walker v. Rowe, 535 F. Supp. 55 (N.D.Ill. 1982); Hutchings v. Erie City, 516 F. Supp. 1265 (W.D.Pa. 1981).

The Supreme Court has explained that "legislative [**6] enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974). Furthermore, federal civil rights statutes are "designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." Id.; Swenson, 858 F.2d 1304.

Under these principles, the federal remedy for disability discrimination cannot be limited by a state workers compensation act. Although the Minnesota WCA provides some relief for discrimination against an injured employee, Section 504 of the Rehabilitation Act creates a supplemental remedy for disability discrimination.

II. Exhaustion of Administrative Remedies

Defendants move for summary judgment on both claims on the grounds that Smith failed to exhaust her administrative remedies. She responds that while plaintiffs suing the United States under Section 504 must exhaust administrative remedies, those suing recipients of federal assistance need not.

The Eighth Circuit has explained that:

In cases where the federal government is not a defendant, several courts have held [**7] that exhaustion is not required because Title VI remedies do not provide individual relief. . . In cases involving the federal government, however, courts have required exhaustion of Title VII remedies in @ 504 actions. . . The difference appears to lie with the identity of the defendant.
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Morgan v. United States Postal Service, 798 F.2d 1162 (8th Cir. 1986), cert. denied, 480 U.S. 948, 94 L. Ed. 2d 794, 107 S. Ct. 1608 . Indeed, the case cited by the defendant to show that exhaustion is required was brought against the Department of the Army. Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985).

Plaintiff is not required to exhaust administrative remedies prior to bringing a Section 504 claim against a recipient of federal assistance. Furthermore, there is no need no exhaust state remedies prior to seeking relief under Section 1983. Monroe v. Pape, 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961).

III. Due Process

Plaintiff's due process claim is based on her property right in continued public employment. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1972). Defendants argue that they did not deprive her of any property right, because [**8] Smith voluntarily left her job without exercising pre-termination rights available to her under her collective bargaining agreement, [*988] the Public Employees Labor Relations Act, and the Workers Compensation Act.

Defendants' argument assumes that they did not terminate plaintiff's employment. In her affidavit, Smith states that after the nursing home informed her that she could return to work only as a full time employee with no

restrictions, she telephoned her immediate supervisor who said she was "done" as an employee. These allegations raise a genuine issue of fact as to whether defendants terminated plaintiff without any pre-termination hearing.

ORDER

Based on the foregoing and on the entire file and record, it is HEREBY ORDERED that defendants' motion for summary judgment is DENIED.

ALEXANDER, GOVERNOR OF TENNESSEE, ET AL. v. CHOATE ET AL.

No. 83-727

SUPREME COURT OF THE UNITED STATES

469 U.S. 287; 105 S. Ct. 712; 1985 U.S. LEXIS 39; 83 L. Ed. 2d 661; 53 U.S.L.W. 4072

October 1, 1984, Argued
January 9, 1985, Decided

PRIOR HISTORY: [***1]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

DISPOSITION: 715 F.2d 1036, reversed.

SYLLABUS: Faced with Medicaid costs beyond its budget, Tennessee proposed to reduce from 20 to 14 the number of annual inpatient hospital days that state Medicaid would pay hospitals on behalf of a Medicaid recipient. Before the reduction took effect, respondent Medicaid recipients brought a class action in Federal District Court for declaratory and injunctive relief. Respondents alleged that the proposed 14-day limitation would have a disproportionate effect on the handicapped and hence was discriminatory in violation of @ 504 of the Rehabilitation Act of 1973 -- which provides that no otherwise qualified handicapped person shall, solely by reason of his handicap, be subjected to discrimination under any program receiving federal financial assistance -- and its implementing regulations, and moreover that any annual limitation on inpatient coverage would disadvantage the handicapped disproportionately in violation of @ 504. The District Court dismissed the complaint on the ground that the 14-day limitation was not the type of discrimination that @ 504 was intended to proscribe. [***2] The Court of Appeals held that respondent had established a prima facie case of a @ 504 violation, because both the 14-day and any annual limitation on inpatient coverage would disproportionately affect the handicapped.

Held: Assuming that @ 504 or its implementing regulations reach some claims of disparate-impact discrimination, the effect of Tennessee's reduction in annual inpatient hospital coverage is not among them. Pp. 292-309.

(a) The 14-day limitation is neutral on its face, is not alleged to rest on a
discriminatory motive, and does not deny the handicapped meaningful access to or exclude them from the particular package of Medicaid services Tennessee has chosen to provide. The State has made the same benefit equally accessible to both handicapped and nonhandicapped persons, and is not required to assure the handicapped "adequate health care" by providing them with more coverage than the nonhandicapped. Nothing in the Rehabilitation Act's legislative history supports the conclusion that the Act requires the States to view certain illnesses, i. e., those particularly affecting the handicapped, as more important than others and more worthy of cure through government [***3] subsidization. Section 504 does not require the State to alter its definition of the benefit it will be providing as 14 days of inpatient coverage simply to meet the reality that the handicapped have greater medical needs. While @ 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal financial assistance, the Act does not guarantee the handicapped equal results from the provision of state Medicaid. Pp. 302-306.

(b) In addition, the State is not obligated to modify its Medicaid program by abandoning reliance on annual durational limitations on inpatient coverage. Section 504 does not require the State to redefine its Medicaid program, and nothing in its legislative history suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and durational limitations on services covered by Medicaid. Moreover, @ 504 does not require that federal grantees make a broad-based distributive decision always in the way most favorable, or least disadvantageous, to the handicapped. To do so would impose a virtually unworkable [***4] requirement on state Medicaid administrators. Pp. 306-309.

COUNSEL: W. J. Michael Cody, Attorney General of Tennessee, argued the cause for petitioners. With him on the briefs were William M. Leech, Jr., former Attorney General, William B. Hubbard, Chief Deputy Attorney General, and Frank J. Scanlon, Deputy Attorney General.

Deputy Solicitor General Bator argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Assistant Attorney General Cooper, John H. Garvey, and Brian K. Landsberg.

Gordon Bonnyman argued the cause for respondents. With him on the brief were Brian Paddock, Arlene Mayerson, J. LeVonne Chambers, and Eric Schnapper. *

* Robert E. Williams and Douglas S. McDowell filed a brief for the Equal Employment Advisory Council as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the Center for Independent Living -- San Gabriel/Pomona Valleys et al. by Marilyn Holle and Timothy Cook; and for United Cerebral Palsy of New York City, Inc., by Michael A. Rebell.

JUDGES: MARSHALL, J., delivered the opinion for a unanimous Court.

OPINIONBY: MARSHALL

OPINION: [*289] [***5] [**714] JUSTICE MARSHALL delivered the opinion of the Court.

In 1980, Tennessee proposed reducing the number of annual days of inpatient hospital care covered by its state Medicaid program. The question presented is whether the effect upon the handicapped that this reduction will have is cognizable under @ 504 of the Rehabilitation Act of 1973 or its implementing regulations. We hold that it is not.

I

Faced in 1980-1981 with projected state Medicaid n1 costs of $ 42 million more than the State's Medicaid budget of $ 388 million, the directors of the Tennessee Medicaid program decided to institute a variety of cost-saving measures. Among these changes was a reduction from 20 to 14 in the number of inpatient hospital days per fiscal year that Tennessee Medicaid would pay hospitals on behalf of a Medicaid recipient. Before the new measures took effect, respondents, Tennessee Medicaid recipients, brought a class action for declaratory and injunctive relief in which they alleged, inter alia, that the proposed 14-day limitation on inpatient coverage would have a discriminatory effect on the handicapped. n2 Statistical evidence, which petitioners do not [*290] [***6] dispute, indicated that in the 1979-1980 fiscal year, 27.4% of all handicapped users of hospital services who received Medicaid required more than 14 days of care, while only 7.8% of nonhandicapped users required more than 14 days of inpatient care.

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n1 Medicaid was established by Title XIX of the Social Security Act of 1965, 79 Stat. 343, as amended, 42 U. S. C. @ 1396 et seq. Medicaid is a joint state-federal funding program for medical assistance in which the Federal Government approves a state plan for the funding of medical services for the needy and then subsidizes a significant portion of the financial obligations the State has agreed to assume. Once a State voluntarily chooses to participate in Medicaid, the State must comply with the requirements of Title XIX and applicable regulations. Harris v. McRae, 448 U.S. 297, 301 (1980).

n2 The State proposed an array of other changes in its Medicaid program. Although respondents challenged many of these other changes, settlement was reached on all the proposed changes other than the reduction in the number of inpatient days covered. Thus none of the other changes is before this Court. Respondents also asserted a number of causes of action other than their @ 504 claim in their original and amended complaints. These additional legal theories are similarly not before the Court.

Since the District Court's decision, the State has amended its Medicaid program in two minor ways not materially significant to the issues presented on certiorari.

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[***7]

Based on this evidence, respondents asserted that the reduction would violate @ 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. @
794, and its implementing regulations. Section 504 provides:

"No otherwise qualified handicapped individual . . . 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. . . ." 29 U. S. C. @ 794.

Respondents' position was twofold. First, they argued that the change from 20 to 14 days of coverage would have a disproportionate effect on the handicapped and hence was discriminatory. n3 The second, and major, thrust of respondents' attack [**715] was directed at the use of any annual limitation on the number of inpatient days covered, for respondents acknowledged that, given the special needs of the handicapped for medical care, any such limitation was likely to disadvantage the handicapped disproportionately. Respondents noted, however, that federal law does not require States to impose any annual durational limitation on inpatient coverage, [*291] and that the [***8] Medicaid programs of only 10 States impose such restrictions. n4 Respondents therefore suggested that Tennessee follow these other States and do away with any limitation on the number of annual inpatient days covered. Instead, argued respondents, the State could limit the number of days of hospital coverage on a per-stay basis, with the number of covered days to vary depending on the recipient's illness (for example, fixing the number of days covered for an appendectomy); the period to be covered for each illness could then be set at a level that would keep Tennessee's Medicaid program as a whole within its budget. n5 The State's refusal to adopt this plan was said to result in the imposition of gratuitous costs on the handicapped and thus to constitute discrimination under @ 504.

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n3 The evidence indicated that, if 19 days of coverage were provided, 16.9% of the handicapped, as compared to 4.2% of the nonhandicapped, would not have their needs for inpatient care met.

n4 As of 1980 the average ceiling in those States was 37.6 days. Six States also limit the number of reimbursable days per admission, per spell of illness, or per benefit period. See App. B to Brief for United States as Amicus Curiae. [***9]

n5 See Jennings v. Alexander, 518 F.Supp. 877, 883, n. 7 (MD Tenn. 1981). Respondents' diagnosis-related reimbursement proposal is supported by a committee of the Tennessee Legislature, which has recommended that the State adopt such a plan. The Medicaid System of the Tennessee Department of Public Health, A Report of the Special Joint Committee to the Ninety-Third General Assembly 24, 26 (1983). The Court of Appeals seems to have mischaracterized this proposal of respondents as an attempt to limit "the total number of visits per annum rather than the number of days." Jennings v. Alexander, 715 F.2d 1036, 1044 (CA6 1983).

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A divided panel of the Court of Appeals for the Sixth Circuit held that respondents had indeed established a prima facie case of a @ 504 violation. Jennings v. Alexander, 715 F.2d 1036 (1983). The majority apparently concluded that any action by a federal grantee that disparately affects the handicapped states a cause of action under @ 504 and its implementing regulations. Because both the 14-day rule [***10] and any annual limitation on inpatient coverage disparately [*292] affected the handicapped, the panel found that a prima facie case had been made out, and the case was remanded n6 to give Tennessee an opportunity for rebuttal. According to the panel majority, the State on remand could either demonstrate the unavailability of alternative plans that would achieve the State's legitimate cost-saving goals with a less disproportionate impact on the handicapped, or the State could offer "a substantial justification for the adoption of the plan with the greater discriminatory impact." Id., at 1045. We granted certiorari to consider whether the type of impact at issue in this case is cognizable under @ 504 or its implementing regulations, 465 U.S. 1021 (1984), and we now reverse.

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n6 The District Court had dismissed respondents' complaint under Federal Rule of Civil Procedure 12(b)(6) on the basis, inter alia, that the effect on the handicapped of the plan that included the 14-day limitation was "not the type of discrimination that @ 504 was intended to proscribe." 518 F.Supp., at 881.

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II

The first question the parties urge on the Court is whether proof of discriminatory animus is always required to establish a violation of @ 504 and its implementing regulations, or whether federal law also reaches action by a recipient of federal funding that discriminates against the handicapped by effect rather than by design. The State of Tennessee argues that @ 504 reaches only purposeful discrimination against the handicapped. As support for this position, the State relies heavily on our recent decision in Guardians Assn. v. Civil Service Comm'n of New York City, 463 U.S. 582 (1983).

[**716] In Guardians, we confronted the question whether Title VI of the Civil Rights Act of 1964, 42 U. S. C. @ 2000d et seq., which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both [*293] intentional and disparate-impact discrimination. n7 No opinion commanded a majority in Guardians, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, [***12] the Court held that Title VI itself directly reached only instances of intentional discrimination. n8 Second, the

Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. n9 In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily [*294] enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

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n7 Section 601 of the Civil Rights Act of 1964, 42 U. S. C. @ 2000d, provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The premise of the State's reliance on Guardians is that @ 504 was modeled in part on Title VI, and that the evolution of Title VI regulatory and judicial law is therefore relevant to ascertaining the intended scope of @ 504. We agree with this basic premise. See S. Rep. No. 93-1297, p. 39 (1974) ("Section 504 was patterned after and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, 42 U. S. C. 2000d-1 (relating to race, color, or national origin) and section 901 of the Education Amendments of 1972, 42 U. S. C. 1683 (relating to sex)"). Nonetheless, as we point out infra, at 295-297, and n. 13, too facile an assimilation of Title VI law to @ 504 must be resisted. [***13]

n8 463 U.S., at 607-608 (opinion of POWELL, J., in which BURGER, C. J., and REHNQUIST, J., joined); id., at 612 (opinion of O'CONNOR, J.); id., at 634 (opinion of STEVENS, J., in which BRENNAN and BLACKMUN, JJ., joined).

n9 Id., at 584 (WHITE, J., announcing the judgment of the Court); id., at 623, n. 15 (opinion of MARSHALL, J.); id., at 634 (opinion of STEVENS, J., in which BRENNAN and BLACKMUN, JJ., joined).

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Guardians, therefore, does not support petitioners' blanket proposition that federal law proscribes only intentional discrimination against the handicapped. Indeed, to the extent our holding in Guardians is relevant to the interpretation of @ 504, Guardians suggests that the regulations implementing @ 504, upon which respondents in part rely, could make actionable the disparate impact challenged in this case. n10 Moreover, there are reasons to pause before too quickly extending even the first prong of Guardians to @ 504. Cf. Consolidated Rail Corporation v. Darrone, 465 U.S. 624, 632-633, n. 13 (1984) [***14] (recognizing distinctions between Title VI and @ 504). n11

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n10 See also Lau v. Nichols, 414 U.S. 563, 569 (1974) (Stewart, J., concurring). We conclude infra, at 304-306, and n. 24, that in this case the regulations do not in fact support respondents' action.

n11 In addition to the nature of the problems with which the @ 504 Congress was concerned, see infra, at 295-297, at least two other considerations counsel hesitation before reading Title VI and @ 504 in pari materia with respect to the effect/intent issue. First, for seven Justices, the outcome in the first prong of Guardians was settled by their view that a majority of the Court in University of California Regents v. Bakke, 438 U.S. 265 (1978), had already concluded that Title VI reached only intentional discrimination. See 463 U.S., at 607 (opinion of POWELL, J., in which BURGER, C. J., and REHNQUIST, J., joined); id., at 612 (opinion of O'CONNOR, J.); id., at 634 and 641, n. 12

(STEVENS, J., joined by BRENNAN and BLACKMUN, JJ., dissenting). Although two of the five Justices who were said to have reached such a conclusion in Bakke wrote in Guardians to reject this interpretation of Bakke, see 463 U.S., at 590-591 and 590, n. 11 (WHITE, J., announcing the judgment of the Court); id., at 616-618 (MARSHALL, J., dissenting), in the view of the seven Justices Bakke controlled as a matter of stare decisis. Had these Justices not felt the force of this constraint, it is unclear whether they would have read an intent requirement into Title VI. See 463 U.S., at 626 (O'CONNOR, J., concurring in judgment) ("Were we construing Title VI without the benefit of any prior interpretation from this Court, one might well conclude that the statute was designed to redress more than purposeful discrimination") (citation omitted). For that reason, the conclusion that, in response to factors peculiar to Title VI, Bakke locked in a certain construction of Title VI would not seem to have any obvious or direct applicability to @ 504.

Second, by the time Congress enacted the Rehabilitation Act in 1973, nearly a decade of experience had been accumulated with the operation of the nondiscrimination provisions of Titles VI and VII. By this time, model Title VI enforcement regulations incorporating a disparate-impact standard had been drafted by a Presidential task force and the Justice Department, and every Cabinet Department and about 40 federal agencies had adopted standards in which Title VI was interpreted to bar programs with a discriminatory impact. See Guardians, 463 U.S., at 629-630 (MARSHALL, J., dissenting). These regulations provoked some controversy in Congress, and in 1966 the House of Representatives rejected a proposed amendment that would have limited Title VI to only intentional discrimination. Id., at 630-631. Thus, when Congress in 1973 adopted virtually the same language for @ 504 that had been used in Title VI, Congress was well aware of the intent/impact issue and of the fact that similar language in Title VI consistently had been interpreted to reach disparate-impact discrimination. In refusing expressly to limit @ 504 to intentional discrimination, Congress could be thought to have approved a disparate-impact standard for @ 504. See United States v. Rutherford, 442 U.S. 544, 554 (1979); Cannon v. University of Chicago, 441 U.S. 677, 698-699 (1979).

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[*295] [**717] Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference -- of benign neglect. n12 Thus, Representative Vanik, introducing the predecessor to @ 504 in the House, n13 described the treatment [*296] of the handicapped as one of the country's "shameful oversights," which caused the handicapped to live among society "shunted aside, hidden, and ignored." 117 Cong. Rec. 45974 (1971). Similarly, Senator Humphrey, who introduced a companion measure in the Senate, asserted that "we can no longer tolerate the invisibility of the handicapped in America. . . ." 118 Cong. Rec. 525-526 (1972). And Senator Cranston, the Acting Chairman of the Subcommittee that drafted @ 504, n14 described the Act as a response to "previous societal neglect." 119 Cong. Rec. 5880, 5883 (1973). See also 118 Cong. Rec. 526 (1972) (statement of cosponsor Sen. Percy) (describing the legislation leading to the 1973 Act as a national commitment to eliminate the "glaring neglect" of the handicapped). n15 [**718] Federal agencies and commentators on the plight of the [***16] handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus. n16

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n12 To be sure, well-cataloged instances of invidious discrimination against the handicapped do exist. See, e. g., United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, Ch. 2 (1983); Wegner, The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973, 69 Cornell L. Rev. 401, 403, n. 2 (1984).

n13 Although @ 504 ultimately was passed as part of the Rehabilitation Act of 1973, the nondiscrimination principle later codified in @ 504 was initially proposed as an amendment to Title VI. This proposal was first introduced by Representative Vanik in the House. See H. R. 14033, 92d Cong., 2d Sess., 118 Cong. Rec. 9712 (1972); H. R. 12154, 92d Cong., 1st Sess., 117 Cong. Rec. 45945 (1971). A companion measure was introduced in the Senate by Senators Humphrey and Percy. See S. 3044, 92d Cong., 2d Sess., 118 Cong. Rec. 525-526 (1972). The principle underlying these bills was reshaped in the next Congress and inserted as @ 504 into major vocational-rehabilitation legislation then pending. Senator Humphrey and Representative Vanik indicated that the intent of the original bill had been carried forward into @ 504. See 119 Cong. Rec. 6145 (1973) (statement of Sen. Humphrey); 118 Cong. Rec. 32310 (1972) (same); 119 Cong. Rec. 7114 (1973) (statement of Rep. Vanik). Given the lack of debate devoted to @ 504 in either the House or Senate when the Rehabilitation Act was passed in 1973, see R. Cappalli, Federal Grants and Cooperative Agencies @ 20:03 (1982), the intent with which Congressman Vanik and Senator Humphrey crafted the predecessor to @ 504 is a primary signpost on the road toward interpreting the legislative history of @ 504. [***17]

n14 118 Cong. Rec. 30680 (1972) (statement of Sen. Randolph describing origins of @ 504).

n15 Senator Percy was both a cosponsor of the predecessor to @ 504 and of the Senate version of the Rehabilitation Act of 1973.

n16 See, e. g., United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 17 (1983); Note, Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act, 55 N. Y. U. L. Rev. 881, 883 (1980).

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In addition, much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if [*297] not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent. For example, elimination of architectural barriers was one of the central aims of the Act, see, e. g., S. Rep. No. 93-318, p. 4 (1973), yet such barriers were clearly not erected with the aim or intent of excluding the handicapped. Similarly, Senator Williams, the chairman of the Labor and Public Welfare Committee that reported out @ 504, asserted that [***18] the handicapped were the victims of "[discrimination] in access to public transportation" and "[discrimination] because they do not have the simplest forms of special educational and rehabilitation services they need. . . ." 118 Cong. Rec. 3320 (1972). And Senator Humphrey, again in introducing the proposal that later became @ 504, listed, among the instances of discrimination that the section would prohibit, the use of "transportation and architectual barriers," the "discriminatory effect of job qualification . . . procedures," and the denial of "special educational assistance" for handicapped children. Id., at 525-526. These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design. n17

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n17 All the Courts of Appeals that have addressed the issue have agreed that, at least under some circumstances, @ 504 reaches disparate-impact discrimination. See, e. g., New Mexico Assn. for Retarded Citizens v. New Mexico, 678 F.2d 847, 854 (CA10 1982); Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1384-1385 (CA10 1981); Dopico v. Goldschmidt, 687 F.2d 644, 652-653 (CA2 1982); NAACP v. Wilmington Medical Center, 657 F.2d 1322, 1331 (CA3 1981) (en banc); Majors v. Housing Authority of County of DeKalb, Georgia, 652 F.2d 454, 457-458 (CA5 1981); Jones v. Illinois Dept. of Rehabilitation Services, 689 F.2d 724 (CA7 1982); Stutts v. Freeman, 694 F.2d 666 (CA11 1983); Georgia Assn. of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1578-1580 (CA11 1983), vacated for further consideration in light of Smith v. Robinson, 468 U.S. 992 (1984), 468 U.S. 1213 (1984); cf. Joyner by Lowry v. Dumpson, 712 F.2d 770, 775-776, and n. 7 (CA2 1983) (rejecting use of "adverse impact" theory as grounds for challenging state statute that requires parents who desire special state-subsidized residential child-care services for handicapped children to transfer temporary custody of their children to State, but reserving question of whether that test might be used in employment discrimination actions).

At least 24 federal agencies have reached the same conclusion. See 5 CFR @ 900.704(b)(3) (OPM) (1984); 7 CFR @ 15b.4(b)(4) (DOA) (1984); 10 CFR @ 4.121(b)(4) (NRC) (1984); 10 CFR @ 1040.63(b)(4) (DOE) (1984); 14 CFR @ 251.103(b)(5) (NASA) (1984); 15 CFR @ 8b.4(b)(4) (DOC) (1984); 18 CFR @ 1307.4(b)(3) (TVA) (1984); 22 CFR @ 142.4(b)(4) (DOS) (1984); 22 CFR @ 217.4(b)(4) (AID/IDCA) (1984); 28 CFR @@ 41.51(b)(3), 42.503(b)(3) (DOJ) (1984); 29 CFR @ 32.4(b)(4) (DOL) (1984); 31 CFR @@ 51.52(b)(1)(vi), 51.55(b)(1)(viii) (Dept. of Treas. (OST)) (1984); 32 CFR @ 56.8(a)(6) (DOD) (1984); 34 CFR @ 104.4(b)(4) (Dept. of Ed.) (1984); 38 CFR @ 18.404(b)(4) (VA) (1984); 49 Fed. Reg. 1656 (EPA) (1984) (to be codified at 40 CFR pt. 7); 41 CFR @ 101-8.303(d) (GSA) (1984); 43 CFR @ 17.203(b)(4) (DOI) (1984); 45 CFR @ 84.4(b)(4) (HHS) (1984); 45 CFR @ 605.4(b)(4) (NSF) (1984); 45 CFR @ 1151.17(c) (NEA) (1984); 45 CFR @ 1170.12(c) (NEH) (1984); 45 CFR @ 1232.4(b)(3) (ACTION) (1984); 49 CFR @ 27.7(b)(4) (DOT) (1984). We are unaware of any case challenging the facial validity of these regulations.

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[*298] At the same time, the position urged by respondents -- that we interpret @ 504 to reach all action disparately affecting the handicapped -- is also troubling. Because the handicapped typically are not similarly situated to the nonhandicapped, respondents' [**719] position would in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped. The formalization and policing of this process could lead to a wholly unwieldy administrative and adjudicative burden. See Note, Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness, 97 Harv. L. Rev. 997, 1008 (1984) (describing problems with pure disparate-impact model in context of employment discrimination against the handicapped). Had Congress intended @ 504 to be a National Environmental Policy Act n18 for the handicapped, requiring the preparation of "Handicapped Impact [*299] Statements" before any [***20] action was taken by a grantee that affected the handicapped, we would expect some indication of that purpose in the statute or its legislative history. Yet there is nothing to suggest that such was Congress' purpose. Thus, just as there is reason to question whether Congress intended @ 504 to reach only intentional discrimination, there is similarly reason to question whether Congress intended @ 504 to embrace all claims of disparate-impact discrimination.

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n18 42 U. S. C. @ 4321 et seq.

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Any interpretation of @ 504 must therefore be responsive to two powerful but countervailing considerations -- the need to give effect to the statutory objectives and the desire to keep @ 504 within manageable bounds. Given the legitimacy of both of these goals and the tension between them, we decline the parties' invitation to decide today that one of these goals so overshadows the other as to eclipse it. While we reject the boundless notion that all disparate-impact showings constitute prima facie cases under @ 504, [***21] we assume without deciding that @ 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped. On that assumption, we must then determine whether the disparate effect of which respondents complain is the sort of disparate impact that federal law might recognize.

III

To determine which disparate impacts @ 504 might make actionable, the proper starting point is Southeastern Community College v. Davis, 442 U.S. 397 (1979), our major previous attempt to define the scope of @ 504. n19 Davis involved a plaintiff with a major hearing disability who sought admission [*300] to a college to be trained as a registered nurse, but who would not be capable of safely performing as a registered nurse even with full-time personal supervision. We stated that, under some circumstances, a "refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped [is] an important responsibility of HEW." Id., at 413. We held that the college was not required [***22] to admit Davis because it appeared unlikely that she could benefit from any modifications that the relevant HEW regulations required, id., at 409, and because the further modifications Davis sought -- full-time, personal supervision whenever she attended patients and elimination of all clinical courses -- would have compromised the essential nature of the college's nursing program, id., at 413-414. Such a "fundamental alteration in [**720] the nature of a program" was far more than the reasonable modifications the statute or regulations required. Id., at 410. Davis thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones. Compare ibid. with id., at 412-413. n20

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n19 Davis addressed that portion of @ 504 which requires that a handicapped individual be "otherwise qualified" before the nondiscrimination principle of @ 504 becomes relevant. However, the question of who is "otherwise qualified" and what actions constitute "discrimination" under the section would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped. [***23]

n20 In Davis, we stated that @ 504 does not impose an "affirmative-action obligation on all recipients of federal funds." 442 U.S., at 411. Our use of the term "affirmative action" in this context has been severely criticized for failing to appreciate the difference between affirmative action and reasonable accommodation; the former is said to refer to a remedial policy for the victims of past discrimination, while the latter relates to the elimination of existing obstacles against the handicapped. See Note, Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act, 55 N. Y. U. L. Rev. 881, 885-886 (1980); Note, Accommodating the Handicapped:

Rehabilitating Section 504 After Southeastern, 80 Colum. L. Rev. 171, 185-186 (1980); see also Dopico v. Goldschmidt, 687 F.2d 644, 652 (CA2 1982) ("Use of the phrase 'affirmative action' in this context is unfortunate, making it difficult to talk about any kind of affirmative efforts without importing the special legal and social connotations of that term."). Regardless of the aptness of our choice of words in Davis, it is clear from the context of Davis that the term "affirmative action" referred to those "changes," "adjustments," or "modifications" to existing programs that would be "substantial," 442 U.S., at 410, 411, n. 10, 413, or that would constitute "fundamental [alterations] in the nature of a program . . . ," id., at 410, rather than to those changes that would be reasonable accommodations.

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[*301] The balance struck in Davis requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made. n21 In this [*302] case, respondents argue that the 14-day rule, or any annual durational limitation, denies meaningful access to Medicaid services in Tennessee. We examine each of these arguments in turn.

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n21 As the Government states: "Antidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is 'collapsed' into one's definition of what is the relevant benefit." Brief for United States as Amicus Curiae 29, n. 36. At oral argument, the Government also acknowledged that "special measures for the handicapped, as the Lau case shows, may sometimes be necessary. . . ." Tr. of Oral Arg. 14-15 (referring to Lau v. Nichols, 414 U.S. 563 (1974)).

The regulations implementing @ 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access. See, e. g., 45 CFR @ 84.12(a) (1984) (requiring an employer to make "reasonable accommodation to the known physical or mental limitations" of a handicapped individual); 45 CFR @ 84.22 and @ 84.23 (1984) (requiring that new buildings be readily accessible, building alterations be accessible "to the maximum extent feasible," and existing facilities eventually be operated so that a program or activity inside is, "when viewed in its entirety," readily accessible); 45 CFR @ 84.44(a) (1984) (requiring certain modifications to the regular academic programs of secondary education institutions, such as 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).

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The 14-day limitation will not deny respondents meaningful access to Tennessee Medicaid services or exclude them from those services. The new limitation does not invoke criteria that have a particular exclusionary effect on the handicapped; the reduction, neutral on its face, does not distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of [**721] having. Moreover, it cannot be argued that "meaningful access" to state Medicaid services will be denied by the 14-day limitation on inpatient coverage; nothing in the record

suggests that the handicapped in Tennessee will be unable to benefit meaningfully from the coverage they will receive under the 14-day rule. n22 The reduction in inpatient coverage will leave both handicapped and nonhandicapped Medicaid users with identical and effective hospital services fully available for their use, with both classes of users subject to the same durational limitation. The 14-day limitation, therefore, does not exclude the handicapped from or deny them the benefits of the 14 [***26] days of care the State has chosen to provide. Cf. Jefferson v. Hackney, 406 U.S. 535 (1972).

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n22 The record does not contain any suggestion that the illnesses uniquely associated with the handicapped or occurring with greater frequency among them cannot be effectively treated, at least in part, with fewer than 14 days' coverage. In addition, the durational limitation does not apply to only particular handicapped conditions and takes effect regardless of the particular cause of hospitalization.

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To the extent respondents further suggest that their greater need for prolonged inpatient care means that, to provide meaningful access to Medicaid services, Tennessee must single out the handicapped for more than 14 days of [*303] coverage, the suggestion is simply unsound. At base, such a suggestion must rest on the notion that the benefit provided through state Medicaid programs is the amorphous objective of "adequate health care." But Medicaid programs do not guarantee that each recipient [***27] will receive that level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services, such as 14 days of inpatient coverage. That package of services has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered -- not "adequate health care."

The federal Medicaid Act makes this point clear. The Act gives the States substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in "the best interests of the recipients." 42 U. S. C. @ 1396a(a)(19). The District Court found that the 14-day limitation would fully serve 95% of even handicapped individuals eligible for Tennessee Medicaid, and both lower courts concluded that Tennessee's proposed Medicaid plan would meet the "best interests" standard. That unchallenged conclusion n23 indicates that Tennessee is free, as a matter of the Medicaid Act, to choose to define the benefit it will be providing as 14 days of inpatient coverage.

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n23 Because that conclusion is unchallenged, we express no opinion on whether annual limits on hospital care are in fact consistent with the Medicaid Act. See, e. g., Charleston Memorial Hospital v. Conrad, 693 F.2d 324, 329-330 (CA4 1982) (upholding 12-day-a-year limitation on inpatient hospital coverage); Virginia Hospital Assn. v. Kenley, 427 F.Supp. 781 (ED Va. 1977) (upholding 21-day limitation).

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Section 504 does not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs. To conclude otherwise would be to find that the Rehabilitation Act requires States to view certain illnesses, i. e., those [*304] particularly affecting the handicapped, as more important than others and more worthy of cure through government subsidization. Nothing in the legislative history of the Act supports such a conclusion. Cf. Doe v. Colautti,

592 F.2d 704 (CA3 1979) (State may limit covered-private-inpatient-psychiatric care to 60 days even though State sets no limit on duration of coverage for physical illnesses). Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance. Southeastern Community College v. Davis, 442 U.S. 397 [**722] (1979). The Act does not, however, guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed. Ibid. [***29]

Regulations promulgated by the Department of Health and Human Services (HHS) pursuant to the Act further support this conclusion. n24 These regulations state that recipients of federal funds who provide health services cannot "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." 45 CFR @ 84.52(a)(3) (1984). The regulations also prohibit a recipient of federal funding from adopting "criteria or methods of administration that [*305] have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to the handicapped." 45 CFR @ 84.4(b)(4)(ii) (1984). n25

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n24 We have previously recognized these regulations as an important source of guidance on the meaning of @ 504. See Consolidated Rail Corporation v. Darrone, 465 U.S. 624 (1984) (holding that 1978 Amendments to the Act were intended to codify the regulations enforcing @ 504); Southeastern Community College v. Davis, 442 U.S., at 413 ("Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped person continues to be an important responsibility of HEW"); see generally Guardians Assn. v. Civil Service Comm'n of New York City, 463 U.S. 582 (1983). 1974 Amendments to the Act clarified the scope of @ 504 by making clear that those charged with administering the Act had substantial leeway to explore areas in which discrimination against the handicapped posed particularly significant problems and to devise regulations to prohibit such discrimination. See, e. g., S. Rep. No. 93-1297, pp. 40-41, 56 (1974). [***30]

n25 Respondents also rely on a variety of other regulations. See, e. g., 45 CFR @ 84.52(a)(2) (1984) (stating that a recipient who provides health services cannot "[afford] a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons"); @ 84.4(b)(1)(iii) (prohibiting a recipient of federal funds from providing "a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others"); @ 84.4(b)(1)(ii) (stating that a recipient cannot "[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").

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While these regulations, read in isolation, could be taken to suggest that a state Medicaid program must make the handicapped as healthy as the nonhandicapped, other regulations reveal that HHS does not contemplate imposing such a requirement. Title 45 CFR @ 84.4(b)(2) (1984), referred to in the regulations quoted above, makes clear that "[for] purposes of this part, aids, benefits, [***31] 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. . . ."

This regulation, while indicating that adjustments to existing programs are contemplated, n26 also makes clear that [*306] Tennessee is not required to assure that its handicapped Medicaid users will be as healthy as its nonhandicapped users. Thus, to the extent respondents are seeking a distinct

durational limitation for the handicapped, Tennessee is entitled to respond by asserting that the relevant benefit is 14 days of coverage. Because the handicapped have meaningful and equal access to that benefit, Tennessee is not obligated to reinstate its 20-day rule or to provide the handicapped with more than 14 days of inpatient coverage.

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n26 The interpretive analysis accompanying these regulations states:

"[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." 45 CFR, pt. 84, App. A, para. 6 (1984).

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[**723] B

We turn next to respondents' alternative contention, a contention directed not at the 14-day rule itself but rather at Tennessee's Medicaid plan as a whole. Respondents argue that the inclusion of any annual durational limitation on inpatient coverage in a state Medicaid plan violates @ 504. The thrust of this challenge is that all annual durational limitations discriminate against the handicapped because (1) the effect of such limitations falls most heavily on the handicapped and because (2) this harm could be avoided by the choice of other Medicaid plans that would meet the State's budgetary constraints without disproportionately disadvantaging the handicapped. Viewed in this light, Tennessee's current plan is said to inflict a gratuitous harm on the handicapped that denies them meaningful access to Medicaid services.

Whatever the merits of this conception of meaningful access, it is clear that @ 504 does not require the changes respondents seek. In enacting the Rehabilitation Act and in subsequent amendments, n27 Congress did focus on several [*307] substantive areas -- employment, n28 education, n29 and the elimination of physical barriers to [***33] access n30 -- in which it considered the societal and personal costs of refusals to provide meaningful access to the handicapped to be particularly high. n31 But nothing in the pre- or post-1973 legislative discussion of @ 504 suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid, see Beal v. Doe, 432 U.S. 438, 444 (1977). And, more generally, we have already stated, supra, at 298-299, that @ 504 does not impose a general NEPA-like requirement on federal grantees. n32

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n27 The year after the Rehabilitation Act was passed, Congress returned to it with important amendments that clarified the scope of @ 504. See Pub. L. 93-516, 88 Stat. 1617. While these amendments and their history cannot substitute for a clear expression of legislative intent at the time of enactment, Davis, supra, at 411, n. 11, as virtually contemporaneous and more specific elaborations of the general norm that Congress had enacted into law the previous year, the amendments and their history do shed significant light on the intent with which @ 504 was enacted. See, e. g., Andrus v. Shell Oil Co., 446 U.S. 657, 666-671 (1980); Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980). Congress again amended Title V of the Rehabilitation Act in 1978, in the process incorporating the enforcement mechanisms available under Title VI of the Civil Rights Act of 1964. See Pub. L. 95-602, 92 Stat. 2982, @ 505(a)(2), 29 U. S. C. @ 794a. We have previously relied on the post-1973 legislative actions to interpret @ 504. Consolidated Rail Corporation v.

Darrone, 465 U.S., at 632-633. [***34]

n28 "The primary goal of the Act is to increase employment." Consolidated Rail Corporation v. Darrone, supra, at 633, n. 13. See also 29 U. S. C. @ 701 (11) (1976 ed.).

n29 See, e. g., 117 Cong. Rec. 45974 (1971) (statement of Rep. Vanik); 118 Cong. Rec. 525-526 (1972) (statement of Sen. Humphrey); 119 Cong. Rec. 5882-5883 (1973) (statement of Sen. Cranston); 118 Cong. Rec. 3320-3322 (1972) (statement of Sen. Williams).

n30 See, e. g., 29 U. S. C. @ 701 (11) (1976 ed.); S. Rep. No. 93-318, p. 4 (1973); S. Rep. No. 93-1297, p. 50 (1974).

n31 Rehabilitation training, of course, was also central to the purposes of the 1973 Act, and such training might involve issues concerning specific health care benefits. In this case, however, respondents have never asserted that the 14-day rule has any effect at all on rehabilitation programs.

n32 Assuming, arguendo, that agency regulations may impose such a requirement in specific areas to further the purposes of @ 504, see Guardians Assn. v. Civil Service Comm'n of New York City, 463 U.S. 582 (1983); Lau v. Nichols, 414 U.S. 563 (1974), the current regulations are drafted in far too broad terms to permit the conclusion that state Medicaid programs must always choose, from among various otherwise legitimate benefit and service options, the particular option most favorable, or least disadvantageous, to the handicapped. Before we would find that these generally worded regulations were intended to limit a State's longstanding discretion to set otherwise reasonable Medicaid coverage rules, that intent would have to be indicated with greater specificity in the regulations themselves or through other agency action.

The Government agrees that the current regulations are not intended to impose a NEPA-like requirement on state Medicaid administrators.

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[***35]

[*308] [**724] The costs of such a requirement would be far from minimal, and thus Tennessee's refusal to pursue this course does not, as respondents suggest, inflict a "gratuitous" harm on the handicapped. On the contrary, to require that the sort of broad-based distributive decision at issue in this case always be made in the way most favorable, or least disadvantageous, to the handicapped, even when the same benefit is meaningfully and equally offered to them, would be to impose a virtually unworkable requirement on state Medicaid administrators. Before taking any across-the-board action affecting Medicaid recipients, an analysis of the effect of the proposed change on the handicapped would have to be prepared. Presumably, that analysis would have to be further broken down by class of handicap -- the change at issue here, for example, might be significantly less harmful to the blind, who use inpatient services only minimally, than to other subclasses of handicapped Medicaid recipients; the State would then have to balance the harms and benefits to various groups to determine, on balance, the extent to which the action disparately impacts the handicapped. In addition, [***36] respondents offer no reason that similar treatment would not have to be accorded other groups protected by statute or regulation from disparate-impact discrimination.

It should be obvious that administrative costs of implementing such a regime would be well beyond the accommodations that are required under Davis. As a result, Tennessee need not redefine its Medicaid program to eliminate [*309] durational limitations on inpatient coverage, even if in doing so the State could achieve its immediate fiscal objectives in a way less harmful to the handicapped.

IV

The 14-day rule challenged in this case is neutral on its face, is not alleged to rest on a discriminatory motive, and does not deny the handicapped access to or exclude them from the particular package of Medicaid services Tennessee has chosen to provide. The State has made the same benefit -- 14 days of coverage -- equally accessible to both handicapped and nonhandicapped persons, and the State is not required to assure the handicapped "adequate health care" by providing them with more coverage than the nonhandicapped. In addition, the State is not obligated to modify its Medicaid program by abandoning reliance [***37] on annual durational limitations on inpatient coverage. Assuming, then, that @ 504 or its implementing regulations reach some claims of disparate-impact discrimination, the effect of Tennessee's reduction in annual inpatient coverage is not among them. For that reason, the Court of Appeals erred in holding that respondents had established a prima facie violation of @ 504. The judgment below is accordingly reversed.

It is so ordered.

Document Separator

ODIS D. HALL, Plaintiff-Appellant, v. UNITED STATES POSTAL SERVICE; PAUL N. CARLIN; and CHESTER COLE, Defendants-Appellees

No. 86-2082

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

857 F.2d 1073; 1988 U.S. App. LEXIS 11557; 47 Fair Empl. Prac. Cas. (BNA) 1540; 47 Empl. Prac. Dec. (CCH) P38,327

August 23, 1988, Filed

NOTICE: Ordered Published, September 27, 1988.

PRIOR HISTORY: [**1]

On Appeal from the United States District Court for the Eastern District of Michigan, No. 85-75844.

JUDGES: Jones, Wellford and Boggs, Circuit Judges.

OPINIONBY: JONES

OPINION: [*1074] JONES, Circuit Judge.

Plaintiff-appellant, Odis D. Hall, brought this action under the Rehabilitation Act of [*1075] 1973, 29 U.S.C. @ 701, et seq. (1982), alleging that the United States Postal Service improperly denied her a position as a distribution clerk based on her physical handicap. The district court granted summary judgment for the defendants. Because we find that there are genuine issues of material fact that remain unresolved, we reverse the court's grant of summary judgment and remand for further proceedings in the district court.

I.

The underlying facts giving rise to this lawsuit are largely undisputed. Plaintiff, Odis D. Hall, who is a 47 year old woman, began working with defendant, the United States Postal Service, in 1968 as a letter carrier in the Detroit Region. At the time she was hired, Hall passed two tests; one for a clerk's position and the other for letter carrier. While she could have taken either position, she chose to be a letter carrier. In that capacity, Hall sorted and delivered mail on [**2] foot, a job which she held for five years. Occasionally during this period she performed what she termed "clerk work" at the main post office during the Christmas rush. Hall could not say exactly what type of clerk work she was doing, but she did indicate that no heavy lifting was required and that the job basically involved sorting mail.

On June 11, 1973, while in the course of delivering mail, an automobile went out of control and struck Hall, causing injury to her right hip, foot and back. As a result of this on-the-job injury, Hall received Workers' Compensation benefits under the Federal Employee Compensation Act ("FECA"). She continued to receive this compensation until June 1982, when it was determined that she was no longer disabled.

On October 7, 1984, fifteen months after she stopped receiving FECA benefits, Hall wrote the Detroit Postmaster requesting that she be "reinstated as a Distribution Clerk at the General Mail facility." J. App. at 105-06. She did not request reinstatement to her carrier position because she could no longer do all of the walking, lifting and bending required of that position. Hall asked to become a distribution clerk because she "assumed" that it [**3] was the same position that she had previously performed with the postal service during the Christmas rush. Moreover, she believed that her physical limitations would not

prevent her from doing the work that she formerly did as a clerk at the main post office. According to Ms. Hall's deposition: "Whatever I was doing then I can do now." Id. at 66.

The job description of a distribution clerk states that the position requires, among other things, lifting up to 70 pounds, kneeling and repeated bending. David Adams, a Supervisor of Employment and Placement at the Detroit Post Office, described in his affidavit the basic functions of a distribution clerk:

The job involves substantial amounts of heavy lifting and bending. Distribution clerks must lift heavy sacks of mail, dump them out and then sort the mail. They also must lift parcel post packages weighing up to 70 pounds. The heavy lifting is an essential part of the job, as it is often done repetitively throughout the day. Id. at 96.

During the course of the application process, Hall was found to be unable to perform the physical requirements of the job -- particularly the heavy lifting and bending -- and therefore medically unsuited [**4] for the distribution clerk position. According to Mr. Adams, this conclusion was based in part upon the opinion of Hall's treating physician who stated that she is able to perform employment not requiring excessive bending and strenuous lifting. The Postal Service's examining physician concurred with this conclusion stating, in his report dated April 15, 1985, that Hall could not meet the criteria of heavy lifting and bending without being hazardous to her health. Therefore, on May 16, 1985, Hall's application was denied.

During the first week of May 1985, prior to her application being formally denied, Hall went with her daughter to the Equal Employment Opportunity ("EEO") Office at the Detroit Post [*1076] Office to file a complaint that she was being discriminated against by the Post Office due to her physical handicap. According to Hall, she spoke with an EEO officer and asked that there be an investigation regarding the denial of her application. Hall alleges that she was told by the officer at this time that she would have to wait until she received the actual denial or termination from the Post Office before any action could be taken. Id. at 6 (Complaint @@ 18-20). Thereafter, [**5] in the third week of May 1985, after receiving the letter informing her that her application was denied, Hall went back to the EEO office with her daughter and renewed her request that an investigation be undertaken regarding her complaint of handicap discrimination. Id. at 7 (Complaint @@ 21-23).

After 180 days passed without any action by the EEO office, Hall, on December 30, 1985, filed her complaint in the United States District Court for the Eastern District of Michigan against the United States Postal Service, Paul H. Carlin, then Postmaster General of the United States, n1 and Chester Cole, Postmaster of the Detroit, Michigan Post Office. n2 In her complaint, Hall alleged she had been denied a position with the Postal Service because of a physical handicap in violation of the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. @ 701 et seq. (1982), the regulations issued thereunder, 29 C.F.R. @ 1613.701 et seq. (1987), and the Michigan Handicappers Civil Rights Act.

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n1 In January 1986, Albert V. Casey was named Postmaster General of the United States, replacing Paul N. Carlin. Pursuant to Fed. R. Civ. P. 25(d)(1), Casey's name has been automatically substituted as a party. [**6]

n2 By order dated May 20, 1986, Chester Cole was dismissed as a party to this lawsuit.

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Prior to answering Hall's complaint, the defendants, on March 11, 1986, filed a motion to dismiss, or in the alternative, for summary judgment. In this motion, the defendants argued, among other things, that the district court did not have jurisdiction over Hall's Rehabilitation Act claim because she had not exhausted her administrative remedies, and, further, that her claim for relief under Michigan law must be dismissed because the Rehabilitation Act provides the exclusive remedy for a federal employee's claim of handicap discrimination. By order dated May 20, 1986, Judge Horace Gilmore granted defendants' motion to dismiss as to the claim arising under the Michigan Handicappers Civil Rights Act, but denied the motion as to the claim arising under the Rehabilitation Act.

Thereafter, on May 30, 1986, the defendants filed their answer to plaintiff's Rehabilitation Act claim, and put forth three affirmative defenses, including the defense that plaintiff had failed to exhaust her administrative remedies.

The parties conducted limited discovery and, on September 19, 1987, the defendants filed a [**7] motion for summary judgment. In their motion, the defendants argued that the Rehabilitation Act forbids discrimination in employment against an "otherwise qualified handicapped individual," which is defined as a person who, with or without reasonable accommodation, can perform the "essential" functions of the position in question. In defendants' view, the 70 pound lifting requirement is an essential function of the distribution clerk position for which Hall applied. Since Hall admittedly could not do this heavy lifting and, further, since defendants are not required by the Act to accommodate Hall by eliminating this essential function, defendants contend Hall is not an "otherwise qualified handicapped individual" and thus cannot maintain a claim of handicap discrimination under the Rehabilitation Act.

In his oral opinion, Judge Gilmore agreed with defendants' contention that the 70 pound lifting requirement for distribution clerks was an essential function of the job and that there was no factual question on this. The court also agreed with defendants' argument that the Postal Service did not have to modify the lifting "requirement" so that Hall could perform the job, because this [**8] would result in the elimination of an essential function of the distribution [*1077] clerk position. Such an accommodation, in the view of the district court, would not be reasonable and, therefore, was not required by the Act.

Because Hall believed there were genuine issues of material fact as to whether the lifting requirement was an essential function and as to whether a reasonable accommodation could be made, she timely filed this appeal.

II.

The Rehabilitation Act of 1973, 29 U.S.C. @ 701 et seq. (1982) ("the Rehabilitation Act" or "the Act"), is a program designed to assist and protect the rights of the handicapped. Title V of the Act prohibits federal agencies, federal contractors, and recipients of federal funds from discriminating against handicapped individuals. Toward this end, section 504 of the Act provides in pertinent part:

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 or under any program or activity conducted by any Executive agency [**9] or by the United States Postal Service.

Id. @ 794 (emphasis added). In addition, section 501 of the Act requires federal employers, including the Post Office, to undertake affirmative action on behalf of the handicapped. Id. @ 791(b). This affirmative action obligation goes beyond the obligation set out in section 504, which, by its terms, requires only non-discrimination. See generally Southeastern Community College v. Davis, 442 U.S. 397, 410-11 (1979). As one court observed:

Section 501 "impose[s] a duty upon federal agencies to structure their procedures and programs so as to ensure that handicapped individuals are afforded equal opportunity in both job assignment and promotion."

Prewitt v. United States Postal Service, 662 F.2d 292, 306 (5th Cir. Unit A 1981) (quoting Ryan v. FDIC, 565 F.2d 762, 763 (D.C. Cir. 1977)); see also Mantolete v. Bolger, 767 F.2d 1416, 1421 (9th Cir. 1985).

The Equal Employment Opportunity Commission ("EEOC"), the agency charged with the enforcement of the Act, has promulgated administrative regulations that define the duties of federal agencies, such as the Post Office, under section 501. The regulations ambitiously [**10] declare "that the Federal Government shall become a model employer of handicapped individuals," 29 C.F.R. @ 1613.703 (1987), and make clear that federal employers have an obligation to make reasonable accommodations for handicapped job applicants:

(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities 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, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

29 C.F.R. @ 1613.704 (1987). The regulations also define the factors that should be considered in determining whether an accommodation would impose an undue hardship on the operation of the agency in question. Id. @ 1613.704(c). n3

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n3 These factors are: 1) the overall size of the agency's program with respect to number of employees, number and types of facilities and size of budget; 2) the type of agency operation, including the composition and structure of the agency's work force; and 3) the nature and the cost of the accommodation.

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[**11]

While it has not always been so, it is now clear, at least in this circuit, that federal employees, including Postal Service [*1078] employees, alleging handicap discrimination in employment may maintain private causes of action against their employers under both section 501 and section 504 of the Rehabilitation Act. n4 Smith v. United States Postal Service, 766 F.2d 205, 206 (6th Cir. 1985) (per curiam); Smith v. United States Postal Service, 742 F.2d 257, 259-60 (6th Cir. 1984). See also Gardner v. Morris, 752 F.2d 1271, 1277-78 (8th Cir. 1985); Mackay v. United States Postal Service, 607 F. Supp. 271, 274 (E.D. Pa. 1985). In her complaint, Hall alleges violations of section 504 of the Act and of the administrative regulations, discussed above, adopted under section 501. As such, we view her complaint as alleging causes of action under section 504 as well as under section 501.

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n4 It is also clear that a handicapped person alleging discriminatory treatment must exhaust administrative remedies as a condition precedent to bringing an action under either section 501 or section 504. See Smith v. United States Postal Service, 742 F.2d 257, 262 (6th Cir. 1984). In her complaint, Hall alleges that she notified the EEO office of her claim of handicap discrimination; asked that an investigation be undertaken with regard to her

claim; and, receiving no response from the agency after 180 days, filed this lawsuit in district court. In their motion to dismiss and/or for summary judgment, the defendants argued that Hall's efforts were not sufficient to satisfy the exhaustion requirement and that, accordingly, her Rehabilitation Act claims must be dismissed for failure to state a claim and for lack of subject matter jurisdiction. The district court did not accept this argument and declined to dismiss Hall's Rehabilitation Act claims. Defendants did not object to this conclusion. Moreover, in their subsequent summary judgment motion, defendants did not reassert the exhaustion issue, nor did they raise the issue in their briefs in this court. Accordingly, while we note that Hall's compliance with the exhaustion requirement is not entirely free from doubt, we decline to address that issue because it is not properly before us.

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[**12]

Because there is no dispute that Hall was handicapped within the meaning of the Act and was denied a position because of her handicap, the essential inquiry in this case, under either section of the Act, is whether Hall was otherwise qualified for the job of distribution clerk. In terms of the regulations, Hall would meet this requirement --and thus be considered a "qualified handicapped person" -- if, "with or without reasonable accommodation, [she] can perform the essential functions of the position in question without endangering" her own health and safety or that of others. 29 C.F.R. @ 1613.702(f) (1987) (emphasis added). This definition is essentially the same as that which courts have used for the operative term in section 504 of the Act -- "otherwise qualified handicapped individual." See, e.g., School Bd. of Nassau County v. Arline, 107 S. Ct. 1123, 1131 n. 17 (1987); Mantolete v. Bolger, 767 F.2d 1416, 1421 (9th Cir. 1985); Jasany v. United States Postal Service, 755 F.2d 1244, 1250 (6th Cir. 1985).

It is evident from a review of the case law in this area that the "otherwise qualified" inquiry requires a consideration not only of the handicapped applicant's [**13] ability to perform the job's essential function, but also whether a reasonable accommodation by the employer would enable the handicapped person to perform those functions. See Arline, 107 S. Ct. at 1131 n.17; Brennan v. Stewart, 834 F.2d 1248, 1261-62 (5th Cir. 1988). As the Supreme Court recently explained:

In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions.

Arline, 107 S. Ct. at 1131 n.17 (citations omitted & emphasis added). To some extent, these inquiries are interrelated in that courts have held that an employer, including a federal employer, is not required to accommodate a handicapped individual by eliminating one of the essential functions of the job. Jasany, 755 F.2d at 1250. In other words, an accommodation that eliminates an essential function of the job is not reasonable.

In determining whether a handicapped individual can perform the essential [**14] functions of a position and, if not, whether [*1079] a reasonable accommodation will enable him or her to do so, a district court "will need to conduct an individualized inquiry and make appropriate findings of fact." Arline, 107 S. Ct. at 1131 (emphasis added). As stated by the Eleventh Circuit in its opinion in Arline (affirmed by the Supreme Court):

While legitimate physical qualifications may be essential to the performance of certain jobs, both that determination and the determination of whether accommodation is possible are fact-specific issues. The court is obligated to scrutinize the evidence before determining whether the defendant's

justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice.

Arline v. School Bd. of Nassau County, 772 F.2d 759, 764-65 (11th Cir. 1985) (citations omitted & emphasis added), aff'd, 107 S. Ct. 1123 (1987).

Applying these principles to this case, we believe the summary judgment order was inappropriate. In [**15] our view, there are genuine issues of material fact as to whether Hall could perform the essential functions of the distribution clerk position and, if she could not, whether a reasonable accommodation by the Postal Service would enable her to perform those functions.

In holding that Hall could not perform an essential function of the distribution clerk position, the lower court concluded that it must accept the Postal Service's job description as controlling. Since the job description states that a distribution clerk must be able to lift 70 pounds, and since Hall admittedly could not lift that much, the court concluded that there was no factual issue as to Hall's inability to perform an essential function of the job of distribution clerk. We believe this was error. As the court stated in Arline, the determination of whether physical qualifications are essential functions of a job requires the court to engage in a highly fact-specific inquiry. Arline, 772 F.2d at 764-65. Such a determination should be based upon more than statements in a job description.

In our view, Hall has raised a legitimate factual dispute as to whether the 70 pound lifting requirement was indeed [**16] essential. Hall spent time doing clerk work in the early 1970's and, as she stated in her affidavit, never observed any clerks -- whether they be "distribution clerks" or something else -- doing any heavy lifting. As Hall points out in her brief, if lifting were "essential" to the position, she most likely would have had to do some lifting herself, or at least would have observed others doing heavy lifting, while she worked in a clerk capacity. While the Postal Service suggests that Hall's prior clerk experience was not in a distribution clerk position, the Postal Service was unable to indicate what type of clerk position this was, even though that information presumably would be within its control. Nor did the Postal Service suggest that Hall's observations regarding the lifting requirements of other clerk positions were not accurate.

We are not persuaded that the affidavit of David Adams, the Employment and Placement Supervisor at the Detroit Post Office, removes the genuine factual dispute regarding the essential functions of the distribution clerk position. Adams's affidavit references the job description, avers that distribution clerks must do substantial amounts of heavy [**17] lifting, and concludes that "heavy lifting is an essential part of the job, as it is done repetitively every day." J. App. at 96. In the first place, the statement that the lifting requirement is "essential" is a legal conclusion. Mr. Adams's assessment of what is "essential" may differ from a court's conclusion after it has conducted the "individualized inquiry" required by Arline. Further, while Mr. Adams asserts that distribution clerks must lift heavy sacks of mail, he does not state that all distribution clerks must do so on a regular basis, nor does he say that clerks could not do the job if they could lift only 25-30 pounds, as Hall can. In short, we think [*1080] that there are material factual questions as to whether the lifting requirement is such an essential function of the job so as to justify the Postal Service's refusal to hire Hall. Accordingly, summary judgment on this issue was inappropriate.

Even if it were concluded that no factual questions existed with respect to whether the lifting requirement was an essential function of the job, there is still the question as to whether Hall could perform that function if she were reasonably accommodated. See Arline, 107 S. [**18] Ct. at 1131 n.17. The district court concluded that no factual questions existed with respect to whether an accommodation was necessary. The court based this conclusion on its

view that to require an accommodation in this case would result in the elimination of an essential function of the job. We believe this was error.

As we mentioned earlier, federal employers have an affirmative obligation to make reasonable accommodations for handicapped employees. The burden is on the employer to present credible evidence that a reasonable accommodation is not possible in a particular situation. 29 C.F.R. @ 1613.704(a); Jasany, 755 F.2d at 1251 (citing Prewitt v. United States Postal Service, 662 F.2d 292, 308 (5th Cir. Unit A 1981)). An accommodation is not reasonable, and will therefore not be required, if, for instance, it imposes an undue hardship upon the operation of the federal employer. However, this determination, like the essential function determination, is highly fact-specific and requires the court to engage in an individualized inquiry to ensure that the employer's justifications "reflect a well-informed judgment grounded in a careful and open-minded weighing of the [**19] risks and alternatives . . . ." Arline, 772 F.2d at 765. Thus, the fact-specific, individualized inquiry as to whether a particular accommodation is reasonable should reflect the practicability to the enterprise involved of making the necessary accommodation.

In this case, the Postal Service failed to introduce any evidence suggesting that it could not reasonably accommodate Hall. Therefore, the lower court was completely unable to make the kind of individualized inquiry on the accommodation issue that is required by Arline. Moreover, while the court was correct in stating that an employer is not required to eliminate an "essential function" in accommodating a handicapped individual, the Postal Service made absolutely no showing that this would occur if they attempted to accommodate Hall. Indeed, the court (and the Postal Service in its brief) evidently operated under the assumption that every accommodation relating to an essential function of a position necessarily eliminates that function. This is simply not the law. Because a particular function is found to be essential does not relieve the federal employer of its burden of showing that the handicapped invididual cannot be reasonably accommodated. To hold otherwise, as we think the district court did, is to ignore the reasonable accommodation aspect of the "otherwise qualified" inquiry.

For the foregoing reasons, [**20] we REVERSE the grant of summary judgment in the defendants' favor and REMAND to the district court for further proceedings.

DISSENTBY: WELLFORD

DISSENT: WELLFORD, Circuit Judge, dissenting:

Hall was a letter carrier before being injured, and in 1982, she was finally determined no longer to be disabled after she had protested this decision administratively. (She requested a hearing by a hearing representative who found her no longer disabled, and this decision was reviewed by the Office of the Director for Federal Employees' Compensation.) n1 Hall specifically requested reinstatement "as a Distribution Clerk at the General Mail Facility." The job description for this position included a requirement of lifting up to 70 pounds, which was, according to postal authorities, "an essential part of the job," as found by the district court. Hall testified that she [*1081] had previously done "clerk work at the main post office . . . during the Christmas rush." (Not "any special job" and she did not know whether the job she did was, or was not, classified as "distribution clerk work.") Hall said that during this short special season work she was not called upon to do any lifting of heavy mail sacks.

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n1 Hall's letter of October 7, 1984 to the Postmaster at Detroit concedes that her claim for continued "Workman's" compensation was denied by the "review" Board.

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[**21]

It is unquestioned that from a medical standpoint, Hall cannot, without hazard to her health, meet the criteria for the distribution clerk job. Just before official denial of her re-employment for this reason, Hall claimed to speak to someone in the Detroit EEO office of the Postal Service to assert discrimination by reason of her physical handicap. After the official denial of her application as distribution clerk, Hall made a further oral request of the EEO officer to investigate her rejection but not specifically based on her asserted handicap. After 180 days without a response, she filed this action under the Rehabilitation Act (29 U.S.C. @ 701 et seq. and the Michigan Handicappers Act. I believe the district court was correct in granting the defendants judgment. Accordingly, I dissent.

The Rehabilitation Act prescribes only that "otherwise qualified" persons shall not be excluded from Postal Service Work by reason of a handicap. 29 U.S.C. @ 794. n2 Under the statutory scheme, the Postal Service must make "reasonable accommodation" to a "qualified applicant." Defendants claimed in their motion for summary judgment that plaintiff failed to exhaust her administrative remedies [**22] before proceeding with this suit. There is no record that Hall ever filed any formal written complaint of handicap discrimination. Plaintiff has the burden of showing that she fulfilled administrative requirements before proceeding into federal court to sue the Postal Service. She has merely asserted that she wanted and asked about an EEO officer's investigation "concerning her complaint of handicap discrimination." She has never claimed or demonstrated any filing of a written complaint asserting handicap discrimination as is required, nor has she asserted any excuse for not following this necessary prerequisite to this suit. n3 Defendants have questioned the exhaustion necessity, and should have been granted a motion to dismiss on this basis. Smith v. United States Postal Service, 742 F.2d 257 (6th Cir. 1984).

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n2 Judge Jones makes reference to 29 U.S.C. @ 501, which sets out that handicapped persons, if qualified, are to be afforded "equal opportunity" to do work with the Postal Service. 29 U.S.C. @ 501. Plaintiff made no such reference in her complaint.

n3 Hall stated that "she assumed that the EEO officer had filed or completed the necessary paperwork" based on an oral complaint which is uncertain. (Emphasis added).

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[**23]

Even if not dismissed on grounds of failure to exhaust, defendants were entitled to summary judgment for the reasons stated by Judge Gilmore. Hall asserted a claim in her complaint only under the Rehabilitation Act, 29 U.S.C. @
701 et seq., specifically @ 794, and the regulations spelling out a "reasonable accommodation." She did not assert a claim under @ 501, nor claim that defendants had any affirmative duty toward her except "not [to] discriminate against a qualified physicially or mentally handicapped person."

Plaintiff has not demonstrated, as a matter of law, that she can perform an essential function of the position she herself sought in writing. Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985). See also School Board of Nassau County, Fla. v Arline, U.S. , 107 S. Ct. 1123, 1131 n. 17 (1987). As Judge Jones recognizes, "an accommodation that eliminates an essential function of the job is not reasonable." That plaintiff served in a short time, part-time clerk position at some earlier period which did not, according to her recollection, require heavy lifting or "excessive bending" is

no basis upon which to counter the undisputed requirements [**24] of the particular job she sought--distribution clerk. There was no factual material issue as to Hall's inability to perform that job as to one or more of its essential functions. The grant of summary judgment was clearly indicated. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). [*1082] Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

On either or both bases herein discussed, judgment should be affirmed for defendants.

JAMES L. WONDER, Appellant, v. DEPARTMENT OF ENERGY, Agency.

DOCKET NUMBER SE07528610243

MERIT SYSTEMS PROTECTION BOARD

35 M.S.P.R. 209; 1987 MSPB LEXIS 247

September 30, 1987

[*1]

Lonnie Davis, Seattle, Washington, Disabilities Law Project, for the appellant.

Joseph F. Bennett, Portland, Oregon, for the agency.

OPINION:
BEFORE

Daniel R. Levinson, Chairman

Maria L. Johnson, Vice Chairman

Dennis M. Devaney, Member

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of a decision of an administrative judge of the Board's Seattle Regional Office, which denied his motion for reimbursement of fees for a sign language interpreter. n1 For the reasons discussed below, the appellant's petition is DENIED for failure to meet the criteria for review set forth at 5 C.F.R. @ 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. @ 1201.117, however, and AFFIRMS the decision as MODIFIED in this Opinion and Order.

n1 The appellant is deaf.

BACKGROUND

The appellant petitioned the Board's Seattle Regional Office for appeal of the agency's action removing him from his GS-9 position as a Computer Programmer for unacceptable performance and unauthorized use of the agency's computer system. On the day of the scheduled hearing before the administrative judge, the parties announced that a settlement had [*2] been reached. With an interpreter present, the appellant's counsel stated the terms of the agreement for the record. The parties' settlement of the issue in the appeal obviated the need for an evidentiary hearing. A copy of the settlement agreement, signed by both parties' attorneys, was submitted for inclusion into the record. See Appeal File, Tab 16. The administrative judge then dismissed the appeal based on the terms of the settlement agreement.

In his petition for review, the appellant contends that, because he is deaf, he needed an interpreter in order to understand and participate in the hearing and that he is entitled to one under 29 U.S.C. @ 794. Specifically, the appellant states that the policy of nondiscrimination set forth in section 794 requires the appointment of an interpreter at Board expense in order to provide him with meaningful access the hearing process and, once it is shown that he is deaf, no further showing is needed to grant his motion for reimbursement of interpreter fees.

ANALYSIS

Pursuant to 29 U.S.C. @ 794, n2 a handicapped employee may not "solely be reason of his handicap, be excluded from participation in, be denied the benefits of, [*3] or be subjected to discrimination . . . under any program or activity conducted by any Executive agency. . . ." In addition, the appellant has both a statutory and regulatory right to a hearing on his initial appeal to the regional office. See 5 U.S.C. @ 7701(a)(1); 5 C.F.R. @ 1201.24(d). Therefore, reasonable accommodations "may have to be made" to assure "otherwise qualified handicapped individuals the meaningful access to which they are entitled." See Alexander v. Choate, 105 S.Ct. 712, 721 (1985).

n2 Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. @ 794). In enacting 29 U.S.C. @ 794, Congress has in effect codified the constitutional right to equal protection. See Halderman v. Pennhurst State School and Hospital, 446 F.Supp. 1295, 1323 (D.C. Pa. 1977), aff'd in part, reversed in part on other grounds, 612 F.2d 84 (3rd Cir. 1979), reversed on other grounds, 101 S.Ct. 1531 (1981), on remand 673 F.2d 647 (3rd Cir. 1982).

The record indicates that the appellant did not submit his request for the designation of an interpreter until the day of the scheduled hearing. See Appeal File, Tab 14. Although an interpreter was present [*4] at the hearing where the parties entered on the record their settlement on the merits of the appellant's appeal, the appellant has not established why the presence of an interpreter was necessary at the proceedings. The appellant has not shown that his hearing impairment affected his communications with his attorney or the administrative judge. n3 From the record of the settlement hearing, the information communicated at the hearing was not complex, did not involve questions and the presentation of testimony of witnesses, or extend over a lengthy period of time.

n3 Cf. 28 U.S.C. @ 1827(d) (which provides for the use of interpreters in courts of the United States in proceedings involving the hearing impaired).

As noted above, only the terms of the settlement agreement were stated at the hearing before the administrative judge. Thus, the appellant had no need to testify with regard to the factual issues relating to the merits of the removal action, present witnesses in support of his contentions, or otherwise present any available defense at the hearing. Nor were any witnesses and testimony presented by the agency. The appellant's attorney also signed the written settlement [*5] agreement, which the appellant apparently had the opportunity to read and to discuss with his attorney. In addition, no objection was raised to any stipulation contained in the written agreement, and there is no allegation that the appellant, or his attorney, did not fully comprehend, or appreciate the import of, the terms of the settlement. In light of the very limited and specific events which occurred on the day of the hearing, we find that the appellant was not denied any due process rights or equal protection, or that any principles of fairness and justice were violated. n4

n4 Cf. United States v. Tapia, 631 F.2d 1207, 1210 (5th Cir. 1980) (under 28 U.S.C. @ 1827, the basic inquiry on whether or not the failure to provide an interpreter was error must be whether such failure made the trial fundamentally unfair in a criminal case).

The Board finds that, on this record, the appellant has not demonstrated that he did not have meaningful access to the proceedings as they occurred. Thus, we need not decide whether there would have been a violation of 29 U.S.C. @ 794 if a hearing on the merits of the appellant's case had been held and an interpreter was not present. [*6] However, where the ability of a qualified handicapped individual to understand and communicate with counsel with regard to proceedings before the Board is impaired, the Board is obligated to provide an interpreter. See generally 29 U.S.C. @ 794.

Since the appellant's substantive rights were not affected or denigrated, the administrative judge did not err in denying the motion for interpreter's fees. See Karapinka v. Department of Energy, 6 M.S.P.R. 124, 127 (1981)

(administrative judge's procedural error is on no legal consequences unless it is shown that it has adversely affected a party's substantive rights).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. @ 12201.113(c).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal, if the court has jurisdiction. 5 U.S.C. @ 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

INDEPENDENT HOUSING SERVICES OF SAN FRANCISCO; CALIFORNIA ASSOCIATION OF PERSONS WITH HANDICAPS; INDEPENDENT LIVING CENTER OF SAN FRANCISCO; HELEN RODRIGUEZ, Plaintiff, v. FILLMORE CENTER ASSOCIATES; DMJM; SAN FRANCISCO REDEVELOPMENT AGENCY; DOES 1-25, Defendants

No. C 91-1220 RFP

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1991 U.S. Dist. LEXIS 14960

October 16, 1991, Decided
October 17, 1991, Filed

JUDGES: [*1]

Robert F. Peckham, United States District Judge.

OPINIONBY: PECKHAM

OPINION: ORDER

INTRODUCTION

In the current action defendant architectural firm Daniel, Mann, Johnson, & Mendenhall ("DMJM") is moving to dismiss the complaint against it for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

BACKGROUND

This lawsuit arises out of the construction of the Fillmore Center Project ("project") in San Francisco. The project, which consists of 1,113 low-rent housing units, was started in 1984 and is under construction by Fillmore Center Associates ("FCA").

The plaintiffs, Independent Housing Services of San Francisco, California Association of Persons with Handicaps, Independent Living Center of San Francisco, and Helen Rodriguez allege that due to the federal and state funding of FCA and the San Francisco Redevelopment Agency ("SFRA"), a publicly funded developer support program, as well as the latter's use of eminent domain, the architects ("DMJM") are beneficiaries of federal and state financial assistance.

The plaintiffs further allege that none of the units are fully handicapped accessible and that the construction of [*2] the project violated federal, state and local handicap access requirements.

DMJM is an architectural firm based in San Francisco and exists under the laws of California. DMJM was the architect of record on the project and is involved in this lawsuit because its architectural design allegedly did not provide sufficient handicap accessibility. The federal and state claims against DMJM arise out of their alleged failure to incorporate any handicapped accessible apartments into their design of the Fillmore Center complex of low-rent apartments. The plaintiffs allege that DMJM knew, or should have known, that the project was designed with insufficient handicap accessibility.

Plaintiff asserts nine causes of actions against DMJM, Fillmore Center

Associates and the San Francisco Redevelopment Agency. Three of the causes of action arise under federal law. The sixth cause of action alleges violation of the Rehabilitation Act of 1973, 29 U.S.C. @ 794, the seventh cause of action alleges violation of Section 1983 of the Civil Rights Act, 42 U.S.C @ 1983, and the eighth cause of action alleges violation of the Architectural Barriers Act of 1968, 42 U.S.C. @ 4151.

In the remaining six actions [*3] of the complaint, the plaintiffs allege violation of state building code, California Building Code Title 24, violation of California Government Code @ 11135, violation of California Government Code @@ 4450 et seq., violation of the Unruh Civil Rights Act, California Civil Code @@ 51 et seq., violation of Unfair Business Practices Act, California Business and Professions Code @ 17200 and declaratory relief.

The defendants argue that none of the federal or state causes of action, however, state a claim against DMJM upon which relief should be granted.

DISCUSSION

A. StAndard for Motion to Dismiss

In considering defendant's motion to dismiss, this court must presume that the plaintiffs' allegations are true, and grant the motion only if it appears "beyond doubt" that the plaintiff can prove no set of facts entitling it to relief. Sun Savings & Loan Assoc. v. Dierdorff, 825 F.2d 187, 191 (9th Cir. 1987); Federal Savings and Loan Ins. Corp. v. Musacchio, 695 F.Supp. 1053, 1058 (N.D. Cal. 1988). Motions to dismiss will therefore be viewed with disfavor under this liberal standard. Intake Water Co. v. Yellowstone River Compact Comm., 590 F.Supp. 293 (D. Mont. 1983), [*4] aff'd, 769 F.2d 568 (9th Cir. 1984), cert. denied, 476 U.S. 1163, 106 S.Ct. 2288, 90 L.Ed.2d 729 (1985). A complaint may be dismissed as a matter of law for two reasons: (1) lack of a

cognizable legal theory or (2) insufficient facts under a cognizable theory. 2A J. Moore, Moore's Federal Practice para. 12.08 at 2271 (2d ed. 1982), cited in Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984). To dismiss, "it must appear to be a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved." Wool v. Tandem Computers. Inc., 818 F.2d 1433, 1439 (9th Cir. 1987).

B. Defendant's Motions to Dismiss All Federal Claims

The plaintiffs allege three federal claims against DMJM: (1) violation of the Rehabilitation Act of 1968; (2) violation of the Architectural Barriers Act of 1973; and (3) violation of Section 1983 of Title 42 of the United States Code.

1. The Rehabilitation Act of 1973

The plaintiffs claim that DMJM's failure to incorporate handicapped accessible apartments into the complex violates Section 504 of [*5] the Rehabilitation Act of 1973, 29 U.S.C. @ 794, and the regulations promulgated thereunder, which prohibit discrimination against the physically handicapped and disabled persons by recipients of "federal financial assistance".

Defendant contends that plaintiff must exhaust its administrative remedies before appearing in federal court, with regard to its allegation of a violation of the Rehabilitation Act. However, in Smith v. Barton, 914 F.2d 1330 (9th Cir. 1990), the Ninth Circuit explicitly found that such exhaustion is not required. First, the Smith court found that the statute had been consistently construed as providing a private right of action. 914 F.2d at 1338 (citing Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1107 (9th Cir. 1987) (holding in part that a private right of action is available if the defendants are not shielded by immunity or uninvolvement with the decision-making process)). Next, the Ninth Circuit found that "administrative remedies, which result in suspension or termination of the federal assistance to the institutional recipient, do not afford individual complainants adequate [*6] relief. Therefore, private plaintiffs suing under section 504 need not first exhaust administrative remedies." Smith, 914 F.2d at 1338. Thus, defendant's contention is without merit.

In order to prevail in a case brought under section 504, however, a plaintiff must show that the plaintiff is seeking to inhabit a residence that exists as part of a program or activity receiving federal financial assistance. Doe v. New York Univ., 666 F.2d 761, 774-75 (2nd Cir. 1981). This test as been adopted by the Ninth Circuit and was reiterated in Smith v. Barton, 914 F.2d 1330 (9th Cir. 1990).

The plaintiffs have failed to allege that DMJM received any federal funds either directly or indirectly. The Rehabilitation Act applies to "programs or

activities" that receive federal financial assistance. The term " federal financial assistance" has been broadly construed to encompass assistance of any kind, direct or indirect. Bellamy v. Roadway Exp., Inc., 668 F.Supp. 615 (N.D. Ohio 1987) (citing Consolidated Rail Corporation v. Darrone, 465 U.S. 624, 104 S.Ct 1248, 79 L.Ed.2d 568 (1984); [*7] Arline v. School Board of Nassau County, 772 F.2d 759 (11th Cir. 1985), cert. granted and limited on other ground, 475 U.S. 1118 (1986), Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center, 765 F.2d 1278 (5th Cir. 1985), cert. denied, 476 U.S. 1142 (1986)). A "recipient" of federal assistance includes any private agency, institution, or organization to which federal financial assistance is extended for any program or activity, directly or through another recipient. 29 C.F.R. @ 8.3 (1990). Discovery may be necessary to determine whether the program or activity receives "federal assistance," and therefore the question ordinarily cannot be resolved on an motion for judgment on the pleadings. However, where plaintiff has simply failed to allege the direct or indirect receipt of financial assistance, the claim may be susceptible to dismissal under Rule 12(b)(6). In Bellamy v. Roadway Express, Inc., plaintiffs simply alleged that the defendant was "a contractor with the United States." This failure to allege federal financial assistance was fatal to the Rehabilitation Act claim. 668 F.Supp. at 618. [*8]

The Supreme Court has made clear that Section 504's scope is limited to those who actually "receive" federal financial assistance. Dept. of Transportation v. Paralyzed Veterans, 477 U.S. 597, 106 S.Ct 2705, 91 L.Ed.2d 494 (1986) (holding that commercial airlines are not recipients of federal financial assistance ("FFA") under section 504 for six reasons.) n1 The importance of Justice Powell's opinion lies in the analysis of legislative intent to show that the airlines are "beneficiaries" and not "recipients" of the federal financial assistance to airports, and therefore cannot be reached under the Rehabilitation Act. Congress sought to impose section 504 coverage as a condition or obligation tied to the recipient's agreement to accept federal funds. By so limiting coverage to recipients, Congress imposed section 504's obligations upon those who are in a position to accept or reject those obligations as part of the decision whether or not to "receive" federal funds. Id. Only parties in the position of direct or indirect recipients are defined as the "recipients" for purposes of the Act. Id. To tie section 504's scope to economic benefit [*9] derived from the assistance in question would give the section almost limitless coverage. Id. "Indirect" assistance would occur when the government used an intermediary to give aid to a third party. Id.

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n1 (1) airport officials receive FFA, not airlines, (2) scope of @ 504 is limited to actual receipt of funds, (3) airlines are beneficiaries of FFA, not indirect recipients, (4) Congress did not intend limitless scope, hence @ 504 does not cover beneficiaries, (5) the scope of @ 504 does not fuse airports and

airlines in a single program or activity, and (6) the air traffic control system is not a form of FFA and the airlines are solely beneficiaries.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In the current case, plaintiffs fail to allege that DMJM was a recipient, rather than a beneficiary, of federal financial assistance. See Complaint paras. 22-25,60. n2 DMJM correctly concludes that due to plaintiffs' failure to allege direct or indirect receipt of "federal financial assistance", the claim should be dismissed.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 Para. 25. At all times mentioned, and particularly at the time DMJM drew the plans and specifications and supervised the construction, DMJM knew, or in the exercise of reasonable care should have known, that the Fillmore Center project was being constructed in violation of state and federal laws providing accessibility to physically handicapped and disabled persons.

Para. 60. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. @ 794, and the regulations promulgated thereunder, as revised, prohibit discrimination against physically handicapped and disabled persons by recipients of federal funds in the administration of their programs. The defendants are, and have been, under an affirmative duty to plan, design, and construct a housing project without physical obstacles that limit access to and usage of housing units, and to achieve accessibility to its programs for physically handicapped and disabled persons.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[*10]

In this case, plaintiffs' only claim is that "the defendants are, and have been, under an affirmative duty to plan, design, and construct a housing project without physical obstacles . . ." Complaint para. 60. Plaintiffs have not sufficiently alleged the " federal financial assistance" hurdle of section 504 with regard to DMJM. Accordingly, the Rehabilitation Act claims against DMJM are dismissed.

2. The Architectural Barriers Act of 1968

Plaintiff contends that the failure to include handicapped accessible facilities in the Fillmore Center also exposes DMJM to liability under the Architectural Barriers Act of 1968 because that Act does not apply solely to recipients of federal financial assistance. Defendant argues that the Architectural Barriers Act applies only to federal financial aid recipients and since it is not a recipient of federal financial assistance, it is not a proper

party under the Architectural Barriers Act.

The overall purpose of the Architectural Barriers Act was "to insure that all public buildings constructed in the future by or on behalf of the Federal Government or with loans or grants from the Federal Government are designed and constructed in such a way [*11] that they will be accessible to and usable by the physically handicapped." Rose v. United States Postal Service, 774 F.2d 1355, 1358 (9th Cir. 1984) (citing S.Rep. No. 538, 90th Cong., 1st Sess., reprinted in 1968 U.S.Code Cong. & Admin. News 3214, 3215).

Section 4151 of the Architectural Barriers Act excepts "a privately owned residential structure not leased by the government for subsidized housing programs." 42 U.S.C. @ 4151. In the discussion of Rose v. United States Postal Service, 774 F.2d 1355 (9th Cir. 1984) (holding in part that all buildings leased to the United States Post Office after January 1, 1977 must be handicapped accessible), the Ninth Circuit interprets the act as "requiring buildings constructed or leased by the federal government to be made accessible to handicapped persons." 774 F.2d at 1356. In the current case, the plaintiffs have not alleged that the Fillmore Center was constructed or leased by the federal government.

Further, plaintiffs have failed to allege that DMJM was a recipient of federal financial assistance rather than a beneficiary, see supra, consequently DMJM has not sufficiently alleged [*12] liability under the Architectural Barriers Act. Locascio v. City of St. Petersburg, 731 F.Supp 1522 (M.D. Fla. 1990). "Construction which is subject to the Barriers Act and/or which is a 'program or activity' subject to @ 504 must conform with Uniform Federal Accessibility Standards." Locascio, 731 F.Supp. at 1529. The Uniform Federal Accessibility Standards, 41 C.F.R. 101, et seq., were adopted August 2, 1984, by the General Services Administration and HUD. Part 41 of 28 C.F.R. defines a recipient of federal financial assistance as "any 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 or a recipient, but excluding the ultimate beneficiary of the assistance." 41.3(d) (emphasis added.). Since plaintiffs have not sufficiently alleged receipt of federal financial assistance, they have not alleged liability under the Architectural Barriers Act.

The interpretation that plaintiffs have not sufficiently alleged liability under the [*13] Architectural Barriers Act because it did not allege receipt of federal funds is supported by the ability of the Architectural and Transportation Barriers Compliance Board to remedy a violation solely by the withholding of funds. This remedy would only be practical if each party that violated the Act could be punished in the fashion available to the Board.

The interpretation of the Architectural Barriers Act as requiring a similar relationship to the federal government as the Rehabilitation Act is further supported by Disabled in Action of Pennsylvania v. Pierce, 606 F.Supp. 310 (E.D. Pa. 1985) in which the court found that though the Barriers Act did not appear to mandate anything that section 504 did not, Congress intended section 504 to be "an independent weapon in its barrier-free arsenal" 606 F.Supp. at 313.

Accordingly, we grant defendant's motion to dismiss the Architectural Barriers Act cause of action.

3. Title 42 U.S.C. @ 1983

Plaintiffs appear to allege that DMJM violated 42 U.S.C. @ 1983 because it was involved in a conspiracy to harm the plaintiffs by depriving the plaintiffs of their federal rights. Plaintiffs claim DMJM denied [*14] them handicapped accessible housing. They further allege that even if the Rehabilitation Act claim is dismissed against DMJM, there is still such a claim against the other defendants and as such, a conspiracy may still be shown to have existed. Defendant argues that, since the Rehabilitation Act does not apply to DMJM, DMJM has not deprived plaintiff of their federal rights.

However, to act "'under color of' state law for section 1983 purposes does not require that the defendant be an officer of the State. It is enough that it is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for the purposes of section 1983 actions." Dennis v. Sparks, 449 U.S. 24, 28, 101 S.Ct 183, 189, 66 L.Ed.2d 185, 191 (1980). An otherwise private person acts "under color of" state law when engaged in a conspiracy with state officials to deprive another of federal rights. Tower v. Glover, 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984). In Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983), [*15] for example, the defendants acted under color of state law when they engaged a police officer to help evict the plaintiff tenant. The court's finding of a conspiracy under section 1983 hinged on the required showing of deliberateness with which the color of law was invoked. 708 F.2d at 390.

In this case, the plaintiffs have claimed that the SFRA is a state actor. Complaint para. 19. Plaintiffs further claim that the Fillmore Center Associates is a recipient of state and federal funds. Complaint para. 18. Plaintiffs do not allege that DMJM is a state actor or received state or federal funds.

To survive a motion to dismiss, plaintiffs must allege with sufficient factual particularity that the private and state actors "directed themselves towards an unconstitutional act by virtue of a mutual understanding or agreement." Hauptmann v. Wilentz, 570 F.Supp. 351, 382 (D.N.J. 1983), aff'd mem, 770 F.2d 1070 (3rd Cir. 1985); see also Annunziato v. The Gap, Inc., 744 F.2d

244, 250-52 (2d Cir. 1984); Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204, 1206-07 (7th Cir. 1980). "To prove a conspiracy [*16] between private parties and the government under section 1983, an agreement or 'meeting of the minds' to violate constitutional rights must be shown." Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1983), citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 152, 158, 90 S.Ct. 1598, 1609, 1626, 26 L.Ed.2d 142, 151, 155 (1970) (Black, J., concurring).

Plaintiffs allege that the Fillmore Center project was "constructed in accordance with the plans and specifications prepared and drawn by DMJM, and under DMJM's supervision." Complaint para. 24. Further, the Complaint alleges that "defendants, each of them, in doing or failing to do each of the acts alleged in this complaint, were acting for each other in a common scheme to cause damage to the plaintiffs." Complaint para. 27. "The acts and omissions of defendants alleged herein are and were under color of law and official policy and custom, as hereinabove set forth, and deprive plaintiffs of their rights in violation of 42 U.S.C. @ 1983." Complaint para. 64.

Since it does not "appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could [*17] be proved," Wool v. Tandem Computers, Inc., 818 F.2d at 1439, we deny defendant, DMJM's motion to dismiss on the 42 U.S.C. @ 1983 claim.

C. Defendant's Motions to Dismiss All State Claims

The plaintiffs raise four state-based causes of action against the defendants, California Government Code @ 11135 (discrimination under program receiving financial assistance from the state), California Government Code @ 4450 (mandating equal access for physically handicapped), California Civil Code @@ 51, et seq. (the Unruh Civil Rights Act) and the Unfair Business Practices Act, California Business and Professions Code @ 17200.

1. Strict Liability Protection Bars All State Claims

DMJM alleges that plaintiffs are holding it strictly liable for construction of housing projects. DMJM goes on to argue that since it is a service provider, under California law, architects cannot be strictly liable, and that all state law claims should fail, absent a showing of negligence.

It is true that, in California, "where the primary objective of a transaction is to obtain services, the doctrines of implied warranty and strict liability do not apply." Stuart v. Crestview Mut. Water Co., 34 Cal. App. 3d 802, 811 (1973). [*18] "Those who sell their services for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or intentional misconduct." Del Mar Beach Club Owners Assn. v. Imperial Contracting Co., 123 Cal. App. 3d 898 (1981).

However, it is equally clear that these cases fall within the realm of product liability and warranty. For example, in Del Mar Beach Club, 123 Cal. App. 3d 898, upon which defendant relies, a strict liability action could not stand against engineers or architects where the cause of the action lay in the defective design and construction of a project on an unstable bluff.

Architects may be protected in product liability cases absent a showing of negligence, but the four claims made by the plaintiff do not involve questions of warranty. Plaintiff alleges violating Cal. Government Code @ 11135 (discrimination under program receiving state financial assistance) , Government Code @ 4450 (mandating access for physically handicapped if built with state or local funds), the Unruh Civil Rights Act and the Unfair Business Practices Act. There is no total bar to the plaintiffs' state law [*19] claims, because none of plaintiffs' causes of action plead for strict liability resulting from a defective product or process.

2. Plaintiffs Must Show Certificate of Merit

Defendant argues that plaintiffs' state law claims must be dismissed because plaintiffs have not filed a "Certificate of Merit" as required by California Code of Civil Procedure @ 411.35. That provision states, in relevant part that:

(a) In every action,. . . arising out of the professional negligence of a person holding a valid architect's certificate . . . the plaintiff's attorney shall file the certificate specified by subdivision (b).

(g) The failure to file a certificate in accordance with this section shall be grounds for a demurrer pursuant to section 430.10 or a motion to strike pursuant to section 435.

We need not decide whether, under the Erie doctrine, this code section must be considered by this court. Even assuming for the moment that this is a substantive state law, it is inapplicable to the case at hand.

As noted it legislative history, the bill "[r]equires . . . that an attorney, on or before service of a complaint on a defendant, file a certificate of intent in a malpractice action against [*20] a licensed architect, professional engineer, or land surveyor." Digest of Bill AB 357 para. 1 (Aug. 29, 1979). (emphasis added). "The purpose of this bill is to reduce the number of frivolous claims filed against design professionals, thereby reducing legal defense costs and discouraging increases in malpractice insurance rates for design professionals." Id. at 2. (emphasis added).

This is not a cause of action for malpractice. Plaintiffs have not alleged that they were clients of DMJM. Therefore, a certificate of merit is not required in order for plaintiffs to pursue their state claims.

3. California Government Code 11135

As a first state cause of action, plaintiffs allege that the defendants violated California Government Code @ 11135, which states that,

"No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color, or mental or physical disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial assistance from the state."

"Program or activity" means:

"any project, action or procedure undertaken [*21] directly by recipients of State support or indirectly by recipients through others by contracts, arrangements or agreements, with respect to the public generally or with respect to any private or public entity. Such programs and activities include, but are not limited to . . . housing." 22 Cal. Code Reg. @ 98010

There is a private right of action under section 11135, prohibiting discrimination against handicapped persons by any program or activity funded directly by the state or receiving financial assistance from the state. Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103 (9th Cir. 1987) (holding that the similarity of language between section 11135 and section 504 supports a finding of a private right of action under section 11135) (citing See Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980) (private right of action under section 504)). California has explicit policy that encourages and enables disabled persons to participate fully in the social and economic life of the state Cal. Gov. C. @ 19230(a). Section 11136, providing an administrative remedy for section 11135, is not written in mandatory or exclusive [*22] terms and does not preclude a private financial remedy. Id.

However, plaintiffs have failed to state a claim against DMJM because they have not alleged that DMJM is a recipient of "state financial assistance". "The basic statutes [including section 11135] prohibit discrimination in any program receiving federal or state financial assistance, on the basis of physical handicap or disability." Martin v. City of Los Angeles, 162 Cal. App. 3d 559, 562, 209 Cal. Rptr. 301, 302 (1984). See, In re Marriage of Carney, 24 Cal.3d 725, 157 Cal. Rptr. 383 (1979).

In People v. Levinson, 155 Cal. App. 3d Supp. 13, 16, 203 Cal. Rptr. 426, 428 (1984), the court applied a two part test, first determining if the defendants were state or local agents, and if so, did the agency's actions in the case at hand meet the definition of program or activity under section 11135. Levinson held that a municipal court was a local agency, but its referral to traffic school was not a "program or activity," hence the municipal court was not

required to provide an interpreter for a deaf man attending traffic school. [*23] 155 Cal. App. 3d Supp. 13 at 19.

The Levinson court determined that the legislature's intended reach of section 11135 is to recipients of "state financial assistance" or "state support". "Recipient" is defined by Title 22 Cal. Admin. Code @ 98010 as "any contractor, local agency, or person, who regularly employs five or more persons and who receives state support, as defined in this section, . . ., but excluding the ultimate beneficiary 'of the State support." 22 Cal. Admin. Code @ 98010.

In the current case, plaintiff does not allege that DMJM was in any way a direct or indirect recipient of state financial assistance or state support. Accordingly, we grant defendants motion to dismiss the section 11135 cause of action.

4. California Government Code @ 4450

The second state cause of action arises out of plaintiffs' claim that the defendants violated California Government Code @@ 4450-4458. These sections were enacted to "insure that all buildings . . . constructed in this state by use of state, county or municipal funds . . . shall be accessible to and usable by the physically handicapped." Govt.C. @ 4450. Sections 4450-4458 are the principal statutory [*24] scheme regarding access to and use of public facilities by disabled persons. Donald v. Sacramento Valley Bank, 209 Cal.App.3d 1183, 1191 (1989).

Not all public buildings are subject to Sections 4450-4458. Donald v. Sacramento, 209 Cal.App.3d at 1192. "Generally, the requirements for access and use are applicable only to buildings and facilities stated in Section 4450 intended for use by the public, which have any reasonable availability to, or usage by, physically handicapped person, . . . " Cal.Gov.Code @ 4451(a).

The parties did not address the question of whether the Fillmore Center project is a facility that is subject to these Sections of the Government Code. Moreover, the parties did not discuss the issue of who is subject to Government Code Sections 4450-4458, and whether DMJM is subject to the legislation. Thus, we will not decide these questions here. We will only address the questions that the parties raised regarding mootness and the availability of damages.

a. Injunctive Relief Under Section 4450

The only remedy contained solely within Govt.C. @ 4452 is injunctive relief. Though DMJM alleges that they have completed the design [*25] of the building and that their role in the Fillmore Center is complete, we decline to grant defendant's motion to dismiss on the ground that future work on the Fillmore Center by DMJM may meet the standard of defendant's "capability of repetition,

yet evading review". Nebraska Press Assoc. v. Stewart, 427 U.S. 539, 96 S.Ct 2791, 49 L.Ed.2d 683 (1976). n3

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n3 Injunctive relief was denied in Cafe Royale because the restaurant had long since gone out of business. Cafe Royale, 218 Cal.App.3d at 183-84.

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b. Damages Under Section 4450

In a handicapped individual's action, seeking damages against a restaurant for its failure to construct, alter, and maintain its facilities in violation of Health & Saf. Code @ 19955 et seq., the court interpreted statutes Heath & Saf @@ 19955 et seq., and Gov. @@ 4450 et seq., as not providing a damages cause of action independent of the Unruh Civil Rights Act. Donald v. Cafe Royale, Inc., 218 Cal. App. 3d 168, 172, 266 Cal. Rptr. 804, 807 (1990). [*26] (holding in part that a restaurant with separate and limited accommodations (a few tables in a different area) for physically handicapped diners did not constitute equal access, but that damages were unavailable absent a showing of discrimination on a particular occasion.) n4

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n4 "Although Cafe Royale was not in compliance with section 19955 et seq. and section 4450 et seq., . . ., these statutes do not provide a cause of action for damages independent of section 54 et seq. to a physically disabled individual denied access." Donald, 218 Cal.App. at 182-83 (1990) (emphasis in original).

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Thus, with regard to the individual plaintiff, in order to establish damages under section 4450, Ms. Rodriguez must have taken the additional step of establishing that she was denied equal access on a particular occasion in order to claim damages under the Unruh Act. Cafe Royale, Inc., 218 Cal. App. 3d at 183. Plaintiff does not allege that she has ever been denied housing at the Fillmore [*27] Center project. Ms. Rodriguez only claims to have "been severely damaged by the inaccessibility she has encountered." Complaint para. 17. However, she has not alleged that she found the Fillmore project inaccessible on a particular occasion, that she would be interested in living at the Center, or that she could afford to live there. See Complaint paras. 15-16. Therefore, plaintiffs' request for damages is dismissed.

5. The Unruh Civil Rights Act

The plaintiffs' third state claim is a breach of plaintiffs' civil rights under the Unruh Civil Rights Act, California Civil Code @@ 51, et seq. ("Unruh Act"). An apartment complex is a business enterprise within the meaning of the act. Flowers v. John Burnham & Co., 21 Cal.App.3d 700, 703 (1972) (citing Swann v. Burkett, 209 Cal.App.2d 685); see also Marina Point, Ltd. v. Wolfson, 30 Cal.3d 721 (1982). The defendants claim that due to the plaintiffs' failure to attempt to rent from Fillmore Center on a particular occasion, damages are unavailable as a remedy under section 54.3. Furthermore, defendants contend that since their involvement with the Fillmore Center Project [*28] is complete, that plaintiffs' entire claim should be dismissed.

a. Plaintiffs' Claims Under Section 54

The underlying legislative intent of Civ. Code, sections 54 et seq., n5 which declares that all physically handicapped persons are entitled to the same rights as non-handicapped persons to full and free use of public facilities and places, is to require affirmative conduct so as to guarantee access to the physically handicapped upon construction of new facilities or with the repair and alteration of existing facilities. People ex rel. Deukmejian v. CHE, Inc., 150 Cal. App. 3d 123, 197 Cal. Rptr. 484 (1983).

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n5 "Blind persons, visually handicapped persons, and other physically disabled persons shall have the same right as the able-bodied to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities, and other public places." California Civil Code @ 54.

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The section requires that "physically disabled persons shall be entitled to full and [*29] equal access, as other members of the general public, to all housing accommodations offered for rent, lease, or compensation in this state, subject to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons. California Civil Code @ 54.1(b)(1). Within the context of public buildings, failure to conform to handicap access requirements applicable to a remodeling or construction qualifies as a denial of equal access under section 54.1(a). City and County of San Francisco v. Grant Co., 181 Cal. App. 3d 1085, 227 Cal. Rptr. 154 (1986).

The plaintiffs are limited to injunctive relief under Civil Code @ 55 and Marsh v. Edwards. This is supported by Donald v. Sacramento Valley Bank, 209 Cal. App. 3d 1183 (1989) in which summary judgment was denied in order for plaintiff to proceed with injunctive relief. In the current case, the architects

claim to have no further role in the design and construction of the project, however, the court denies defendant's motion to dismiss due to the possibility that DMJM could do future work on Fillmore Center. Hence the issue is not moot and [*30] a claim is cognizable. Nebraska Press Assoc. v. Stewart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) (declining to declare the issue moot due to the possibility of "capability of repetition, yet evading review.")

For all of the above reasons, DMJM's motion to dismiss DMJM from plaintiffs' cause of action for injunctive relief under sections 54-55 of the Unruh Act claim is denied.

b. Plaintiffs' Claims Under Section 51

Section 51 of the Unruh Act provides that:

All persons within the jurisdiction of this state are free and equal and no matter what their . . . physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. Cal.Civil Code @ 51 (1991).

The fourth and fifth paragraphs of section 51 were added in 1987,

"Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever to any new or existing establishment, facility, building, improvement, or any other structure, or to augment, restrict or alter in any way the authority [*31] of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other provisions of the law."

"Nothing in this section shall require any person renting, leasing, or otherwise providing real property for compensation to modify his or her property in any way, or to provide a higher degree of care for a blind or other physically disabled person than for a person who is not physically disabled."

California Civil Code @ 51 paras. 4-5.

The plaintiffs propose that we interpret the fourth paragraph of section 51 as exempting only the state architect from such modification. We decline this approach and instead read the first clause of the fourth paragraph of section 51 to explain that this section does not contain specific directives or requirements for the physical renovation of business premises in order to achieve equal access for all citizens. The directives regarding the physical modification of business establishments are provided by @ 54.1. Section 54.1 strictly limits the circumstances under which a modified structure must be made physically handicapped accessible. Specifically, @ 54.1(3) provides as follows:

[*32]
Nothing in this subdivision shall require any person renting, leasing, or providing for compensation real property to modify his or her property in any way or provide a higher degree of care for a blind person, visually handicapped person, deaf person, or other physically disabled person than for a person who is not disabled.

Cal.Civil Code @ 54.1(3) (1991).

One California court, in ruling to require a restaurant to modify its structure to provide handicapped access, explained that the limitation of the duty to modify a new or existing business establishment, contained in @ 54.1 and quoted above, is expressly limited to "housing accommodations offered for rent, lease, or compensation" and does not apply to places of public accommodation, such as a restaurant. City and County of San Francisco v. Grant Co., 227 Cal. Rptr. 154, 156-157 (Cal.App. 1 Dist. 1986). We agree with this interpretation of the language of @ 54.1 and therefore find that neither @ 51 nor @ 54.1 require that housing accommodations offered for rent be altered or modified to provide handicapped access.

Our reading of @ 51 is also supported by the fact that paragraphs 4 and 5 were [*33] amended at the same time as parts of section 54. Section 51 intended to clarify the boundaries of the new rights of the handicapped being amended to section 54 of the Unruh Act. The plaintiffs' interpretation of section 51 would exempt public works such as schools and police stations from modification while burdening all other property owners, in clear opposition to the section 54 amendments of the same date.

Paragraph 5 of section 51 further supports the court's interpretation of paragraph 4. In paragraph 5 the legislature further limits the ability of the handicapped to require landlords to make changes in public and private rental properties other than those changes that would be similarly required by a non-physically disabled individual. Plaintiffs' interpretation of paragraph 4 of section 51 conflicts with the spirit of paragraph 5 of the same section.

This court finds no cause of action within section 51 of the Unruh Act and grants defendant's motion to dismiss the plaintiffs' cause of action for damages under this section. The court denies defendant's motion to dismiss the entire Unruh Act cause of action due to the possibility of plaintiffs receiving injunctive relief.

6. [*34] Unfair Business Practices Act

The plaintiffs' fourth cause of action is the defendant's violation of the California Unfair Business Practices Act, California Business and Professions Code @ 17200. The Supreme Court of California has explained that the Unfair

Practices Act defines "unfair competition" as "unlawful, unfair or fraudulent business practice." The statute is directed at "on-going wrongful business conduct." State Ex Rel. Van de Kamp v. Texaco, Inc., 252 Cal. Rptr. 221, 235 (1988). DMJM only argues that the plaintiffs failed to allege on-going wrongful business conduct, and thus, the claim should be dismissed.

However, in Allied Grape Growers v. Bronco Wine Co., 203 Cal.App.3d 432 (1988), the victim was a cooperative consisting of over 1,000 members, 100 of whom were damaged by the unfair practice, and the actions occurred over the span of a month and consisted of a multitude of individual acts. The state court found that evidence at trial existed from which the trial court could infer that there was a pattern or practice of an unfair practice that affected more than one victim. Thus, the court found substantial evidence to support [*35] the trial court's finding that defendant had violated Section 17200.

Similarly, in the case at hand, plaintiffs have alleged unlawful practices by DMJM which occurred throughout the project in separate buildings, structures, and units. Complaint para. 1. The alleged practice consisted of a "multitude of individual acts". Allied Grape Growers, 203 Cal.App.3d at 452. Since it is not "a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved," Wool v. Tandem Computers, Inc., 818 F.2d at 1439, and it is not "beyond doubt" that a jury could infer that there was a pattern or practice of unlawful business practice, Sun Savings & Loan Assoc. v. Dierdorff, 825 F.2d at 191, the motion to dismiss this claim must be denied.

CONCLUSION

The Rehabilitation Act and the Architectural Barriers Act claims are dismissed. The motion to dismiss the section 1983 action is denied.

The California Government Code @ 11135 claim is dismissed. The California Government Code @ 4450 and the Unruh Civil Rights Act claims for damages are dismissed. With regard to the California Government Code @ 4450 and [*36] the Unruh Civil Rights Act claims for injunctive relief, the motion to dismiss is denied. The motion to dismiss the Unfair Business Practices Act is denied.

IT IS SO ORDERED.

Document Separator

JOHN DOE, by his next friend and father, RICHARD DOE, individually and on behalf of all others similarly situated v. ALDO COLAUTTI, individually and in his official capacity as Secretary of Public Welfare, Pennsylvania Department of Public Welfare and GLENN JOHNSON, individually and in his official capacity as Director of Medical Assistance, Pennsylvania Department of Public Welfare

CIVIL ACTION NO. 78-1413

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

454 F. Supp. 621

JUNE 21, 1978

COUNSEL: R. Michael Owens, Esquire Elliot B. Platt, Esquire 3156 Kensington Avenue Philadelphia, Pennsylvania 19134 FOR PLAINTIFFS

Margret E. Anderson, Esquire Assistant Attorney General 206 State Office Building Philadelphia, Pennsylvania 19130 FOR DEFENDANTS

OPINIONBY: LUONGO

OPINION: [*623] LUONGO, J.

This civil action presents a challenge to section 443.1 of the Pennsylvania Public Welfare Code, as amended, Pa. Stat. Ann. tit. 62, @ 443.1 (Purdon Supp. 1978), which imposes certain limits on medical assistance benefits payable for inpatient care in a private psychiatric hospital. John Doe, the pseudonymous plaintiff, is presently an inpatient at the Institute of Pennsylvania Hospital, a private psychiatric hospital located in Philadelphia. Under the challenged statutory provision, plaintiff has exhausted his currently available benefits, and he seeks a judicial determination that he is entitled to further benefits in order that he may remain an inpatient. On May 31, 1978, I entered a temporary restraining order directing defendants, who are officials of the Pennsylvania Department of Public Welfare, to continue paying benefits to the Institute of Pennsylvania Hospital on behalf of plaintiff. On June 7 and 12, I heard testimony and argument bearing on plaintiff's motion for a preliminary [*624] injunction, and I extended the restraining order pending my decision on that motion. For the reasons hereafter stated, I now conclude that the motion for a preliminary injunction must be denied.

Title XIX of the Social Security Act, 42 U.S.C.A. @@ 1396-1396k (1974 & Supp. 1978), "establishes the Medicaid program under which participating States may provide federally funded medical assistance to needy persons." Beal v. Doe, 432 U.S. 438, 440, 53 L. Ed. 2d 464, 97 S. Ct. 2366 (1977) (footnote omitted). The Commonwealth of Pennsylvania participates in the Medicaid program, and it has implemented a federally-approved "plan for medical assisstance." 42 U.S.C.A. @ 1396a(1974 & Supp. 1978). Although participating states must provide medical assistance benefits for certain specific services, 42 U.S.C.A. @ 1396a(a)(13) (1974 & Supp. 1978), Title XIX generally "confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act." Beal v. Doe, 432 U.S. 438, 444, 53 L. Ed. 2d 464, 97 S. Ct. 2366 (1977) (footnote omitted) (quoting 42 U.S.C. @ 1396a(a)(17) (Supp. V 1975)).

At issue here is section 443.1 of the Pennsylvania Public Welfare Code, as amended, which defines the extent of medical assistance available under the Pennsylvania plan for various types of institutional care. This section differentiates sharply between general inpatient hospital care, on the one hand,

and inpatient care in a private psychiatric hospital, on the other. With respect to the former, section 443.1(1) authorizes medical assistance payments for "[the] reasonable cost of inpatient hospital care." Pa. Stat. Ann. tit. 62, @ 443.1(1) (Purdon Supp. 1978). With respect to the latter, however, section 443.1(4) provides that benefits for "[care] in a private mental hospital shall be limited to sixty days in a benefit period." Id. @ 443.1(4). See also note 3 infra. When read in conjunction with the statutory definition of "benefit period," this limitation requires an individual who has received medical assistance benefits for sixty days of inpatient care in a private psychiatric hospital to undergo a sixty-day period "during each day of which he is not an inpatient in a hospital" in order to become eligible for an additional sixty days' benefits. Id. @ 402. Each time an individual receives such additional benefits, he must again become an outpatient for sixty days as a prerequisite to receipt of further benefits for inpatient care in a private psychiatric hospital.

Plaintiff is an incompetent adult presently residing at the Institute of Pennsylvania Hospital. Although he desires to remain there as an inpatient, the Pennsylvania Department of Public Welfare, which pays out benefits under the Pennsylvania medical assistance plan, "will make no further payments for plaintiff's private in-patient psychiatric care because [he] has exhausted his benefit period." Stipulation P10.

Plaintiff, using the fictitious name of John Doe, "brings this action by his next friend and father" under the Civil Rights Act of 1871, 42 U.S.C. @ 1983 (1970).Complaint P2. He urges that Pennsylvania's sixty-day limitation on benefits for inpatient psychiatric care violates both the equal protection clause and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. @ 794 (Supp. V 1975), and he seeks both declaratory and injunctive relief. Jurisdiction over this action is conferred by sections 1331, 1343(3), and 1343(4) of title 28, United States Code.

In deciding whether to grant preliminary injunctive relief, a district court generally focuses on two issues: (1) Has the moving party shown that he will be irreparably harmed before the case can be finally determined unless relief pendente lite is granted? (2) Has the moving party shown a reasonable probability that he will prevail on the merits when the case is finally determined? In addition to these considerations, however, the court "should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." Delaware [*625] River Port Auth. v. Trans-american Trailer Transport, Inc., 501 F.2d 917, 902 (3d Cir. 1974); see, e.g., A.O. Smith Corp. v. Federal Trade Comm'n, 530 F.2d 515, 525 (3d Cir. 1976); Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 104 U.S. App. D.C. 106, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam), followed in Parker v. Penn Central Transp. Co. (In re Penn Central Transp. Co.), 457 F.2d 381, 384-85 (3d Cir. 1972). Underlying these formulations, of course, is the concern "to minimize the probable irreparable loss of rights caused by errors incident to hasty decision." Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525, 541 (1978). After careful consideration of the testimony and arguments presented in this case, I conclude that plaintiff's likelihood of ultimate success on the merits is so slight as to preclude the issuance of preliminary injunctive relief.

With respect to the "irreparable injury" requirement, the Third Circuit has noted:

"[An] essential prerequisite to the grant of a preliminary injunction is a showing by the movant of irreparable injury pendente lite if the relief is not granted. The key aspect of this prerequisite is proof that the feared injury is irreparable; mere injury, even if serious or substantial, is not sufficient."

United States v. Pennsylvania, 533 F.2d 107, 110 (3d Cir. 1976) (Citations omitted).

Based on the evidence submitted at the hearing, I find that plaintiff very possibly will suffer irreparable harm unless defendants are preliminarily enjoined to continue paying medical assistance benefits on his behalf.

In attempting to meet the "irreparable injury" requirement, plaintiff relied largely on the expert testimony of Dr. Nathan L. Comer, his treating psychiatrist at the Institute of Pennsylvania Hospital. Dr. Comer testified at his deposition that plaintiff was referred to the Institute in early April of 1978, following an unsuccessful attempt at suicide. N.T. 4. Since that time, Dr. Comer has seen plaintiff approximately three times a week for individual psychotherapy at the Institute. N.T. 5-6. Dr. Comer also testified that plaintiff presently suffers from a "schizoaffective reaction," and that plaintiff's prognosis is "guarded." N.T. 5, 10-11. Moreover, he stated that plaintiff's condition has deteriorated "in the past month or so," n1 and that plaintiff refuses to eat or drink anything. N.T. 6.

n1 Dr. Comer's deposition was taken on June 9, 1978.

It appears that plaintiff's family cannot afford to pay for continued inpatient care at the Institute, and that, if no further medical assistance benefits are available, plaintiff's family will have no alternative but to arrange for plaintiff to become an inpatient at Philadelphia State Hospital, which is the designated state-run facility for persons who reside in Philadelphia, as plaintiff does, and require long-term care. See generally Pa. Stat. Ann. tit. 50, @@ 7101-7503 (Purdon Supp. 1978) (Mental Health Procedures Act). Accordingly, counsel on both sides questioned Dr. Comer closely about the likely effects of such a transfer on plaintiff's condition. In this regard, Dr. Comer testified that "there is a very definite possibility" that plaintiff might again attempt to commit suicide, N.T. 9, and that, in any event, a transfer would significantly retard plaintiff's progress by disrupting his present patient-therapist relationship and requiring him to establish a rapport with a new psychiatrist or psychotherapist. N.T. 9-10, 13-14. Moreover, Dr. Comer testified that most persons with schizophrenic disorders who eventually respond to treatment do so within two or three months, and that the prognosis for a schizophrenic individual who does not respond within that time "goes rapidly downhill until after a year the prognosis is very gloomy." N.T. 14. Thus, the setback and loss of time caused by a transfer might worsen plaintiff's overall chances for improvement. N.T. 28. Dr. Comer conceded, however, that he knows of no method that can accurately predict the probability that such a transfer would impinge upon plaintiff's overall prognosis. Id.

Notwithstanding the difficulty of making valid and reliable psychiatric predictions, I [*626] am satisfied that plaintiff has shown a significant potential for irreparable harm if defendants are not preliminarily enjoined.

The "likelihood of success" requirement, however, presents an insurmountable obstacle to plaintiff's case. Granting that the requirement is somewhat amorphous, n2 and looking for nothing more than "a reasonable probability of eventual success in the litigation," I nevertheless conclude that plaintiff is not entitled to preliminary injunctive relief. Delaware River Port Auth. v. Transamerican Trailer Transport, Inc., 501 F.2d 917, 919-20 (3d Cir. 1974). This conclusion obtains both with respect to plaintiff's statutory argument and with respect to his constitutional argument.

n2 A recent commentary points out that "[one] line of cases requires plaintiffs to show a fair question of success on the merits, another a substantial probability of success, another a reasonable certainty, and another a clear right." Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525, 526 (1978) (footnotes omitted).

SECTION 504 OF THE REHABILITATION ACT

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. @ 794 (Supp. V. 1975), provides:

"No otherwise qualified handicapped individual in the United States, as defined in [29 U.S.C. @ 706(6)], shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

It is now well-settled that a handicapped individual has an implied private right of action under this provision. See, e.g., Leary v. Crapsey, 566 F.2d 863, 865 (2d Cir. 1977) (per curiam); United Handicapped Fed'n v. Andre, 558 F.2d 413, 415 (8th Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284-87 (7th Cir. 1977); Davis v. Bucher, 451 F. Supp. 791, slip op. at 10-13 (E.D. Pa. 1978); Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1323-24 (E.D. Pa. 1977).

Defendants do not dispute that plaintiff is a "handicapped individual" within the meaning of section 504. Section 7(6) of the Act defines a "handicapped individual," for purposes of section 504# as "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." 29 U.S.C. @ 706(6) (Supp. V 1975). Moreover, the interpretative regulations issued by the Secretary of Health, Education, and Welfare define "physical or mental impairment" to include, inter alia, "any mental or psychological disorder." 45 C.F.R. @ 84.3(j)(2)(i)(B) (1977). Thus, plaintiff unquestionably is a "handicapped individual" within the meaning of section 504.

Furthermore, the parties have stipulated that the Commonwealth of Pennsylania and, more specifically, the Pennsylvania Department of Public Welfare, receive federal financial assistance "for a variety of programs and purposes including but not limited to mental health programs." Stipulation P11. By reason of this federal assistance, of course, the Pennsylvania medical assistance program is subject to the antidiscrimination mandate of section 504.

The central question, then, is this: Does Pennsylvania's sixty-day limitation on benefits for inpatient care in a psychiatric hospital discriminate against plaintiff "solely by reason of his handicap? Plaintiff strenuously urges that it does, and in support of this contention he relies primarily on the interpretative regulations adopted by the Secretary of Health, Education, and Welfare. Subpart F of these regulations elucidate the constraints imposed by section 504 upon a provider of health services. In pertinent part, the regulations provide:

"(a) General. In providing health, welfare, or other social services or benefits, a recipient [of federal financial assistance] may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

[*627] (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 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."

45 C.F.R. @ 84.52(a)(1977).

Plaintiff also relies on the more general provisions of subpart A of the

regulations:

"(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 handicaped 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;

. . .

(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 program 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."

45 C.F.R. @ 84.4(a), (b)(1977).

The argument advanced by plaintiff is deceptively simple. Plaintiff would characterize medical assistance benefits for inpatient care as a single, unitary benefit, without regard to the particular illness or injury for which an individual requires such care. It is undisputed that section 443.1 of the Pennsylvania Public Welfare Code limits benefits for inpatient care in a private [*628] psychiatric hospital to sixty days during any one "benefit period," but places no such limit on benefits for inpatient care in a general hospital. Pa. Stat. Ann. tit. 62, @ 402 (Purdon Supp. 1978); discussion supra. Thus, plaintiff concludes that he is being denied that which is available to all

medical assistance recipients who require inpatient care in a general hospital, i.e., benefits for inpatient care without any time limit.

In my view, this argument seriously misconceives the scope of section 504. I base this conclusion not on the legislative history of that provision, which is singularly unenlightening, but rather on a formal "analysis" of the Secretary's regulations interpreting section 504. That analysis, prepared by the Department of Health, Education, and Welfare, appears as Appendix A to part 84 of the Code of Federal Regulations, title 45, and it strongly suggests that the Pennsylvania Department of Public Welfare need not provide the same "unlimited" benefits for persons requiring inpatient care in private psychiatric hospitals that it provides for those requiring inpatient care in general hospitals.

Three passages from the Department's analysis are particularly relevant here. The first one, a commentary on 45 C.F.R. @ 84.43(a)(1977), which applies to postesecondary educational programs and activities, reads as follows:

"The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients [of federal financial assistance] are not required, however, to provide specialized services 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."

45 C.F.R., part 84, Appendix A, @ 33.

A second passage, which discusses 45 C.F.R. @ 84.52(a), quoted earlier, is also instructive.

"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."

45 C.F.R., part 84, Appendix A, @ 36, P3.

Finally, a third passage interprets 45 C.F.R. @ 84.53 (1977), which was not included in the Department's original notice of proposed rulemaking.

"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 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."

45 C.F.R., part 84, Appendix A, @ 37.

These three passages help to define the import of section 504 with respect to a provider of health or social services. They suggest that such a provider need do no more than provide handicapped persons with the same services it provides to nonhandicapped persons. See generally 45 C.F.R. @ 84.52(a) (1977) (set out supra). To put the matter somwhat differently, they also suggest that such a provider need not extend a service that is limited to particular injuries or illnesses to all conditions that amount to a "handicap."

As I noted earlier, plaintiff would view medical assistance for inpatient care as a single, unitary benefit that may not be denied to a medical assistance recipient on the basis of the particular handicap (here, a schizo-affective reaction) that leads him to seek treatment. This argument proves entirely too

much. By parity of reasoning, physician's services would also be viewed as a unitary benefit, and, on plaintiff's reading of section 504, a hospital or health care provider that received federal funds then [*629] could not decline to treat any condition that amounted to a "handicap." Whether or not this result is desirable as a matter of social policy, the three passages quoted earlier rather clearly suggest that section 504 does not require such a result.

Although the Department's "analysis," from which those passages were taken, is a less certain guide to congressional intent than a detailed legislative history would ideally provide, it nevertheless is entitled to great weight here. For the legislative history of the Rehabilitation Act does establish that the Secretary's interpretative regulations were to play a central role in the administration and enforcement of section 504. As the District Court for the District of Columbia noted:

"The statute's discrimination prohibitions were certainly not intended to be self-executing. Reports from the Senate and the House on the 1974 Amendments to the Act indicate that Congress contemplated a swift implementation of @ 504 through a comprehensive set of regulations."

Cherry v. Mathews, 419 F. Supp. 922, 924 (D.D.C. 1976) (citations omitted). Indeed, the Cherry court, based solely on the 1974 congressional reports, held that the Secretary was required to issue regulations effectuating section 504, although nothing in the Rehabilitation Act itself explicitly required such rulemaking. Id. To accept plaintiff's argument that section 504 requires defendants to extend benefits for "unlimited" inpatient care to all persons who are "handicapped" would entail the conclusion that the Department had fundamentally misunderstood the scope of that section in the context of health and social services. I cannot accept that conclusion absent some persuasive supporting evidence, and plaintiff has offered none.

Another external source--the structure of the Medicaid program created by Title XIX--provides additional evidence that plaintiff's argument misconceives congressional intent. "Title XIX establishes two groups of needy persons with dependent children and the aged, blind and disabled; and (2) the 'medically' needy, which includes other needy persons." Beal v. Doe, 432 U.S. 438, 440, 53 L. Ed. 2d 464, 97 S. Ct. 2366 n. 1 (1977) (citations omitted). A state that participates in the Medicaid program must provide medical assistance to the "categorically needy," and may, at its option, extend coverage to the "medically needy," as Pennsylvania has done. Id. Title XIX also defines "medical assistance" as payment by the state of part or all of the cost of sixteen enumerated categories of care and services. 42 U.S.C.A. @ 1396(a)(1)-(16) (1974 & Supp. 1978). Finally, a related provision requires that a state medical assistance plan provide "categorically needy" recipients with at least the care and services listed in clauses (1) through (5) of section 1396d(a); with respect to the "medically needy," however, a state plan must provide at least those five categories of care and service, or, alternatively, "the care and services listed in any 7 of the clauses numbered (1) through (16)" of that section. 42 U.S.C. @ 1396a(a)(13)(B), (C) (Supp. V 1975).

These provisions together define the minimum obligations of a participating state with respect to various broad categories of medical care. Interestingly, clause (1) of section 1396d(a) refers to "inpatient hospital services (other than services in an institution for tuberculosis or mental disease)," which indicates that a participating state need not provide benefits for inpatient care in a psychiatric hospital even to "categorically needy" recipients. Clauses (14) and (16) of that same section refer to such inpatient care for, respectively, persons 65 years of age and older, and persons under 21 years of age. Under the Medicaid program, then, a state may obtain partial federal reimbursement if it chooses to provide medical assistance benefits for such care, n3 [*630] but participating states plainly are not required to provide such benefits to recipients in either category. Moreover, with respect to individuals who are 21 years of age or older, but who are under 65 years of age, a participating state not only is not required to provide benefits for inpatient

care in a psychiatric hospital, but it receives no federal reimbursement if it should choose to provide such benefits. Indeed, defendants presented evidence at the hearing that Pennsylvania receives no federal reimbursement when it pays benefits for inpatient care in a psychiatric hospital to a recipient (such as plaintiff) who is 21 years of age or older, but who is under 65 years of age.

n3 It is undisputed that Pennsylvania's medical assistance plan provides "unlimited" benefits for persons under 21 years of age, and for persons 65 years of age and older, who require inpatient care in a private psychiatric hospital. The challenged sixty-day limitation thus applies only to medical assistance recipients who are 21 years of age or older, but who are under 65 years of age.

Finally, Title XIX contains another provision that "confers broad discretion on the States to adopt standards for determining the extent of medical assistance" to be provided under state plans. Beal v. Doe, 432 U.S. 438, 444, 53 L. Ed. 2d 464, 97 S. Ct. 2366 (1977). Section 1396a(a)(17) requires each state plan to "include reasonable standards... for determining eligibility for and the extent of medical assistance under the plan... which... are consistent with the objectives of [Title XIX]." Thus, although Title XIX does require participating states to provide medical assistance for certain enumerated categories of treatment, section 1396a(a)(17) negates any suggestion "that participating States are required to fund every medical procedure that falls within the delineated categories of medical care." Beal v. Doe, supra, 432 U.S. at 444.

In short, Title XIX establishes an intricate structure that governs state medical assistance plans. Congress, in drafting Title XIX, was especially careful to allow participating states considerable freedom in determining which services would be included in state plans, and, additionally, the extent to which particular services would be funded by state plans. Plaintiff's interpretation of section 504 would knock that carefully drafted structure into a cocked hat, for it would require a state plan that afforded recipients "unlimited" inpatient care for any single illness or injury to provide identical benefits for every other illness or injury that qualifies as a "handicap" under the Rehabilitation Act. Significantly, it would also require such a plan to provide identical benefits for services, such as inpatient psychiatric care for persons between the ages of 21 and 65, that do not even qualify for federal reimbursement under the Medicaid statute. Again, whether or not this result would be desirable as a matter of social policy, plaintiff has not persuaded me that Congress, in enacting section 504, contemplated any such sweeping restrictions on state medical assistance plans. The manifest inconsistency between plaintiff's interpretation of section 504, on the one hand, and the congressional purpose evidenced by Title XIX, on the other hand, counsels rejection of plaintiff's argument.

For the reasons stated above, I find that plaintiff is unlikely to prevail on the merits of this statutory theory. Even if his argument were more persuasive, however, plaintiff would still face another difficulty, i.e., his failure to exhaust administrative remedies. See generally McKart v. United States, 395 U.S. 185, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969). The Secretary's regulations under section 504 incorporate by reference "[the] procedural provisions applicable to title VI of the Civil Rights Act of 1964." 45 C.F.R. @
84.61 (1977). Those provisions, particularly 45 C.F.R. @ 80.8(d) (1977), require that a complaining party exhaust his administrative remedies with the Secretary of Health, Education, and Welfare before bringing a civil action to enforce compliance with title VI, or, in this case, with section 504. Plaintiff does not suggest that the available administrative remedies are inadequate, or that requiring exhaustion even at this stage would be futile. See generally, e.g., NAACP v. Wilmington Medical Center, Inc., 426 F. Supp. 919, 924-25 (D. Del. 1977). I add these [*631] observations simply to help explain my conclusion regarding plaintiff's chances of ultimate success on the merits of his statutory theory.

EQUAL PROTECTION OF THE LAWS

With respect to plaintiff's constitutional argument, I am again constrained to find a very slim possibility of ultimate success on the merits.

It cannot be gainsaid that the General Assembly of Pennsylvania, in drawing up the state's medical assistance plan, is subject to the strictures of the equal protection clause. See Dandridge v. Williams, 397 U.S. 471, 483, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970).As the Court noted in Maher v. Roe, 432 U.S. 464, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977):

"The Constitution imposes no obligation on the States to... pay any of the medical expenses of indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations."

432 U.S. at 469-70 (footnote omitted).

However, the critical question here, as in all equal protection cases, is whether the statute under attack "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973); see Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976) (Marshall, J., dissenting). Plaintiff urges an affirmative answer to this question. Although he does not suggest that section 443.1 of the Pennsylvania Public Welfare Code impinges on any fundamental right, plaintiff contends that "the mentally ill are a suspect class, subjecting any state legislation which uses mental illness as the basis for classification to strict analysis." Plaintiff's Memorandum of Law at 5.

I cannot accede to plaintiff's sweeping designation of "the mentally ill" as a suspect class for all purposes. Assuming for the moment that "the mentally ill" compose a discrete and unified class for purposes of equal protection analysis, several important differences exist between this class and the handful n4 of classes traditionally viewed as "suspect." An individual's race or nationality, for example, "is an immutable characteristic determined solely by the accident of birth." Frontiero v. Richardson, 411 U.S. 677, 686, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973) (plurality opinion). By contrast, although heredity may play a part in determining whether an individual will suffer from some form of mental illness, the matter is not inevitably resolved at birth. Furthermore, race and nationality are considered "suspect" bases for legislative classification partly because an individual's race or nationality "frequently bears no relation to [his] ability to perform or contribute to society." Id (footnote omitted). Indeed, Justice Brennan's plurality opinion in Frontiero expressly stated that this lack of correlation with an individual's ability is "what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria [of race and nationality]." Id.; accord, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976) (per curiam). It appears self-evident that, on this dimension, mental illness must be grouped with intelligence and physical disability, which often bear importantly on an individual's ability, rather than with often bear nationality, which do so only rarely. [*632] In view of these very substantial differences between mental illness, on the one hand, and the traditionally "suspect" bases for classification, on the other, I conclude that "the mentally ill" should not be treated as a suspect class for purposes of equal protection analysis.Thus, section 443.1 of the Pennsylvania Public Welfare Code should not be subjected to the "strictest" level of judicial scrutiny. Mathews v. Lucas, 427 U.S. 495, 509, 49 L. Ed. 2d 651, 96 S. Ct. 2755 (1976).

n4 Apart from race and nationality, only alienage has explicitly been deemed a suspect classification by a majority of the Supreme Court. See, e.g., Graham v. Richardson, 403 U.S. 365, 372, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971).

Moreover, the Court only recently held that "[it] would be inappropriate... to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny.'" Foley v. Connelie, 435 U.S. 291 at 295, 98 S. Ct. 1067, at 1070, 55 L. Ed. 2d 287, slip op. at 4 (U.S. March 22, 1978).

Plaintiff urges, with some force, that "the mentally ill" historically have been "relegated to such a position of political powerlessness as to command extradordinary protection from the majoritarian political process." San Antonio Independent School Dist. v. Rodriguez, supra, 411 U.S. at 28. See generally United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938). This contention raises any number of difficult questions that the parties here understandably have not addressed, given the time constraints inherent in a motion for preliminary injunctive relief. It may well be that, in some contexts, the asserted political powerlessness of "the mentally ill," or of some subgroups of that group, justifies the application of a standard of judicial review somewhat more stringent than the traditional "rational basis" standard.Cf. Mathews v. Lucas, supra, 427 U.S. at 510 (standard of review applied to statute that discriminates against illegitimate children "is not a toothless one"). I need not resolve that issue here, however, for I have determined that section 443.1 is entirely consistent with the equal protection clause, whether it is judged by the rationality standard or by the somewhat more stringent test applied to classifications based on illegitimacy.

The background to the challenged statutory provision is instructive. Two years after Title XIX established the Medicaid program, the General Assembly of Pennsylvania enacted the Public Welfare Code, which outlined the Pennsylvania scheme of medical assistance and other public welfare benefits. Act No. 21, 1967 Pa. Laws 31. At the next legislative session, the Code was amended to prescribe in greater detail the benefits available under the medical assistance program. Act No. 273, 1968 Pa. Laws 904. In particular, section 443.1(1) imposed a sixty-day limitation on benefits for inpatient hospital care, without regard to the type of hospital involved. Section 443.1(4) further provided, as it still does, that "[care] in a private mental hospital shall be limited to sixty days in a benefit period."

At its 1976 session, the General Assembly of Pennsylvania amended section 443.1(1) by removing the sixty-day limitation on benefits for inpatient care in a general hospital.Act No. 202, @ 6, 1976 Pa. Laws 993. The sixty-day limitation on inpatient care in a private psychiatric hospital, contained in section 443.1(4), was left unchanged. At the hearing on this motion, defendants presented evidence that this differentiation was based on the availability of unlimited inpatient care in a state-run mental hospital to any person requiring inpatient care for a period of time exceeding sixty days. The availability of such care is not disputed here.

Thus, the General Assembly of Pennsylvania, in deciding how to allocate the funds available for its medical assistance program, determined that the sixty-day limitation on care in a private hospital struck an appropriate balance. Had the legislature chosen not to fund any private inpatient care, then indigent persons requiring only short-term care for acute problems would have had no choice but to use the state-run facilities. On the other hand, a decision to fund "unlimited" private inpatient care would have saddled the state treasury with the enormous costs of long-term private hospital care for persons with chronic illnesses, many of whom are unlikely to improve. Plaintiff understandably wishes that the Pennsylvania legislature had done more for persons requiring short-term care for periods exceeding sixty days.)But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking [*633] the problem at all." Dandridge v. Williams, 397 U.S. 471, 486-87, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970).

As the preceding discussion should make clear, the distinction drawn by section 443.1 is entirely rational. Moreover, no suggestion has been made that an invidious purpose underlies that statutory provision. That being so, "the

Constitution does not empower [the federal courts] to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." Dandridge v. Williams, 397 U.S. 471, 487, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970) (citations omitted).

Indeed, the legislative classification involved here is strikingly similar to the one upheld in Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y.), aff'd mem. sub nom. Legion v. Weinberger, 414 U.S. 1058, 38 L. Ed. 2d 465, 94 S. Ct. 564 (1973) (three-judge court). As originally enacted by Congress, the Medicaid and Medicare programs provided no federal benefits for inpatient care in a private mental hospital for persons under 65 years of age. In rejecting an equal protection challenge to this aspect of the benefit programs, the Legion court noted:

"It is unnecessary to trace the entire legislative history of Medicare and Medicaid to conclude that there exists in this instance a rational justification for the exclusions and restrictions here challenged. At the time of the passage of Medicare and Medicaid, Congress had determined that advances made in treating mental patents were sufficient to indicate that many would soon be treated in facilities where more remedial benefits were available. Paralleling this determination was the belief by Congress that care of the mentally ill in state hospitals was the responsibility of the states."

354 F. Supp. at 459 (footnotes omitted).

Thus, the result reached in Legion, and summarily affirmed by the Supreme Court, is strongly suggestive of the correct result in this case.

Finally, as I noted earlier, plaintiff's equal protection argument fares no better under the somewhat more stringent standard applied in recent cases involving illegitimacy than it fares under the traditional rationality standard articulated in Dandridge v. Williams, supra. Even under the more stringent standard, a state that chooses to dispense social welfare benefits retains considerable latitude in defining the class of recipients. See, e.g., Califano v. Goldfarb, 430 U.S. 199, 210, 51 L. Ed. 2d 270, 97 S. Ct. 1021 (1976) (plurality opinion). Although a reviewing court applying this standard will not lightly accept proffered justifications for criteria that differentiate between similarly situated persons, neither will it lightly set aside the legislative judgment that a particular group shall receive more than another group, or that a third group shall receive nothing at all. Where, as here, the legislature has differentiated between two groups of recipients made up of persons with entirely different kinds of illnesses and entirely different treatment needs, and has chosen to afford one group benefits for extended inpatient care in private hospitals, while affording the other group benefits for limited inpatient care in private hospitals and also affording it unlimited care in state-run hospitals, I cannot say that the equal protection clause has been violated.

For the reasons stated in this opinion, I conclude that plaintiff's likelihood of ultimate success on the merits is so slight as to preclude the issuance of preliminary injunctive relief. Accordingly, plaintiff's motion for a preliminary injunction will be denied. The findings of fact and conclusions of law required by Rule 52(a) are set out in the foregoing opinion.

ORDER

This 21st day of June, 1978, it is

ORDERED that Plaintiff's Motion for a Preliminary Injunction is DENIED.

Document Separator

JOHN AND JOAN DOE, et al., and RICHARD ROE, et al., Plaintiffs, v. DONALD J. DEVINE, Director, Office of Personnel Management, et al., Defendants and BLUE CROSS ASSOCIATION AND BLUE SHIELD ASSOCIATION and AETNA LIFE INSURANCE COMPNAY, Defendant-Intervenors.

Civil Action No. 81-2878; Civil Action No. 81-2927

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

545 F. Supp. 576

May 5, 1982

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OPINIONBY: FLANNERY

OPINION: [*577]

MEMORANDUM OPINION

These consolidated cases come before the court on cross-motions for summary [*578] judgment. Defendants seek summary judgment on the grounds that the Office of Personnel Management (OPM) has, pursuant to the Court of Appeals' mandate, furnished a complete, reasonable explanation for its decision to accept mental health benefit cutbacks in the Blue Cross/Blue Shield (BC) federal health insurance plan. This explanation, according to defendants, lays to rest any contention that OPM's decision was arbitrary or capricious. Plaintiffs skek summary judgment on the grounds that the affidavit furnished by OPM is legally deficient in several critical respects. In the alternative, plaintiffs contend that defendants' summary judgment motions cannot be granted because there are genuine issues of material fact with respect to certain claims proffered by plaintiffs.

I. Background

OPM has negotiated a contract for the provision of government-wide health insurance benefits with BC, pursuant to the provisions of the Federal Employees Health Benefit Act (FEHBA), 5 U.S.C. @@ 8901 et seq. (1976 & Sup,. III 1979). The contract announced reduces both inpatient and outpatient mental health benefits below 1981 levels and below the benefit levels provided for physical illness. The high option plan reduces mental health outpatient payments from 70% of an unlimited number of visits to 70% of an annual total of 50 visits with a lifetime maximum of $50,000. The agreed to high option plan also reduces inpatient hospitalization benefits for mental illness from 365 days per year to 60 days per year. For physical illness, outpatient visits were similarly reduced. Payment will be made for 80% of charges for a maximum of 50 visits. Coverage for inpatient hospitalization for physical illness will extend for unlimited days.

Plaintiffs' motions for preliminary injunction, denied by this court on December 2, 1981, challenged the mental health benefit cuts in the BC plan on four independent bases: (1) as violative of the equal protection component of the Due Process Clause of the Fifth Amendment; (2) as violative of section 504 of the Rehabilitation Act, 29 U.S.C. @ 794 (1978); (3) as contrary to

section 8904 of the Federal Employees Health Benefit Act, 5 U.S.C. @ 8904; and (4) as arbitrary and capricious and an abuse of discretion within the meaning of section 706(2) (A) of the Administrative Procedure Act, 5 U.S.C. @ 706(2) (A) (1976). The Court of Appeals, in affirming the denial of preliminary injunctive relief, agreed with this court that there was little likelihood that plaintiffs would succeed on the merits of their Rehabilitation Act and substantive FEHBA claims. Doe, Roe v. Devine, Nos. 81-2378, 81-2400, slip op. at 2 (D.C. Cir. Feb. 23, 1982). n1

n1 The Roe plaintiffs did not press their equal protection claim in the Court of Appeals.

The Court of Appeals was "less confident" about plaintiffs' claim that OPM acted arbitrarily or capriciously by approving the cutbacks at issue. Id., slip op. at 2, 4. The Court expressed concern that the agency had not provided a particularized explanation of its decision-making process, focusing upon how the cutbacks in mental health benefits could be harmonized with the policies embodied in section 8904. Id., slip op. at 4. The Court indicated that such a "reasoned explanation" should explicate why OPM accepted "the particular package of benefits proposed by Blue Cross/Blue Shield rather than requiring a package of benefits with the same overall financial cost but with less serious consequences on one category of "catastrophic" coverage." Id., slip op. at 4. The Court recognized that OPM's September 11, 1981, Preliminary Analysis was too "unfocused" and ambiguous to provide a concrete foundation for judicial review of OPM's decision-making process. Accordingly, the Court concluded that it would be essential for OPM, "if it wishes to prevail on the merits" to provide a
"more adequate explanation for its decisions." Id., slip op. at 5.

OPM provided that explanation on March 5, 1982, in the form of an affidavit by Kevin J. Burns, Assistant Director for Insurance Programs at OPM. Mr. Burns' affidavit indicates that a number of factors motivated OPM's decision to accept the levels of mental health benefits proposed by BC. [*579] First, OPM found it "significant" that the "vast majority" of persons using mental health benefits would require less coverage than that provided for by BC, and therefore, the BC proposal would achieve the FEHBA policy of insuring against catastrophic illness. Burns Aff. at P10.Second, Mr. Burns indicates that OPM was concerned with the high cost of mental health benefits relative to the cost of other types of services; such costly coverage was seen as conflicting with OPM's statutory goal of attaining the maximum health benefits at the lowest possible cost to federal employees. Id., at P11.Third, and related to the preceding rationale, OPM felt that the disparity in payments made and benefits received by mental health users amounted to a partial subsidy by physical benefit users of mental benefit users. Id., at P13. The level of mental health benefits suggested by BC would render premiums paid for those benefits roughly equal to claims paid for them, and, therfore, would bring physical and mental benefit users into rough parity. Id.

Fourth, OPM found it material that, according to representations made by BC and independently corroborated by OPM staff, the levels of benefits proposed by BC were generally superior to those offered by private sector employers. Id., at P11. Finally, OPM was "well aware" of BC's concerns that unlimited coverage for mental illness caused adverse selection, and agreed on a 1982 contract that could "avoid, to the extent possible, the loss of subscribers who are good risks." Id. at P15.

Defendants' motions contend that the only challenge of any force to the mental health benefit reductions, that OPM abused its discretion, has been completely devitalized by the Burns affidavit. In the precise format envisioned by the Court of Appeals, OPM has explained the reasoning process which underlay its decision to accept the mental benefit levels at issue. Since that reasoning process was fully consistent with the policy goals embodied in the FEHBA, including those specific to section 8904, this court has no choice but to uphold the legality of the cutbacks.

Plaintiffs' motions also focus upon whether OPM was arbitrary or capricious but plaintiffs vigorously dispute defendants' characterization of the Burns affidavit. Plaintiffs and amicus curiae American Federation of Government Employees n2 contemplated more than a conclusory statement of justifications for OPM's decision. Rather, the Court instructed OPM to provide a highly specific description of the alternatives OPM considered before singling out mental health benefits as the only element of catastrophic coverage to be significantly devalued. Since the Burns affidavit was deficient in this and other respects, OPM has failed to demonstrate its decision was rationally based; plaintiffs are, therefore, presently entitled to judgment.

n2 Pursuant to the Court of Appeals' suggestion, this court invited "appropriate" employee organizations to participate in the case and state their views. Roe, Doe v. Devine, supra, slip op. at 4. AFGE decided to participate in an amicus curiae capacity.

In the alternative, plaintiffs maintain that there are genuine issues of material fact precluding the court from granting defendants' motions for summary judgment. The Burns affidavit is based upon numerous factual assumptions which are contradicted by plaintiffs or will be if discovery is permitted to proceed.

Finally, while plaintiffs do not seek judgment with respect to certain other claims in their complaints, they argue that judgment for defendants as to these claims would be premature. Specifically, plaintiffs maintain that discovery with regard to OPM's intent in accepting the cutbacks is crucial to a resolution of plaintiff 's Rehabilitation Act and equal protection claims. n3

n3 Apparently, plaintiffs have abandoned the claim, formerly made, that the cutbacks transgress the substantive requirements of section 8904.

II. Discussion

A) Section 706(2) (A) of the Administrative Procedure Act

In the wake of the Court of Appeals' decision rejecting plaintiffs' request for [*580] preliminary relief, the principal substantive question before this court is whether OPM was arbitrary or capricious, or abused its discretion, in agreeing to the mental health benefit reductions proposed by BC. More precisely stated, the issue is whether OPM has, in a manner consistent with the Court of Appeals' directives and prevailing legal principles, demonstrated that the level of mental health benefits in the 1982 BC plan was reasonably based upon policy considerations permeating the FEHBA.

OPM's decision to accept the benefit reductions in controversy is undoubtedly subject to review for whether it was arbitrary or capricious or constituted an abuse of discretion. See National Treasury Employees Union (NTEU) v. Campbell, 589 F.2d 669 (D.C. Cir. 1978); American Federation of Government Employees (AFGE) v. Devine, No. 81-2239, slip op. at 1 (D.D.C. Oct. 8, 1981). No "statutes preclude judicial review," and, since there is law to apply under sections 8902 and 8904 of the FEHBA, OPM's action is not "wholly committed to agency discretion. . . ." 5 U.S.C. @ 701(a).

In order to determine whether an agency has acted in an arbitrary or capricious fashion, a reviewing court must consider whether the agency decision "was based upon a consideration of the relevant factors and whether there has been a clear error in judgment." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).While the court must carefully scrutinize the facts material to a particular decision, "the ultimate standard of review is a narrow one." Id.; see Bowman Transportation, Inc. v. Arknasas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974).

When considering OPM's procurement decisions under the FEHBA, judicial review is even more limited. Since OPM is granted "considerable latitude" in contracting for health benefits, National Federation of Federal Employees (NFFE)

v. Devine, No. 81-2184, slip op. at 8 (D.C. Cir. Dec. 21, 1981), the court's review is "quite narrow." NTEU v. Campbell, supra, 589 F.2d at 678. The court is restricted to determining whether OPM has acted "in a manner consistent with the underlying purposes of the Act." NFFE v. Devine, supra, slip op. at 9. See also Kentron Hawaii Ltd. v. Warner, 480 F.2d 1156, 1169 (D.C. Cir. 1973).

It is apparent that OPM's decision to accept the mental benefit reductions is consistent with several purposes underlying the FEHBA. One important policy objective is the minimization of programmatic cost to the government. See NFFE v. Devine, supra, slip op. at 10; AFGE v. Campbell, No. 80-2751 (D.D.C. Nov. 26, 1980), aff'd sub nom. AFGE v. Devine, No. 80-2494 (D.C. Cir. Dec. 4, 1981); H.R. Rep. No. 957, 86th Cong., 1st Sess. 4 (1959). The benefit reductions involved here are obviously in conformity with this purpose, as they will decrease the overall expense of program participation. The initial impetus for the cutbacks, in fact, was the government's determination to hold down spending in the federal health insurance area. Burns Aff. at PP3-8.

Another important objective of the FEHBA is to ensure that federal employees receive maximum benefits at the lowest possible cost to themselves. NFFE v. Devine, supra, slip op. at 12; H.R. Rep. No. 957 86th Cong., 1st Sess. 4 (1959). The reduction in mental benefits is in harmony with this policy goal as well. First, it is undisputed that mental health coverage is quite expensive in relation to the number of persons benefitting from such coverage. Burns Aff. at P11. In 1981, the claims made for mental health benefits substantially exceed premiums paid by recipients of these benefits; in contrast, payments by physical health beneficiaries have historically been equivalent to claims made by these subscribers. Burns Aff. at P11.

Thus, reducing 1982 mental benefits could rationally be viewed as one means to ensure the greatest level of overall health services at the lowest possible cost to federal employees. The cutbacks will allow BC to minimize the expense of plan participation for all employees by curtailing a [*581] benefit of little value to most enrollees. n4 Furthermore, the cutbacks could rationally be viewed as a device for preventing physical benefit claimants and other beneficiaries of the program from "subsidizing" the costs of mentally ill persons. Benefit reductions designed to create a situation of rough equilibrium between all beneficiaries are consistent with the interests of program participants in keeping costs commensurate with derived benefits.

n4 This result is particularly pertinent in view of the alternative initially offered by OPM for achieving cost reductions in the BC plan. The major changes proposed by OPM on August 21, 1981, were to decrease the deductible on supplemental benefits to $200 per individual and to reduce the coinsurance rate to 75% on supplemental benefits. Burns Aff. at P4. It was reasonable for OPM to conclude that such changes could adversely affect a larger percentage of plan participants than the mental benefit cuts adopted.

Second, OPM was cognizant of BC's concern that the phenomenon of adverse selection was causally related to unrestricted coverage for the treatment of mental illness and the final BC plan was structured so as to allay this concern. Burns Aff. at P15. To the extent that OPM accepted the mental health benefit reductions in order to ensure BC's continued participation in the FEHB program, OPM's decision was in accordance with the interests of all BC beneficiaries. The risk that BC would otherwise withdraw from the FEHB program threatened the integrity of the entire federal health insurance system and conflicted with the interests of all federal employees in securing low cost, comprehensive insurance. n5

n5 Plaintiffs' contention that the record does not bear out BC's concern about adverse selection misses the point. As the Burns Affidavit makes clear, the critical factor for OPM was not so much whether adverse selection was actually generated by unlimited mental health benefits, but whether BC genuinely believed this to be the case. There is no dispute that BC was quite concerned that 1981 levels of mental health benefits would pose a threat to the plan's

future stability and, therefore, to its participation in the FEHB program. Thus, OPM could rationally conclude that the interests of all federal employees would be served by accepting BC's proposed reductions, independent of the objective need for those reductions.

In addition, plaintiffs' own insurance expert does not controvert BC's factual representation regarding adverse selection. Mr. Vehec merely concludes that the BC plan has not experienced adverse selection "only as a result of mental health benefits." Vehec Aff. at P15. This, of course, suggests that part of the adverse selection problem did result from mental health benefits and substantiates BC's concerns.

There is one final purpose of the FEHBA, embodied in section 8904, that is pertinent to review of OPM's decision; this is the objective of protecting federal employees against the high and unpredictable costs of catastrophic illness. NFFE v. Devine, supra, slip op. at 10 n.9, citing AFGE v. Devine, No. 81-2239, slip op. at 2, 3 (D.D.C. Oct. 8, 1981); H.R. Rep. No. 957, 86th Cong., 1st Sess. 1-2 (1959). The Court of Appeals, in ordering OPM to articulate its reasoning process, was principally interested in OPM's explanation as to how its decision incorporated the policy objectives "represented by the "catastrophic" benefit provisions included in section 8904." Roe, Doe v. Devine, supra, slip op. at 4.

OPM insists that it did not ignore the policy of protecting persons against the costs of catastrophic illness, but conscientiously took this goal into consideration when assessing BC's proposal. In this regard, OPM found it "significant" that the 1982 levels of mental health benefits would completely cover the "vast majority" of persons using such benefits, i.e., approximately 90% of patients hospitalized for nervous or mental conditions were released within sixty days and approximately 88% of patients receiving outpatient care required 50 or fewer visits in a particular year. Burns Aff. at P10. OPM concluded that such high levels of coverage effectuated the purposes of section 8904. Id.

Thus, OPM's ultimate decision to accept BC's proposal was based, in part, on the judgment that the proposal would not unduly compromise the legislative purposes underlying section 8904. While the benefit reductions may not have affirmatively furthered the policy of insuring against catastrophic illness, IPM ascertained that the [*582] cutbacks would not significantly interfere with this policy. It was not irrational for OPM to accept a minor imposition on one of the FEHBA's purposes, in order to substantially further other, equally valid statutory goals. Accordingly, it appears that OPM's decision followed a reasoned assessment of all the relevant purposes underlying the FEHBA, including those unique to section 8904, and this decision was not clearly erroneous. As such, it seems that the decision was not arbitrary or capricious and did not constitute an abuse of discretion.

Plaintiffs challenge this conclusion as inconsistent with the Court of Appeals' opinion in three respects. First, plaintiffs argue that OPM has not adequately demonstrated how its ultimate decision effectuates the purpose of section 8904, as required by the Court of Appeals. Even accepting OPM's statistics, plaintiffs contend, over 10% of all persons using mental health benefits will not be adequately covered by the 50 outpatient visits and 60 inpatient days provided for in the 1982 plan. These persons will not be protected against the staggering costs of catastrophic mental illness and, therefore, the purpose of section 8904 has been overtly disregarded.

The defect in this argument is that it assumes that OPM is required to provide complete coverage against costs associated with catastrophic mental illness. Plaintiffs no longer explicitly maintain that section 8904 mandates a particular level of catastrophic illness benefits, but have imported that identical theory into their challenge under the APA. In essence, plaintiffs contend that OPM's failure to ensure "last dollar" coverage for all costs associated with catastrophic illness is per se arbitrary and capricious. This

is an unacceptable proposition. Plaintiffs would have the court designate a decision as arbitrary or capricious because it does not further one statutory purpose to the maximum extent feasible and to the exclusion of all other purposes. Judicial review under section 702(2) (A) of the APA, however, is not designed to ascertain whether an agency has made the best conceivable decision according to a single isolated criterion. Rather the court's role is the "quite narrow" one of determining whether the agency has considered all the pertinent factors and made a final decision that is not clearly erroneous. OPM considered the impact BC's proposal would have on coverage for catastrophic mental illness and concluded that the proposal would not excessively restrict that coverage. The court cannot conclude that OPM's failure to guarantee last dollar coverage for catastrophic mental illness evidences OPM's apathy towards the interests served by section 8904. Nor can the court conclude that OPM's final decision was clearly erroneous because it did not exalt the policies embodied in section 8904 over other policy goals of equivalent relevance and importance.

Plaintiffs' second argument is based on the statement in the Court of Appeals' opinion that "OPM has not provided a detailed explanation for why it was willing to accept the particular package of benefits proposed by Blue Cross/Blue Shield rather than requiring a package of benefits with the same overall financial cost but with less serious consequences on one category of "catastrophic" coverage." Roe, Doe v. Devine, supra, slip op. at 4. According to plaintiffs, OPM still has not explained why it accepted cutbacks for one particular type of catastrophic illness, rather than demanding a more equitable method for trimming plan costs. In particular, OPM has not, according to plaintiffs, clarified why it did not require comparable reductions for selected categories of physical benefits.

In the court's view, the Burns affidavit cures the deficiency that troubled the Court of Appeals. OPM has isolated several factors which justified selecting out mental health benefits for special treatment. OPM was convinced that such benefits are especially expensive in proportion to the number of subscribers relying upon them; thus, the cost savings sought by the government could be attained without forfeiting a service of widespread appeal and importance to plan members and without increasing across-the-board expenses for plan participation. Plaintiffs insist that the same [*583] rationale could be used to justify cutbacks in particular categories of physical benefits but offer no specific evidence to support this assumption. The fact that persons suffering from illnesses will invariably use a disproportionate amount of plan resources, Vehec Aff. at PP7-10, does not undercut OPM's finding that mental benefits are unusually expensive. Plaintiffs have not adduced evidence indicating that coverage is comparatively expensive for persons suffering from discrete physical disorders.

Moreover, plaintiffs do not dispute OPM's finding that cumulative claims made to mental benefit users greatly exceeded premiums paid by physical benefit users were basically equal. Paring down physical health benefits could only exacerbate the inequality between mental benefit users and physical benefit users. Conversely, reducing mental benefits was the only reasonable way, consistent with OPM's general budgetary constraints, to place physical and mental benefit users in rough equilibrium.

The other major reason for concentrating cutbacks in the area of mental health benefits was to allay BC's concerns regarding adverse selection. Plaintiffs do not dispute that BC harbored grave doubts about the integrity of the plan if unlimited mental health benefits continued to be offered. Even if BC was particularly sensitive to the relationship between mental benefits and adverse selection, n6 it was not irrational for OPM to secure BC's continued participation in the FEHB program by alleviating BC's uncertainties.

n6 Of course, plaintiffs' own expert concedes that some of the adverse selection suffered by BC resulted from high levels of mental health benefits. See n. 4, supra. Thus, it is undisputed that there was an objective, factual foundation for taking BC's concerns about adverse selection into account in

arriving at a final decision.

Thus, it appears that OPM furnished legitimate, supportable reasons for allowing BC to concentrate cutbacks in the mental health benefit component of the plan, rather than compelling BC to implement an alternative "package of benefits with the same overall financial cost." This is all that was mandated by the Court of Appeals and all that is required by section 706 of the APA. n7

n7 Contrary to plaintiffs' apparent assumption, OPM is not required to demonstrate that it considered all imaginable options for reducing costs, or even the options specifically favored by plaintiffs, before agreeing to BC's proposal. OPM is only required to document that the AFGE v. Campbell, supra, slip op. at 6; see generally, Bowman Transportation, Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); NRDC v. United States Nuclear Regulatory Commission, No. 74-1586, slip op. at 68 (D.C. Cir. April 27, 1982). OPM has met this burden.

The third and final criticism of OPM's explanation for its decision is based upon the statement in the Court of Appeal's decision that "OPM has not adequately explained the implication in the "Preliminary Analysis' that reducing mental health coverage would be one way of insuring that "no individual . . . suffer disproportionately" from the overall cuts required by OPM's budget constraints." Roe, Doe v. Devine, supra, slip op. at 5. Plaintiffs contend that the Burns affidavit still does not explain the implication in the Preliminary Analysis and, therefore, OPM's decision is arbitrary or capricious.

Plaintiffs' argument is based on a misreading of the Court of Appeal's opinion. The Court was simply explaining why the Preliminary Analysis could not serve as the articulation of OPM's decisionmaking process; the Analysis was simply too conclusory and ambiguous. The Court of Appeals was not imposing on OPM the affirmative obligation of evidencing that the mental health benefit reductions insured that "no individual . . . suffer disproportionately," n8 but [*584] was simply instructing OPM to furnish some supplemental, targeted explanation for the decision to accept BC's proposal. Since OPM has now proffered a specific explanation of the actual factors motivating the decision at issue, it is irrelevant whether OPM can clarify a vague implication in the earlier Preliminary Analysis.

n8 Such an affirmative obligation would be entirely inconsistent with the discretion vested in OPM to bargain for particular, appropriate levels of health benefits. 5 U.S.C. @ 8902(d); S. Rep. No. 468, 86th Cong., 1st Sess. 3 (1959). OPM is obviously not precluded from agreeing to any benefit reductions that may disadvantage some individuals more than others, as long as this decision is not arbitrary or capricious.

Overall, plaintiffs have not succeeded in demonstrating that the Burns affidavit fails to comply with the mandate of the Court of Appeals. The affidavit explains, in sufficient detail, the various considerations underlying OPM's decision to accept BC's proposal. Those considerations included all the policy goals which are discernible in the FEHBA, including those embodied in section 8904. OPM's ultimate decision reflected a rational balancing of conflicting statutory purposes that the court cannot label "clearly erroneous." Accordingly, the court concludes that OPM was not arbitrary or capricious in accepting the 1982 mental health benefits proposed by BC. n9

n9 In opposing defendants' motion for summary judgment, plaintiffs also contend that there are genuine issues of material fact which prevent the court from granting summary judgment for defendants on plaintiffs' APA claims. The court disagrees. It is axiomatic that review of agency action or inaction is limited to the record before the agency at the time the decision was made. See Citizens to Preserve Overton Park, Inc. v. Volpe, supra, 401 U.S. at 402; Bradley v. Weinberger, 483 F.2d 410, 413 (1st Cir. 1973); Texas v. EPA, 499 F.2d 289, 297 (5th Cir. 1974). The plaintiffs have not demonstrated that there is any dispute as to the record before OPM at the time it decided to accept BC's

proposal. The real dispute in this case is essentially a legal one: whether OPM could rationally conclude on the basis of the record before it that accepting BC's proposal was consistent with the purposes of the FEHBA. The court has resolved this legal dispute in defendants' favor and no purpose would be served by prolonging the matter.

B. Rehabilitation Act and Equal Protection Claims

Defendants contend that they are entitled to summary judgment as to plaintiffs' Rehabilitation Act and equal protection claims and the court concurs.

There are several substantial flaws in plaintiffs' equal protection argument. First, the equal protection prescription incorporated in the Fifth Amendment only prohibits purposeful discrimination. Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979). The limitation on mental health benefits that is at issue is facially neutral; it does not create an inherently invidious classification of persons. See Schweiker v. Wilson, 450 U.S. 221, 101 S.Ct. 1074, 1080, 1081 67 L.ED.2d 186 (1981); General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (the mere exclusion of pregnancy from a disability plan providing general coverage is "not a gender based discrimination at all"). Since plaintiffs have proffered no evidence suggesting that the reductions in question were undertaken with covert discriminatory intent, the equal protection challenge suffers from a fatal threshold deficiency.

Second, even if the benefit reductions are constitutionally reviewable they need only pass muster under the rational basis test. The limitations do not impinge on fundamental rights, Schweiker v. Wilson, supra, 450 U.S. at 230, 101 S.Ct. at 1080 (1981), nor do they implicate the interests of a "suspect class." Contrary to the criteria enumerated for such classes, federal employees receiving mental health benefits are not a "discrete and insular group," United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938), endowed with particular immutable characteristics. See Doe v. Colautti, 454 F. Supp. 621, 631-32, aff'd 592 F.2d 704, 710 (3rd Cir. 1979). n10

n10 Plaintiff Roe has as much as acknowledged this in his brief by stating that "the need for mental health services is the defining characteristic of" the persons affected by the benefit limitations. Plaintiff's Motion for Preliminary Injunction, at 14 (Emphases added).

The defendant has certainly articulated a rational basis for the controversial cutbacks, particularly in view of the "strong presumption of constitutionality" accorded [*585] to legislative and administrative disbursements of monetary benefits. Mathews v. Decastro, 429 U.S. 181, 185 (1976). The defendants have offered the completely neutral rationale of reducing health care costs to the government, Geduldig v. Aiello, 417 U.S. 484, 496 (1974) (minimizing costs is "an objective and wholly noninvidious basis for the state's decision not to create a more comprehensive insurance program than it has here"), as well as the importance of preserving the integrity of the entire federal health insurance program by minimizing the impact of the adverse selection phenomenon. See e.g., Califano v. Boles, 443 U.S. 282, 296 (1979); Califano v. Tobst, 434 U.S. 47, 53 (1977). Finally, the defendants have stressed that the benefit reductions in question will leave physically ill and mentally ill persons in rough parity with respect to projected per capita outlays. This suggests not only that a rational basis existed for the limitations on mental health benefits, but that a discriminatory classification is not even involved in the first instance.

Section 504 of the Rehabilitation Act provides, in pertinent part:

No otherwise 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 or under any program or activity

conducted by an Executive agency. . . .

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The most reasonable interpretation of this provision is that it disallows a federal agency from withholding from a handicapped individual a benefit that is made available to others. Doe v. Colautti, supra, 454 F. Supp. at 629. The alternative interpretation urged by the plaintiffs, that provision of a benefit to ameliorate one harm triggers the requirement to furnish equivalent benefits to all handicapped persons, is neither sensible nor supported by the legislative history of section 504. Id. at 454.

Applying the reasonable interpretation of section 504 to the cutbacks at issue necessitates a finding that they are legally valid. All benefits offered under the BC contract will be made available to both physically and mentally ill persons. No mentally incapacitated persons will be denied benefits or participation in the program "solely by reason" of their handicaps. Once again, the program will restore physically and mentally ill persons to relative equivalency in terms of actual resource expenditures. Thus, there can be no genuine contention that the cutbacks at issue "discriminate" against mentally diseased persons solely by virtue of their handicaps.

Plaintiffs maintain that there are genuine issues of material fact which preclude the granting of summary judgment as to these claims. Specifically, plaintiffs maintain that additional discovery is necessary to ascertain OPM's intent at the time it decided to accept BC's proposal. The court concludes that such discovery is not warranted. OPM has, in the precise manner demanded by the Court of Appeals, described the reasons for its decision to authorize the mental health benefit reductions. Plaintiffs have adduced no evidence tending to imply that these reasons were pretextual for covert discriminatory intent, and have not explained why discovery will be likely to produce such evidence. Moreover, as explained previously, there are several fatal legal flaws in plaintiffs' Rehabilitation Act and equal protection challenges, completely independent of any questions concerning OPM's state of mind. n11 Finally, the court has been directed by the Court of Appeals to decide this matter expeditiously, so that federal employees considering their health insurance options can proceed knowledgeably and confidently. Roe, Doe v. Devine, [*586] supra, slip op. at 5. It would be inconsistent with this mandate to postpone final resolution of this controversy so plaintiffs can undertake a fishing expedition into the mental state of OPM decisionmakers. Accordingly, defendants' motions for summary judgment as to plaintiffs' Rehabilitation Act and equal protection claims are granted.

n11 With respect to plaintiffs' equal protection challenge, it is clear that there is at least a rational basis for the cutbacks in controversy. With regard to plaintiffs' claim under section 504 of the Rehabilitation Act, mentally incapacitated persons have not been denied participation in the FEHB program "solely by reason" of their handicaps.

III. Conclusion

The central issue in this case is whether OPM was arbitrary or capricious in accepting BC's proposal to reduce mental health benefits instead of insisting on alternative ways to achieve desired cost savings. Careful scrutiny of the Burns affidavit submitted by OPM and the "record as a whole," NFFE v. Devine, supra, slip op. at 13, convinces the court that OPM did not abuse its wide discretion in negotiating for federal health insurance benefits, but, rather, based its final decision on a reasoned assessment and balancing of all the purposes underlying the FEHBA. The government adopted the mental health benefit limitations in the Blue Cross/Blue Shield contract not out of callousness for the expenses confronting employees using such benefits, but as a result of legitimate interests in achieving equitable reductions in program costs and in preserving the financial viability of the FEHBA program. Because plaintiff's other substantive challenges also lack merit, the court grants defendants' motions for summary judgment and dismisses these cases.

An appropriate Judgment preceded this Memorandum Opinion.

William E. JONES, Plaintiff-Appellant,v. METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,Defendant-Appellee.

No. 81-7746.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

681 F.2d 1376; 29 Fair Empl. Prac. Cas. (BNA) 729; 29 Empl. Prac. Dec. (CCH) P32,962

August 6, 1982; As Amended

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Georgia.

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OPINION BY: JOHNSON

OPINION: [*1376]

Before VANCE, JOHNSON and HENDERSON, Circuit Judges.

JOHNSON, Circuit Judge:

Plaintiff William E. Jones filed suit alleging that defendant Metropolitan Atlanta Rapid Transit Authority (MARTA) violated Section 504 of the Rehabilitation Act, 29 U.S.C.A. @ 794, and various federal regulations by denying him a position as bus driver because of his handicap. The district court 522 F.Supp. 370, determined that plaintiff lacked standing and dismissed the suit. Plaintiff appeals. We reverse.

I. Facts

MARTA provides rapid transit for the metropolitan area of Atlanta. The transit authority receives federal financial assistance in the form of engineering and construction grants and operating subsidies from the United States Department of Transportation (DOT). MARTA apparently utilizes a portion of the DOT funds to subsidize wages of certain employment positions, including traffic checkers and bus drivers. [*1377]

Plaintiff worked for MARTA as a bus driver for 15 years. In March 1976 plaintiff suffered an injury that necessitated the amputation of his right leg. Plaintiff recovered from the injury and was rehired by MARTA as a traffic checker. Plaintiff, however, became dissatisfied with his position and sought reinstatement as a bus driver. Plaintiff asserted that despite his injury he was capable of performing the required functions of a bus driver. MARTA officials concluded that plaintiff's injury prevented him from performing the duties of a bus driver and denied his request for reinstatement.

After exhausting administrative remedies, plaintiff brought an action under Section 504 of the Rehabilitation Act, 29 U.S.C.A. @ 794, contending that MARTA discriminated against him on the basis of his handicap. n1 The district court dismissed the suit. The court determined that Section 504 only provided a cause of action against employers that received federal financial assistance for the primary purpose of providing employment. Although MARTA received federal financial assistance, the funding was not primarily intended to provide employment.

n1 Plaintiff has an implied right of action under Section 504 of the Rehabilitation Act. Prewitt v. United States Postal Service, 662 F.2d 292, 302 (5th Cir. 1981). Accord, Meiner v. State of Mo., 673 F.2d 969, 973 (8th Cir. 1982).

The district court did note that plaintiff had standing under regulations promulgated by the DOT. 49 C.F.R. @ 27.31. The regulations prohibited discrimination against qualified handicapped people in programs or activities that received federal financial assistance of any kind, not just those receiving funds for purposes of providing employment. The district court determined, however, that the regulations exceeded the scope of Section 504 of the Rehabilitation Act and were therefore invalid. Accordingly, MARTA was not amenable to suit under either the Rehabilitation Act or the DOT regulations.

II. Statutory Framework

Section 504 of the Rehabilitation Act prohibits discrimination against otherwise handicapped individuals in "any program or activity receiving Federal financial assistance. . . ." 29 U.S.C.A. @ 794. n2 The Rehabilitation Act

does not, however, specify the remedies, procedures and rights of an aggrieved party. Instead, Section 505 provides that the "remedies, procedures, and rights" of a handicapped individual injured under the Act are found in Title VI of the Civil Rights Act of 1964. 29 U.S.C.A. @ 794a. n3

n2 Section 504, 29 U.S.C.A. @ 794 provides:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

n3 Section 505, 29 U.S.C.A. @ 794a provides:

(a) (1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. [*1378]

Section 601 of the Civil Rights Act of 1964 (Title VI) contains sweeping prohibitions against race discrimination by employers. n4 Congress, however, placed significant restrictions upon the breadth of Section 601. Section 604

authorizes a federal department or agency to maintain an action against employers to enforce Title VI only if the employer receives federal financial assistance and "a primary purpose of the Federal financial assistance is to provide employment." 42 U.S.C. @ 2000d-3. n5 Thus in order to bring suit under Title VI, an employer must receive federal funds for purposes of providing employment.

n4 Section 601 of the Civil Rights Act of 1964, 42 U.S.C.A. @ 2000d, provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

n5 Section 604 of the Civil Rights Act of 1964, 42 U.S.C.A. @ 2000d-3 provides:

Nothing in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organizations except where a primary objective of the Federal financial assistance is to provide employment. (Emphasis added.)

A number of circuits have concluded that Congress intended to incorporate the restrictions found in Section 604 of Title VI into the Rehabilitation Act. United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981); Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir. 1980), cert. denied, 449 U.S. 892, 101 S.Ct. 249, 66 L.Ed.2d 117 (1981); Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947, 99 S.Ct. 2895, 61 L.Ed.2d 318 (1979). Thus, a plaintiff will not have standing to maintain a suit under Section 504 of the Rehabilitation Act unless the employer receives federal financial assistance and the primary purpose of the assistance is to provide employment. The courts have employed a variety of rationale to justify the incorporation of Section 604 into the Rehabilitation Act. In Carmi, supra, the Eighth Circuit essentially concluded that Congress intended the Rehabilitation Act and Title VI to be read in pari materia. The Fourth Circuit in Trageser, supra, determined that Congress intended to incorporate Section 604 into the Rehabilitation Act when it amended the Act by adding Section 505.

In the absence of controlling precedent in this Circuit n6 and in order to ascertain the correctness of these holdings, we must examine both the language of the relevant statutes and their legislative history.

n6 Standing under Section 504 of the RehabilitationAct was considered by the Court in Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981). In Sibley, the Court determinedthat a plaintiff did not necessarily have standing simply because the employer received some financial assistance from the federal government. Instead, the plaintiff had to establish that "the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefitedby federal financial assistance." Id. at 769. . The opinion further stressed that the burden of establishing that the particular program/activity received federal financial assistance "should be slight." Id. at 769 n.14. Accord, Doyle v. Univ. of Ala. -- Birm., slip op. p. , 680 F.2d 1323 No. 81-7697 (11th Cir. 1982); Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226, 1232 (7th Cir. 1980).

Although holding that the plaintiff had to be involved in a program or activity that directly benefitedfrom federal financial assistance, the Court did not determinewhether the financial assistance had to be for the purpose of providing employment.Sucha determinationwas unnecessary to the opinion.

III. Section 504 of the RehabilitationAct

The starting point for the interpretationof a statute is the language of the act itself. Perrin v. UnitedStates, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979); UnitedStates v. Anderez, 661 F.2d 404, 406 (5th Cir. 1981).Normally, a court will interpreta statute in a manner consistent with the plain meaning of the statutory language. Fitzpatrick v. InternalRevenue Service, 665 F.2d 327, 329 (11th Cir. 1982). [*1379] Where, however, the language of a statute is ambiguous or leads to absurd results, a court is free to consult the legislative history and discern the true intent of Congress. AmericanTrucking Assn, Inc. v. I.C.C., 659 F.2d 452, 459 (5th Cir. 1981); Glenn v. UnitedStates, 571 F.2d 270, 271 (5th Cir. 1978).

Section 504 of the RehabilitationAct specifically prohibits discrimination against qualified handicappedpeople in "any program or activity receiving Federal assistance. . . . 29 U.S.C.A. @ 794.On its face, therefore, the Section applies to programs receiving federal financial aid of any kind. Moreover, nothing in the language of the statute indicates that it was intended to reach only those programs receiving federal financial assistance for the primary purpose of providing employment. n7 Because the statute is unambiguous and does not lead to absurd results, we would normally pretermitour analysis here.Nonetheless,for purposes of clarification and in light of authority to the contrary, UnitedStates v. Cabrini Medical Center, supra; Carmi v. Metropolitan St. Louis Sewer District, supra, we turn to the legislative history to determine whether Congress intendedto restrict applicationof the RehabilitationAct to those programs receiving federal financial assistance for the primary purpose of employment. See Watt v. Alaska, 451 U.S. 259, 266, 101 S.Ct. 1673, 1677, 68 L.Ed.2d 80 (1981).

n7 Similarly, a plain reading of Section 604 of the Civil Rights Act of 1964 would appear to render it inapplicable to private suits under the Rehabilitation Act. Section 604 expressly applies only to federal agencies and departments. Thus a federal agency or department must establish that the employer received federal financial assistance for the purpose of employment in order to maintain an action under Title VI. Section 604 does not, on its face, apply to private individuals. Accordingly, even were Section 604 deemed applicable to suits under the Rehabilitation Act, it would seemingly apply only to suits brought by federal agencies or departments and not suits brought by private individuals. Carmi v. Metropolitan St. Louis Sewer District, supra, 620 F.2d at 678 (McMillian, J., concurring); Hart v. County of Alameda, 485 F.Supp. 66, 72 (N.D.Cal.1979).

Congress enacted the Rehabilitation Act in 1973. Pub.L.No. 93-112, 87 Stat. 355 (1973). Neither the House nor the Senate reports contain even a scintilla of evidence indicating that Congress intended to incorporate Section 604 of Title VI into the Rehabilitation Act and limit the applicability of Section 504 to programs receiving federal financial assistance for the primary purpose of providing employment. The legislative history to Section 504 does not even mention Title VI of the Civil Rights Act. Instead, the reports merely reiterate that Section 504 applies to any program receiving federal financial assistance. n8

n8 For example, the House Report explained the significance of Section 504 by stating that:

Section [504] provides that no otherwise qualified handicapped individual will be discriminated against or excluded from participation in or benefits from any program of activity receiving Federal assistance.
H.R.No. 244, 93rd Cong., 1st Sess. 35 (1973), U.S.Code Cong. & Ad. News, 1973, p. 2076. The Senate Report contained substantially identical language.
S.Rep.No. 318, 93rd Cong., 1st Sess. 50, 70 (1973), U.S.Code Cong. & Ad. News 1973, 2076, 2143.

The Rehabilitation Act was amended in 1974. Pub.L.No. 93-516, 88 Stat. 1619 (1974). Congress noted obliquely in the legislative history to the amendments that Section 504 was "patterned" after Section 601 of Title VI. S.Rep.No. 1297, 93rd Cong., 2d Sess. (1974), reprinted in U.S.Code Cong. & Ad.News 6373, 6390. At least one circuit has relied upon this lone reference as indicia that Congress intended to incorporate wholesale the provisions of Title VI, including Section 604, into the Rehabilitation Act. Carmi v. Metropolitan St. Louis Sewer District, supra, 620 F.2d 675. We find such an interpretation reads far too much into an isolated reference in the legislative history.

The reference does not indicate an intent to incorporate the strictures of Title VI into the Rehabilitation Act. Viewed in context, the reference

constitutes nothing more than acknowledgement that Section 504 was written with the same sweeping language found in Section 601 of Title VI. In fact, the legislative history to the 1974 amendments is replete with notations indicating [*1380] that Section 504 was intended to encompass programs receiving federal financial assistance of any kind, not just those programs receiving federal financial assistance for the purpose of providing employment. n9 Furthermore, had Congress intended to incorporate wholesale the provisions of Title VI into the Rehabilitation Act, the legislative body would have had no reason to amend the Act in 1978 and provide that the "remedies, procedures, and rights" found in Title VI were applicable to suits under Section 504 of the Rehabilitation Act. n10

n9 The Senate Report made clear the broad reach of Section 504. "Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally aided program." (Emphasis added.) S.Rep.No. 1297, 93rd Cong., 2d Sess. 38 (1974), reprinted in U.S. Code Cong. & Ad. News 6373, 6388. Similarly, the Report noted that:

The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient or other means otherwise authorized by law. Implementation of section 504 would also include pre-grant analysis of recipients to ensure that Federal funds are not initially provided to those who discriminate against handicapped individuals. (Emphasis added.) S.Rep.No. 1297, supra, at 40, reprinted in U.S. Code Cong. & Ad. News, supra, at 6390.

n10 In any event, the precise import of the statement in the legislative history that Section 504 was "patterned" after Section 601 of the Civil Rights Act of 1964 is at best unclear. Ambiguous and unclear legislative history may not be used to alter the ordinary meaning of statutory language. Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 158 n.3, 101 S.Ct. 2239, 2241 n.3, 68 L.Ed.2d 744 (1981); Dent v. St. Louis-San Francisco Ry. Co., 406 F.2d 399, 403 (5th Cir. 1969), cert. denied, 403 U.S. 912, 91 S.Ct. 2219, 29 L.Ed.2d 689 (1971); League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 172 (9th Cir.), cert. denied, 444 U.S. 943, 100 S.Ct. 299, 62 L.Ed.2d 310 (1979).

Finally, we note that the RehabilitationAct is remedial in nature. Carmi v. MetropolitanSt. Louis Sewer District, supra, 620 F.2d at 677 (McMillian, J., concurring). As a general matter, courts eschew narrow interpretationsof remedial statutes. Instead, remedial statutes are normally accorded broad construction in order to effectuate their purpose.Peyton v. Rowe, 391 U.S. 54, 65, 88 S.Ct. 1549, 1555, 20 L.Ed.2d 426 (1968); Ayers v. Wolfinbarger, 491 F.2d 8, 16 (5th Cir. 1974).Because the legislative history is devoid of language demonstratingthat Congress intendedSection 604of Title VI to apply to suits under the RehabilitationAct, the remedial nature of the RehabilitationAct mandatesthat we reject such an interpretation.

IV. Section 505 of the RehabilitationAct

In 1978, Congress again amendedthe RehabilitationAct and added Section 505. Pub.L.No. 95-602, 92 Stat. 2955 (1978). n11 The section provides that the "remedies, procedures, and rights" of an aggrieved party are found in Title VI of the Civil Rights Act of 1964. Significantly, Congress did not simply state that suits under Section 504 of the RehabilitationAct were controlled by Title VI. Instead, Congress made clear that only the "remedies, procedures, and rights" of Title VI were incorporatedinto the RehabilitationAct. Section 604, as a substantive restriction on standing, does not constitute a right, remedy or procedure. n12 Thus, under the plain [*1381] meaning of the language in Section 505, Section 604 of the Civil Rights Act was not incorporatedinto the RehabilitationAct.

n11 The language of Section 505 did not appear in the original House bill. The origin of the language was in the Senate and was added to the final bill at the joint conference. H.Con. R.No. 1780, 95th Cong., 2d Sess. (1978), reprinted in U.S.Code Cong. & Ad.News at 7404.

n12 A "remedy" is the means employed to enforce a right or redress an injury. Black's Law Dictionary 1163 (rev. 5th ed. 1979). The term "rights" generally connotes "a power, privilege, faculty, or demand, inherent in one person and incident upon another." Black's Law Dictionary, supra, at 1189. Clearly, the restrictions found in Section 604 of the Civil Rights Act of 1964 constitute neither a right nor a remedy under the aforementioneddefinitions.

Procedures prescribe methods of "enforcing rights or obtaining redress for their invasion; machinery for carrying on proceduralaspects of a civil or criminal action. . . . As a general rule, laws which fix duties, establish rights and responsibilities among and for persons. . . are "substantive laws". . . ." Black's Law Dictionary, supra, at 1083. By severely restricting the category of people that can maintain an action under the RehabilitationAct, Section 604 of the Civil Rights Act of 1964 can only be viewed as a substantive limitation on the rights created by Section 504 of the RehabilitationAct. As such, the restriction cannot be viewed as procedural.

Any lingering doubt concerning the correct interpretation of Section 505 is dispelled by reference to the legislative history. The legislative history makes clear that Congress intended the amendments to expand the remedies of handicapped individuals. See, e.g., 124 Cong.Rec. S-30311 (daily ed., Sept. 20, 1978) (statement by Senator Stafford) ("The bill allows the rehabilitation program to grow and serve more handicapped individuals and provide those individuals with greater opportunities to maximize their potential.") (emphasis added); id. at S-155591 (daily ed., Sept. 20, 1978) (statement by Senator Cranston); id. at S-30303 (statements by Senator Randolph); id. at H-13901 (daily ed., May 16, 1978) (statements by Congressman Jeffords). We find it disingenuous to suggest that we read into an amendment intended to broaden remedies under the Act a restriction on standing. n13

n13 Other evidence demonstrates that the 1978 amendments were intended to expand rather than contract the applicability of the Rehabilitation Act. As originally enacted, Section 504 did not make clear that it applied to the federal government as well as state and local governments. In fact, the Justice Department issued an opinion at the request of the Department of Health, Education and Welfare concluding that the Federal Government was exempt from the statute. The 1978 amendments specifically negated the Justice Department's interpretation by extending the Act to executive agencies and the United States Postal Service. Prewitt v. United States Postal Service, supra, 662 F.2d at 302. As noted by Congressman Jeffords, "[t]his amendment removes [the exemption for the federal government] and applied 504 to the Federal Government as well as State and local recipients of Federal dollars. . . . I think this is fair and appropriate and should go a long way toward developing a uniform and equitable national policy for elimination of discrimination." 124 Cong.Rec. H-13901 (daily ed., May 16, 1978).

More specifically, the Conference Report to the 1978 Amendments acknowledges that the Rehabilitation Act extends to any recipient of federal financial assistance. H.Con.R. No. 1780, 95th Cong., 2d Sess. (1978), reprinted in U.S.Code Cong. & Ad. News 7375, 7404 (Section 505 insures that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 would be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance. . . . ") (emphasis added). Furthermore, the discussion of Section 505 in the Conference Report was located in a subsection titled "Attorneys' Fees and Remedies." The title of an act or subsection can be used to help interpret an ambiguous statute. Russ v. Wilkins, 624 F.2d 914, 922

(9th Cir. 1980). It is reasonable to conclude that the title of this subsection indicates that Congress was adopting the section to provide benefits and remedies for an aggrieved party. On the other hand the restrictions found in Section 604 cannot be construed as either a benefit or a remedy. The explanation of the statute and the title of the subsection therefore establish that Congress did not intend to incorporate Section 604 of the Civil Rights Act

into Section 504 of the RehabilitationAct.

Finally, we note that four years after the adoptionof the RehabilitationAct in 1973, the Departmentof Health, Educationand Welfare enactedregulations that attemptedto implementthe Act. See 45 C.F.R. Part 84. The regulations did not restrict the applicability of the RehabilitationAct to those programs receiving federal funds for the purpose of providing employment.Instead,the regulations prohibited [*1382] discrimination against qualified handicapped individuals in programs and activities receiving or benefiting from any federal financial assistance. 45 C.F.R. @ 84.2(f) & (h); @ 84.4. see

In enacting Section 505, the Senate report specifically noted the existence of the HEW regulations.Moreover, the report noted that Section 505 did nothing more than codify the rights, remedies and proceduresfound in the HEW regulations.

It is the committee's understandingthat the regulations promulgatedby the Departmentof Health, Education, and Welfare with respect to procedures, remedies, and rights under Section 504 conform with those promulgatedunder Title VI. Thus, [Section 505] codifies existing practice as a specific statutory requirement. (Emphasisadded.)

S.Rep.No. 890, 95th Cong., 2d Sess. 19 (1978), U.S.Code Cong. & Ad.News, 1978 p. 7312. Thus Section 505 was intendedto encompassonly those remedies, proceduresand rights of Title VI found in the HEW regulations. Since the HEW regulations did not utilize or mention the restrictions found in Section 604 of Title VI, Congress obviously did not intend Section 505 to incorporatesuch a restriction into the RehabilitationAct. n14

n14 In Trageser v. Libbie Rehab. Cntr. Inc., supra, 590 F.2d 87, the Fourth Circuit relied upon the language of Section 505 to conclude that Congress intendedto incorporatethe restrictions of Section 604 into the Rehabilitation Act. We note, however, that the opinion suffers from a number of deficiencies that render its analysis suspect. The Trageser court made no attemptto determinewhether the restrictions found in Section 604 constituteda right, remedy or procedurewithin the meaning of Section 505. Moreover, the opinion failed to examine the legislative history of Section 505. As a result, the opinion did not provide any support from the legislative history for its interpretation.Infact, as we have shown, the legislative history indicates a contrary intent. Finally, without providing any supporting authority, the Trageser court concluded that Section 604 was intendedto apply to actions by private parties. As noted, however, Section 604 states on its face that it applies only to actions brought by federal departmentsand agencies. see note 7, supra. Accordingly, we find the reasoning of the opinion decidedly unpersuasiveand decline to follow it.

V. Conclusion

Upon consideration of the issue, we have uncovered no evidence demonstrating that Congress intended to incorporate the limitations of Section 601 of Title VI into the Rehabilitation Act. We therefore effectuate the plain meaning of the language in Sections 504 and 505 and conclude that a plaintiff need not establish that the employer received federal financial assistance for the primary purpose of providing employment in order to have standing. Instead, a plaintiff need only show that the employer received federal financial assistance and that he/she was an intended beneficiary of the assistance. Doyle v. Univ. of Ala.-Birm., supra; Brown v. Sibley, supra. Moreover, our determination leads to the ineluctable conclusion that the DOT regulations were written in a manner consistent with the Rehabilitation Act and were therefore valid. n15

n15 The DOT regulations prohibit discrimination against qualified handicapped individuals in any program or activity receiving or benefiting from federal financial assistance. 49 C.F.R. @ 27.7. The regulations define federal financial assistance as:

. . . 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:

(a) Funds;

(b) Services of Federal personnel; or

(c) Real or personal property or any interest in, or use of such property, including:

(1) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(2) 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.

49 C.F.R. @ 27.5. Thus, the regulations are not limited to employers receiving federal aid for purposes of employment. Instead, they extend to employers receiving or benefiting from any kind of federal financial assistance.

Other federal agencies have adopted similar or identical regulations. See 45 C.F.R. Part 85 (Department of Health & Human Services); 18 C.F.R. Part 113 (Small Business Administration); 31 C.F.R. Part 51 (Department of the Treasury). [*1383]

We of course intimate no position on the merits of plaintiff's claim. Instead, we simply hold that the district court applied the incorrect standard in determining plaintiff's standing to maintain the suit. Accordingly, the decision of the district court if REVERSED and REMANDED for proceedings non inconsistent with this opinion.

EDWARD B. OVERTON, Plaintiff-Appellant, v. WILLIAM K. REILLY, Administrator, Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants-Appellees.

No. 91-3186

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

977 F.2d 1190; 1992 U.S. App. LEXIS 27265; 60 Fair Empl. Prac. Cas. (BNA) 128; 60 Empl. Prac. Dec. (CCH) P41,835

April 30, 1992, Argued
October 22, 1992, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 90 C 412. James B. Parsons, Senior Judge.

DISPOSITION: The judgment of the district court is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

COUNSEL: For Plaintiffs-Appellants: James C. Schroeder, 312/782-0600, Vincent J. Connelly, Kathleen Gorr, 312/782-0600, MAYER, BROWN & PLATT, 190 S. LaSalle Street, Chicago, IL 60603, USA.

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JUDGES: Before CUDAHY and KANNE, Circuit Judges, and ESCHBACH, Senior Circuit Judge.

OPINION BY: CUDAHY
OPINION: [*1191]

CUDAHY, Circuit Judge. Edward Overton brought a claim against the United States Environmental Protection Agency (EPA) under sections 501 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. @@ 791 & 794 et seq. (1988). Overton claims that the EPA fired him because of his handicap. The district court granted summary judgment for the EPA, and we reverse.

I.

We review a grant of summary judgment de novo, and must take the facts in the light most favorable to the nonmovant. Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1084 (7th Cir. 1992). The following account, drawn from the briefs, the memorandum opinion of the district court and the record, presents the facts of the case from Overton's point of view.

Overton lacks a finger on his left hand, but the missing finger does not hold him back much. Overton is somewhat disabled, however, by an emotional illness, which appears to put a strain on his contacts [**2] with other people. Despite a long history of mental illness, which includes severe bouts of depression, n1 in 1985 Overton managed to graduate from the University of Illinois at Chicago with a B.S. in Chemistry. Upon graduation, the Illinois Department of Rehabilitation Services (DORS) recommended that Overton apply for a job with the EPA, which had a Disabled Persons Program. DORS notified Seth Diblee, the head of the Program, that Overton had personal and emotional problems and took a small amount of medication to control tension. The DORS letter concluded, however, that Overton's disability would not interfere with his performance as a chemist.

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n1 "Depression" is a misleadingly mild term for an extraordinarily debilitating illness. See William Styron, Darkness Visible: A Memoir of Madness (Random House 1990).

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Diblee referred Overton to Gregory Parker, the (then) Chief of the Underground Injection Control Section of the EPA for Region V, based in Chicago. Parker offered Overton a job with the permit unit of [**3] his section. According to Parker's deposition testimony, he hoped that a chemist would add to the overall expertise of the Permit Unit staff, which consists mostly of geologists. Parker did not know that Overton would have difficulty communicating with the public. On the other hand, Parker and Overton did not discuss public contact, and Overton was under the impression that the job did not require any. Overton's job description states that personal contacts "primarily include employees in the agency, both inside and outside the immediate office, including higher-grade staff, professionals and support staff." Overton App. at 68. It makes no mention of contacts with the public.

Soon after he started work in December 1985, Overton began to have trouble with the new supervisor of the Permit Unit, Valerie Jones. Overton admits to falling asleep at his desk during his first week, when he had nothing to do and his medication made him drowsy. Jones claims, [*1192] and Parker also stated, that Overton slept on the job rather more often. Larger troubles arose in January 1986, however, when Jones announced that all of the members of the Permit Unit technical staff would have to write permits--an activity [**4] that requires some amount of communication with permit applicants. Shortly after this announcement, Overton informed Jones that his emotional problems made personal contact with members of the public difficult for him, if not impossible. Overton asked that his job be restructured so that he could avoid using the telephone and meeting with permit applicants in person. He also asked for more assignments that would require use of his knowledge of chemistry. According to Diblee and Overton, Jones refused even to consider making accommodations along these lines. Jones herself testified that her response was to suggest that Overton seek another position within the agency.

In subsequent performance reviews, Jones criticized Overton for his "inability to communicate effectively with the regulated community." Dep. of Valerie Jones at 61 (Dec. 19, 1990). The reviews also report that Overton continued to sleep on the job and that he was having difficulty with the technical aspects of permit writing.

Despite these negative reviews, there is evidence that Overton was at least trying hard. Although there were eleven or twelve members of the Permit Unit technical staff, Overton completed 25 percent [**5] of the Unit's file reviews (apparently a dirty job that other employees avoided). Overton also completed 42 permits, approximately 20 percent of those completed by the Unit as a whole.

There is also evidence that Overton was doing acceptable work. During 1986, Parker took Overton under his wing: he reviewed Overton's work, talked to him frequently and asked him to perform a substantial research project. According to Parker, Overton showed progress in learning to write permits. Although Overton made mistakes, they were not that serious, nor were they unexpected in light of Overton's lack of geological expertise. Parker opined that Overton was better than other permit writers of his acquaintance who had substantially more experience.

Overton sent the results of his research project to Mario Salazar, a member of the EPA's technical staff in Washington, for peer comments. Salazar commended Overton's paper and sent it to other managers in his office, with the suggestion that the relevant regulations be amended. When Jones saw the paper, however, she

disagreed with Overton's conclusions and criticized him for circulating the paper outside of proper channels.

As early as February or March [**6] 1986, Jones told Parker that Overton should not be in the Permit Unit because he lacked a geotechnical background and because of his psychological problems. In October 1986, Jones gave an unfavorable evaluation of Overton's performance for fiscal year 1986. She cited the inordinate amount of supervision Overton required, his failures to communicate and his lack of progress in understanding the technical aspects of the permit process. Following the negative review, Jones fired Overton as of December 1986. Overton filed an internal complaint, exhausted his administrative remedies and then sued.

One more set of facts is worth noting. In September 1985, before he was hired by the EPA, Overton applied for disability benefits. When he started work at the EPA, Overton notified the Social Security Administration (SSA) that he had taken gainful employment. In January 1986, the SSA determined that Overton was eligible for disability benefits, based on his emotional handicap. Given his employment status, the SSA awarded benefits on a nine-month trial basis. When Overton found out that he would be terminated, in October 1986, Overton notified the SSA, which continued his benefits.

On the EPA's [**7] motion for summary judgment, Judge Parsons concluded that there was no genuine issue that Overton was not "otherwise qualified" for his position. Mem. Op. and Order at 16 (July 9, 1991) (Mem. Op.). The EPA had made every "reasonable accommodation" for Overton's [*1193] handicap; Overton had presented no evidence that he "could have performed the essential functions of any position"; and Overton's suggested accommodations were unreasonable in that they required the EPA to manufacture a new position for him. Id. at 14-15.

II.

Overton brought suit under sections 501 and 504 of the Rehabilitation Act of 1973. 29 U.S.C. @@ 791 & 794. The district court treated Overton's claim as one brought solely under section 504. Mem. Op. at 1. To compound the confusion, we have expressed some doubt that section 504 applies to employment discrimination suits against federal agencies. McGuinness v. United States Postal Service, 744 F.2d 1318, 1321-22 (7th Cir. 1984); see also Johnson v. United States Postal Service, 861 F.2d 1475, 1477 (10th Cir. 1988), cert. denied, 493 U.S. 811, 107 L. Ed. 2d 23, 110 S. Ct. 54 (1989); Boyd v. United States Postal Service, 752 F.2d 410, 413 (9th Cir. 1985) [**8] (section 501 is exclusive remedy for federal employees). Other circuits, however, believe that 504 does apply. See, e.g., Treadwell v. Alexander, 707 F.2d 473, 475 (11th Cir. 1983); Smith v. United States Postal Service, 742 F.2d 257, 260 (6th Cir. 1984); Prewitt v. United States Postal Service, 662 F.2d 292, 302-04 (5th Cir. 1981) (discussing legislative history); cf. Ristoff v. United States, 839 F.2d 1242, 1243-44 (7th Cir. 1988) (assuming without discussion that plaintiff may sue federal employer under section 504). The EPA is also in dissent from our musings in McGuinness, as it has promulgated regulations under section 504 that apply to its own employees. See 40 C.F.R. pt. 12 (1991). n2

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n2 Courts have assumed that section 504 prohibits handicap discrimination against federal employees because it prohibits discrimination "under any program or activity conducted by any Executive agency." 29 U.S.C. @ 794(a) (1988); Prewitt, 662 F.2d at 302 & n.15. In 1988, Congress amended section 504 to provide a definition for " program or activity. " Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 @ 4(2), 102 Stat. 29 (1988). Although the purpose of the amendment was to expand the coverage of the Rehabilitation Act following a restrictive interpretation by the Supreme Court, see DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1383-84 (10th Cir. 1990), cert. denied, 112 L. Ed. 2d 860, 111 S. Ct. 799 (1991), the extensive new definition

of "program or activity" makes no reference to federal employment. As discussed in the text, infra, we need not decide whether the amendment changes the applicability of section 504 to federal employment practices. Accordingly, we also need not decide whether the amendment should apply retroactively if it does change the law.

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[**9]

Neither of the parties has addressed the applicability of section 504 or the differences (if any) between a claim brought under 501 and a claim brought under 504. We need not address these questions either, since the threshold issue on which the district court granted summary judgment is identical (or at least substantially similar) under both provisions.

Section 504 authorizes discrimination suits by "otherwise qualified handicapped individuals." Section 501(b) is phrased in very different terms: the section says nothing about discrimination or qualifications and merely requires federal agencies to submit affirmative action plans. Nonetheless, section 505(a)(1), 29 U.S.C. 794a(a)(1) (1988), authorizes individual lawsuits against federal agencies that violate the terms of section 501. And regulations promulgated by the Equal Employment Opportunity Commission (EEOC) under section 501 make clear that federal agencies may not discriminate against "qualified physically or mentally handicapped persons." 29 C.F.R. @ 1613.703 (1991); see generally Langon v. Department of Health and Human Services, 295 U.S. App. D.C. 49, 959 F.2d 1053, 1057 (D.C. Cir. 1992). [**10] Thus, Overton may not maintain an action under either provision unless he is "qualified."

"Qualified" is a defined term. The EEOC polices section 501, 29 U.S.C. 791(b), and defines a qualified handicapped person as one who "with or without reasonable accommodation, can perform the essential functions of the position in question . . . ." 29 C.F.R. @ 1613.702(f) (1991). "Reasonable accommodation" is also defined:

Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible . . . and (2) job [*1194] restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

29 C.F.R. @ 1613.704(b) (1991). These possibilities are to be balanced against considerations of "undue hardship" to the agency. See 29 C.F.R. @ 1613.704(a) & (c) (1991).

The individual agencies police section 504 and are responsible for promulgating their own regulations. 29 U.S.C. @ 794(a). This might have led to a
hash of conflicting and contradictory provisions, [**11] but it did not, since the agencies have more or less copied the EEOC's regulations including its definitions of "qualified" and "reasonable accommodation." See, e.g., 5 C.F.R. @@ 900.703(e)(1) & 900.706(b)(2) (1992) (Office of Personnel Management); 29 C.F.R. @ 32.3 (1991) (Department of Labor); 38 C.F.R. @@ 18.403(k)(1) & 18.412 (1991) (Department of Veterans Affairs); 45 C.F.R. @@ 84.3(k) & 84.12 (1991) (Department of Health and Human Services). The EPA took a more economical route, and simply declared that the EEOC's regulations apply directly. See 40 C.F.R. @@ 12.103, 12.140 (1991).

In sum, litigants must jump through the same hoops to recover under either section 501 or section 504. The plaintiff must be handicapped and qualified. To be qualified, the plaintiff must be able to perform the essential functions of his job, with or without reasonable accommodation by his employer.

The only potential difference between sections 501 and 504 is the burden of persuasion on the issue of "reasonable accommodation." Other circuits have held that under section 501 the burden of proof is on the government to show that a proposed accommodation is unreasonable. Langon, 959 F.2d at 1061; [**12] Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985); Treadwell, 707 F.2d at 478; Prewitt, 662 F.2d at 308, 310 (full discussion of shifting burdens). Actions under section 504, on the other hand, may require the plaintiff to show that a proposed accommodation is reasonable, although the case law on this issue is, to say the least, complex. Compare Doe v. New York Univ., 666 F.2d 761, 775-77 (2d Cir. 1981) with Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1386-87 (10th Cir. 1981); see also Wynne v. Tufts Univ. Sch. of Medicine, 932 F.2d 19, 22-26 (1st Cir. 1991) (en banc) (questioning Doe). The apparent differences may be justified by the obligation of the government to undertake affirmative action on behalf of the handicapped under section 501, an obligation that section 504 does not impose. Southeastern Community College v. Davis, 442 U.S. 397, 410-13, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979); Hall v. United States Postal Service, 857 F.2d 1073, 1077 (6th Cir. 1988). [**13] n3 We need not allocate the burden of proof here, however, for we conclude that summary judgment was inappropriate even if Overton bears the burden of proof on this issue. n4

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n3 On the other hand, the different formulations of the burden of proof may also be due to differing fact patterns, rather than the different statutory provisions involved. See Doe v. New York Univ., 666 F.2d at 776 (allocation of burdens may depend on whether the employer relies on the handicap expressly, or claims to have acted on another basis).

n4 We trust that the parties will spend some time after remand to flesh out the issues we have raised.

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III.

We turn now to the central issue in this case: Is there a genuine question of fact whether Overton is "otherwise qualified" for his position?

A. Communicating with the "Regulated Community"

Overton concedes that his disability prevents him from communicating effectively with applicants for injection well permits. The EPA contends that such communication [**14] is an essential function of Overton's job. Since he cannot perform that function, the EPA argues, Overton is not qualified for his position. [*1195]

There is a genuine question here, however, whether contact with the public is an essential function of Overton's job. Public contact was not part of Overton's official job description, either when he was hired or when Jones announced that all technical staff would have to write permits. See Davis v. Frank, 711 F. Supp. 447, 453 (N.D. Ill. 1989) (job description is relevant to determination of essential functions of position). Overton also presented evidence that Kris Kamath, another member of the Unit's technical staff, does not have any contact with the public, despite the mandate from Jones. As the district court pointed out, Kamath has better educational credentials than Overton, Mem. Op. at 15, but that does not mean that Overton is necessarily unqualified to perform similar tasks in the Permit Unit.

Even if contact with the public is an essential function of Overton's job, there is evidence to suggest that Overton could perform that function with reasonable accommodation by the EPA. First, even if contact is [**15] essential, the job does not require much of it: Parker testified that about five percent of Overton's job involved public contact. And there does not seem to be

any question that Overton is capable of corresponding with permit applicants by mail. To the extent that telephone contacts are required, it may be reasonable for the EPA to provide Overton with someone to talk for him, just as it might be a reasonable accommodation for the EPA to provide an interpreter for an employee who was deaf. See 29 C.F.R. @ 1613.704(b)(2) (1991). Overton has also suggested that his job be restructured; he could perform support functions for members of the staff who are better on the telephone. This proposal does not seem inherently unreasonable. See id.

At trial, these potential accommodations may turn out to be unduly burdensome on the EPA, but we cannot say that the agency has presented evidence sufficient to make the conclusion inevitable.

B. Sleeping on the Job and Poor Performance

Putting contacts with the public aside, the EPA presented substantial evidence to the district court that Overton's overall performance was unacceptably poor. But here, too, there are genuine issues [**16] of fact. Overton denies that he slept as much as Jones alleges. He has also presented evidence that his sleepiness is a side effect of his medication. Further, there is evidence that, even if Overton slept as much as Jones alleges, he still got his work done. Supervisors are prone to view catnaps as inappropriate and unprofessional, but if Overton's sleepiness is a function of his disability (or, more properly, of the treatment for his disability) and he can still perform the essential functions of his job, then he may still be viewed as "qualified" under the Rehabilitation Act. n5

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n5 We do not mean to condone promiscuous napping. Some positions may actually require full-time vigilance. Every position presumably requires wakefulness for most of the working day and at specified events. In any event, the government may presumably require its employees to stay awake as a matter of decorum. But that is not necessarily to say that an occasional nap would make any federal employee unfit.

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The EPA also presented some evidence [**17] that Overton required an inordinate amount of supervision. But again there was countervailing evidence--the deposition testimony of Gregory Parker that Overton made mistakes typical of a new permit writer and was improving. Some of Overton's problems with writing permits may be due to his lack of a geotechnical background. Parker may have made a mistake when he hired a chemist for the Permit Unit staff. But, again, we cannot say that there is no question about Overton's qualification for his job.

At this point we should emphasize that we have addressed only the threshold issue of Overton's qualification for his position. Nothing in section 504 of the Rehabilitation Act, however, requires a federal agency to retain every minimally qualified handicapped employee. Further, "the Rehabilitation Act requires only a stereotype-free assessment of the person's abilities and prospects rather than a correct decision." [*1196] Anderson v. University of Wisconsin, 841 F.2d 737, 747 (7th Cir. 1988) (interpreting section 504); Carter v. Casa Central, 849 F.2d 1048, 1053 (7th Cir. 1988). Section 501 may impose somewhat greater obligations to take [**18] affirmative action, but again we need not decide. If section 504 standards apply, however, Overton will have to establish at trial not only that he was qualified, but also that Jones fired him because of his handicap. Although the district court does not appear to have ruled on this point in granting summary judgment, we note that Overton presented evidence from which one could infer that Jones did so.

C. Total Disability

The district court was greatly impressed by the finding of the Social Security Administration that Overton was entitled to disability benefits. Overton, the court said, had "failed to offer any evidence to refute the conclusion drawn by the Social Security Administration that he is 'unable to perform any substantial gainful activity.' " Mem. Op. at 15-16. But the evidence that Overton completed a large number of file reviews and permits, that his work was adequate and that his research paper was well received does tend to show that Overton was able to carry on substantial gainful activity.

Further, even if a finding of disability could have preclusive effect in a private lawsuit, n6 such a finding is consistent with a claim that the disabled person is "qualified" [**19] to do his job under the Rehabilitation Act. First, the SSA may award disability benefits on a finding that the claimant meets the criteria for a listed disability, without inquiring into his ability to find work within the economy. Garfield v. Schweiker, 732 F.2d 605, 607 n.2 (7th Cir. 1984). As it turns out, the SSA granted benefits to Overton on this basis. Second, even if the SSA had looked into Overton's ability to find work in the national economy, its inquiry would necessarily be generalized. The SSA may determine that a claimant is unlikely to find a job, but that does not mean that there is no work the claimant can do. In sum, the determination of disability may be relevant evidence of the severity of Overton's handicap, but it can hardly be construed as a judgment that Overton could not do his job at the EPA.

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n6 Judge Parsons did not give the disability determination preclusive effect, and the EPA does not argue that we should.

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IV.

Overton has presented evidence sufficient to [**20] create a genuine question whether he was qualified for his position. Accordingly, the judgment of the district court is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

George Dunbar PREWITT, Jr., Plaintiff-Appellant, v UNITED STATES POSTAL SERVICE, Defendant-Appellee.

No. 80-3525.

United States Court of Appeals for the Fifth Circuit. *
Unit A
* Former Fifth Circuit case, Section 9(1) of Public Law 96-452 -- October 14, 1980.

662 F.2d 292; 27 Fair Empl. Prac. Cas. (BNA) 1043; 27 Empl. Prac. Dec. (CCH) P32,251

November 5, 1981.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Mississippi.

COUNSEL: G. Dunbar Prewitt, Jr., (Pro Se), 250 Cypress Lane, Apt. 8-C Greenville, MS., 38701

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OPINIONBY: TATE

OPINION: [*297]

Before RUBIN, RANDALL and TATE, Circuit Judges.

TATE, Circuit Judge:

Claiming that the United States Postal Service unlawfully denied him employment due to his physical handicap, the plaintiff, George Dunbar Prewitt, Jr., brought this action against the postal service. Prewitt contended that he was physically able to perform the job for which he applied despite his handicap, even though the postal service's physical requirements indicate that only persons in "good physical condition" can perform the job because it involves "arduous" work. Prewitt alleged, inter alia, that the postal service thus violated his rights under the Rehabilitation Act of 1973, as amended, 29 U.S.C. @ 701 et seq . Prewitt filed this suit as a class action, after he was denied employment as a clerk/carrier at the Greenville, Mississippi post office. The district court granted the postal service's motion for summary judgment. On Prewitt's appeal, we find that the plaintiff has raised genuine issues of material fact as to 1) whether the postal service's physical requirements for postal employment are sufficiently "job related" to provide lawful grounds for the refusal to hire Prewitt, and 2) whether the postal service has breached its duty to make "reasonable accommodation" for handicapped persons such as Prewitt. Accordingly, we reverse the summary judgment of the district court, and remand the case for further proceedings in accordance with this opinion.
The Factual Background

The plaintiff Prewitt is a disabled Vietnam war veteran. Due to gunshot

wounds, he must endure limited mobility of his left arm and shoulder. Nevertheless, in May 1970 (prior to his rejection for re-employment in 1978 that gave rise to this lawsuit Prewitt applied for a position as a distribution clerk in the Jackson, Mississippi post office, a position which, according to the job description, "require[s] arduous physical exertion involving prolonged standing, throwing, reaching, and may involve lifting sacks of mail up to 80 pounds." n1 Prewitt was hired after passing the requisite written and medical examinations, and it is undisputed that, despite his handicap, he performed his duties in a competent, entirely satisfactory manner.

n1 These physical requirements of Prewitt's 1970 position as distribution clerk are similar to those for the position of clerk/carrier for which he applied in 1978. See notes 2 and 3 infra .

Prewitt resigned his position at the Jackson post office in September 1970 to return to school. He testified in his affidavit, which we must regard as true for summary judgment purposes, that his physical condition did not diminish in any significant way between May 1970 and September 1978, when he applied for the position at the Greenville post office that gave rise to this lawsuit. Prewitt questions the failure of the postal service to re-employ him in 1978, due to a physical handicap, for a position as clerk/carrier, a position with similar physical requirements to those of the job that he had satisfactorily performed in 1970. [*298]

After applying for the clerk/carrier position at Greenville in 1978, Prewitt took and passed a standard written examination. He received a final rating of 92.8 (basic rating of 82.8 plus a 10 point compensable veteran's preference), which placed him second on the roster of eligible applicants. Physical suitability for the position, however, remained to be determined.

According to the postal services qualification standards, the duties of a carrier "are arduous and require that the incumbent be in good physical condition." Thus, a medical form which was given to Prewitt indicates that applicants for this position must meet a wide range of physical criteria, including, inter alia, the ability to see, hear, lift heavy weights, carry moderate weights, reach above shoulder, and use fingers and both hands. n2 According to the affidavit of Postmaster Charles Hughes, the duties of a clerk/carrier require stooping, behind, squatting, lifting up to seventy pounds, standing for long periods, stretching arms in all directions, reaching above and below the shoulder, and some twisting of the back. n3

n2 The form states:

Carriers and clerks must lift up to 70 lbs. Carriers must carry satchels weighing 35 lbs. Duties require arduous exertion involving prolonged walking, standing, reaching and distribution. Ability to hear conversation voice 15 feet (aid permitted)[.] Vision 20/40 Snellen in one eye. On outside assignments this work is performed in all kinds of weather.

A. FUNCTIONAL REQUIREMENTS

[The following are indicated to be applicable]

1. Heavy lifting, 45 pounds and over.

5. Moderate carrying, 15-44 pounds.

10. Reaching above shoulder.

11. Use of fingers.

12. Both hands required.

13. Walking 8 hours.

14. Standing 8 hours.

21. Operation of crane truck tractor or motor vehicle.

25. Far vision correctable in one eye to 20/20 and to 20/40 in the other.

32. Hearing aid permitted .

n3 Hughes' complete description of the job duties was as follows:

The duties of a newly hired distribution clerk and letter carrier at the Greenville Post Office are:

Meet incoming mail trucks at loading platform in the early morning to assist in off-loading sacks of mail, pouches of mail, containers of parcel post, loose parcels, etc. All types of above received mail is generally placed on 4 wheel nutting trucks except the containers of parcels that can be rolled onto the work room area as received. The 4 wheel nutting trucks are rolled in house for final distribution according to address. Sacks and parcels may weigh up to 70 pounds each. Containers and nutting trucks fully loaded could weigh several hundred pounds. The job of a clerk would then require stooping, bending, squatting, lifting, standing for long periods, and stretching arms in all directions when sorting mail in cases or boxing mail in lockboxes.

Duties of Letter Carrier:

Report at prescribed time and begin casing mail. Casing mail consists of standing at case for approximately 2 & 1/2 hours and routing mail into case. Casing involves reaching above and below shoulder and some twisting back. Withdraws letter mail and flats, bundles same and pushes basket loaded with mail and parcels to vehicle for loading. Loads satchels with no more than 35 pounds of mail and delivers along prescribed route. Route is divided into park and loop segments which are walked by carrier. Each loop ends at parked vehicle. Carrier moves vehicle to next park point and repeats procedure. Sometimes carrier will deliver mail on curbside route, which means delivering mail without leaving vehicle to curbside mail receptacles. Required to deliver parcels weighing as much as 70 pounds. Must be good driver and be able to work out of doors in all types of weather for approximately 6 hours. Works inside office for approximately 2 hours. May be required to collect mail from collection boxes along main arteries and shopping centers. Involves frequent dismounts from vehicle as stooping and bending to make the collection.

To determine whether Prewitt could meet these physical standards, the Greenville postal authorities asked Prewitt to authorize the Veteran's Administration (VA) to release his medical records to the postal service for examination, and Prewitt complied with this request. The VA postal service for examination, and Prewitt records, which apparently were made in 1970 before [*299] Prewitt was awarded disability benefits, indicated that Prewitt had a 30% service-related disability that caused "limitation of motion of left shoulder and atrophy of trapezius," as well as that he had a kidney disease, hypertension, and an eye condition not related to his armed forces service. n4 The VA report was analyzed by Dr. Cenon Baltazar, a postal medical officer, who reported: "Limited records pertaining to [Prewitt] showed limitation of left shoulder and atrophy of trapezius muscle. This is not suitable for full performance as required of postal service positions unless it is a desk job." Prewitt subsequently received from Hughes a terse, two sentence letter informing him that Dr. Baltazar had determined that he was "medically unsuitable for postal employment." The letter did not state any reasons for this finding of unsuitability. n5

n4 The VA report stated in full:

Veteran 30% Service connected for:

Res. P.O. perforating GSW, left neck and shoulder (Major), involving Mus Grp. I with injury to spinal accessory nerve, excision of neuroma, limitation of motion of left shoulder and atrophy of trapezius.

Following disability are non-service connected:

Res., glomerulonephritis [a kidney disease] with arterial hypertension Refractive error; pilonidal cyst.

n5 The body of this letter states in full:

I regret to inform you that our medical officer, C. Q. Baltazar, M.D. has determined that you are medically unsuitable for postal employment.

Your interest in postal employment is appreciated.

After receiving word of this adverse determination, Prewitt contacted Hughes to dispute the conclusion of the medical officer. Hughes told Prewitt that there was no appeal from the decision, but that the decision would be reconsidered at the local level if Prewitt would undergo an examination, at his own expense, by a private physician. In fact, Prewitt did have the right to appeal to the postal service's regional medical director. After belatedly learning of this right, Prewitt exercised his right to appeal, but he chose not to undergo a new physical examination. The regional medical officer, Dr. Gedney, examined the VA report and concluded that Prewitt was medically unsuitable. Unlike Dr. Baltazar, who relied solely on Prewitt's shoulder injury as the basis for his adverse determination, Dr. Gedney also mentioned the shoulder injury, the kidney disease (which Dr. Gedney stated is an unpredictably progressive disease that could possibly be aggravated by arduous duty) and hypertension. n6 Based on Dr. Gedney's report, the regional office sustained the adverse determination and told Prewitt that there were no further medical appeal rights. Again, the letter did not inform Prewitt of the medical reasons upon which this conclusion was based. n7

n6 Dr. Gedney's report stated:

[A]pplicant's upper left extremity is a major extremity and has been injured by a gun shot wound of the left neck and shoulder resulting in limitation of motion of the left shoulder presumably limitation of range of motion above the shoulder level.

In addition, applicant has a glomerulone-phritis with arterial hypertension. Rating Decision states that arterial hypertension and glomerulonephritis pre-existed Service. This is a progressive disease and is unpredictable in disability that it causes.

Considering both the shoulder injury and the kidney disease, this applicant would not be medically suitable for job requiring heavy lifting, pushing and pulling -- especially above shoulder level and from a standpoint of kidney disease I am unable to assure the Postal Service that he will be able to [be] steadily employed and capable of regular attendance. There is a distinct possibility that applicant's condition could be aggravated by arduous duty that is required.

This recommendation is made in the best interest of the applicant's welfare and safety.

n7 The body of this letter states in full:

Dear Mr. Prewitt:

This is in response to your appeal of the finding that you are medically unsuitable for employment with the United States Postal Service.

A final review of your medical records has completed by our Regional Medical Director, with full consideration given to the duties of the position for which you applied. Based on this review, it is our decision to sustain the recommendation that you are medically unsuitable for employment in this position. This is a final determination, and there are no further medical appeal rights. In selecting personnel to fill postal positions, we must be assured that employment with the United States Postal Service will not adversely affect the health and well-being of any applicant. This is our primary concern in screening applicants for medical suitability.

We appreciate your interest in postal employment, and regret the findings were not favorable. [*300]

Although the regional office correctly stated that there were no further medical appeal rights, in fact Prewitt had available to him an entirely independent chain of administrative review of the adverse determination through the postal service's equal employment opportunity (EEO) office. Prewitt filed an EEO complaint, alleging that the postal service had discriminated against him on the basis of his handicap by finding him unsuitable for postal employment. The EEO office conducted an investigation and found that the same medical officer who had disqualified Prewitt had ruled three other disabled or physically handicapped applicants suitable for postal employment. The investigation also revealed that the Greenville post office had hired fourteen persons classified as disabled and/or physically handicapped. Relying on these findings, the EEO office found no discrimination and advised Prewitt that he could appeal its decision to the Office of Appeals and Review of the Equal Employment Opportunity Commission (EEOC). n8

n8 The proposed disposition of Prewitt's complaint which was adopted as the final agency decision, states in pertinent part:

You allege that you were discriminated against because of your physical handicap in that you were ruled unsuitable for postal employment on February 2, 1979, at the Greenville, MS, Post Office. The facts developed during the investigation of August 23, 1979, revealed that you were considered for employment along with several other "non-handicapped" and "physically-handicapped" applicants. Appropriate medical authorities ruled that you were medically unsuitable for the postal clerk-carrier position. Three disabled or physically handicapped applicants were ruled suitable for employment by the same medical officer. The records further reveal that the Greenville, MS, Post Office has hired fourteen employees who are classified as disabled and/or physically handicapped. There is no indication that you were treated differently because of your physical handicap.

As permitted by statute, 42 U.S.C. @ 2000e-16(c), made applicable to the handicapped by 29 U.S.C. @ 794a(a)(1), instead of appealing to the EEOC, Prewitt filed this suit in the district court. No contention is made by the postal service that Prewitt did not exhaust administrative remedies. The postal service responded to Prewitt's complaint with a motion for summary judgment, contending that it had rejected Prewitt for valid medical reasons, and that Prewitt's refusal to take a physical examination had precluded it from making a re-evaluation. The plaintiff responded that postal service regulations required that applicants be given a current physical examination before a medical determination is made, and therefore, even though Prewitt was afforded an opportunity to take a physical after his determination was made, the determination of medical unfitness was invalid. Prewitt further argued that the regulations entitled him to a free physical examination, so that he was not required to bear the expense of an examination by a private physician. Finally, Prewitt noted that in view of the undisputed fact that he had been able to perform competently a similar job in 1970, the postal service had failed to articulate any legitimate reason for its finding of medical unsuitability.

The district court reasoned that:

The key to this case lies in plaintiff's continued refusal to take a current physical examination. This refusal has rendered meaningless the defendant's attempt to re-evaluate plaintiff's current physical condition, though the postal service gave plaintiff ample opportunity to supplement the information available to it. The postal service extended plaintiff this opportunity at the initial stage of the procedure, and the opportunity remained open to plaintiff throughout the appellate process. Plaintiff simply cannot base a claim upon a 1970 medical examination when the Veterans Administration records presently available to defendant disclose substantial disability.... [*301] Accordingly, the district court granted the postal service's motion for summary judgment, and struck the class action allegations in Prewitt's complaint.

The Applicable Legal Principles

Our trial brother fell into error of law in his analysis by his implicit assumption that the "substantial disability" disclosed by the Veterans Administration records provided the postal service with legally sufficient grounds for rejecting Prewitt's bid for the clerk/carrier position. For reasons stated below, we find, construing the evidence in the light most favorable to the party resisting summary judgment, that under the Rehabilitation Act of 1973, as amended, a genuine issue of material fact exists as to whether the postal service's physical requirements for postal employment are sufficiently "job related" to provide lawful grounds for the refusal to hire Prewitt.

1. The Applicability of the Rehabilitation Act to Federal Government Hiring

Only since 1978 have handicapped individuals been entitled to bring private actions against federal agencies for violations of the Rehabilitation Act. This is apparently the first case is which a federal appellate court has been called upon to determine the nature and extent of this newly-created private right. We shall therefore examine the history of this legislation in some detail.

Congress passed the Rehabilitation Act of 1973 for the express purpose, inter alia, of "promot[ing] and expand[ing] employment opportunities in the public and private sectors for handicapped individuals." 29 U.S.C. @ 701(8). In addition to creating a number of wide-ranging federally-funded programs designed to aid handicapped persons in assuming a full role in society, the Act, in its Title V, established the principle that (a) the federal government, (b) federal contractors, and (c) recipients of federal funds cannot discriminate against the handicapped.

The duties of each of these three classes of entities were set forth in separate sections. Section 503 of the Act, 29 U.S.C. @ 793, required federal contractors to include in their contracts with the United States a provision mandating that, in employing persons to carry out the contract, "the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals...." Section 504, 29 U.S.C. @ 794, which imposed duties on recipients of federal funds, provided: "No otherwise qualified handicapped individual... shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

The duties of the federal government itself were set forth in section 501(b), 29 U.S.C. @ 791(b) which stated:

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall... submit to the Civil Service Commission and to the [Interagency Committee on Handicapped Employees] an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. * * *

A Senate committee report commenting on section 501 emphasized that "the Federal Government must be an equal opportunity employer, and that this equal opportunity must apply fully to handicapped individuals." n9 As Senator Cranston subsequently commented in connection with 1978 amendments strengthening the federal employment rights of the handicapped, "[t]he legislative history of the section 501 illustrates [*302] that with respect to the employment of handicapped individuals, Congress expected the Federal Government should be a leader." n10 In the words of Senator Williams, Congress enacted section 501 "to require that the Federal Government itself act as the model employer of the handicapped and take affirmative action to hire and promote the disabled." n11

n9 S.Rep.No.93-318, 93d Cong., 1st Sess., at 49 (1973), U.S.Code Cong. & Admin.News 1973, pp. 2076, 2122.

n10 Cong.Rec. S15591 (Sept. 20, 1978).

n11 Rehabilitation of the Handicapped Programs 1976: Hearings Before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, 94th Cong., 2d Sess., at 1502 (1976), quoted in Linn, Uncle Sam Doesn't Want You: Entering the Federal Stronghold of Employment Discrimination Against Handicapped Individuals, 27 DePaul L.Rev. 1047, 1060 (1978).

Under the original 1973 Rehabilitation Act, a private cause of action founded on handicap discrimination was not recognized upon section 501 as against a federal government employer; the literal statutory wording merely required federal agencies to submit affirmative actions plans. n12 However, due to differences in statutory wording, all courts that considered the issue found that section 504 established a private cause of action for handicapped persons subjected to discrimination by recipients of federal funds, n13 while the federal courts split on the question whether the same was true under section 503 for individuals subjected to handicap discrimination by federal contractors. n14

n12 See Counts v. United States Postal Service, 17 F.E.P. Cases 1161, 1165 (N.D.Fla.1978), reversed due to statutory changes, 631 F.2d 46 (5th Cir. 1980); Coleman v. Darden, 15 F.E.P. Cases 272, 273 (D.Colo.1977), aff'd, 595 F.2d 533 (10th Cir. 1979); B. Schlei & P. Grossman, Employment Discrimination Law 65 (Supp. 1979). But see Linn, supra note 11, at 1056-71 (urging recognition of a private right of action under section 501).

n13 See Camenisch v. University of Texas, 616 F.2d 127, 131 (5th Cir. 1980), vacated on other grounds, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981), and cases from the Seventh, Second, Eighth, Fourth, and Third Circuits cited therein.

n14 Compare Brown v. Sibley, 650 F.2d 760, 763-65 (5th Cir. 1981); Rogers v Frito-Lay, Inc ., 611 F.2d 1074 (5th Cir. 1980); Hooper v. Equifax, Inc ., 611 F.2d 134, 135 (8th Cir. 1979); Anderson v. Erie Lackawanna Railway Co ., 468 F.Supp. 934 (E.D.Ohio 1979); Wood v. Diamond State Telephone Co ., 440 F.Supp. 1003, 1010 (D.Del.1977); and Moon v. Roadway Express, Inc ., 439 F.Supp. 1308, 1310 (N.D.Ga.1977) with Clarke v. FELEC Services, Inc ., 489 F.Supp. 165, 169 (D.Alaska 1980); Hart v. Alameda County, 485 F.Supp. 66, 76 (N.D.Cal.1979); Chaplin v. Consolidated Edison Co ., 482 F.Supp. 1165, 1173 (S.D.N.Y.1980); Duran v. City of Tampa, 430 F.Supp. 75, 78 (M.D.Fla.1977); Drennon v. Philadelphia General Hospital, 428 F.Supp. 809, 816 (E.D.Pa.1977); and Rogers v. Frito-Lay, Inc., supra, 611 F.2d at 1085 (Goldberg, J., dissenting).

In 1978, the Rehabilitation Act was amended to provide a private cause of action in favor of persons subjected to handicap discrimination by the federal government employing agencies. In the House, an amendment was adopted and ultimately enacted by the Congress that extended section 504's proscription against handicap discrimination to "any program or activity conducted by an Executive agency or by the United States Postal Service;" n15 the legislative history, as well as the judicial interpretations (see note 13), fully recognized

that a private right of action had been created by section 504. n16

n15 The amended section 504, 29 U.S.C. @ 794, now states in pertinent part:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title 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 or any program or activity conducted by any Executive agency or by the United States Postal Service .
(Emphasis supplied.)

n16 See, e.g ., the legislative history cited by Judge Goldberg in his dissenting opinion in Rogers v. Frito-Lay, Inc ., 611 F.2d 1074, 1096-98 (5th Cir. 1980), a section 503 case. Although the Rogers majority held that this legislative history does not prove the existence of a private right of action under section 503 of the Rehabilitation Act, this legislative history at least shows that the 1978 Congress had no quarrel with the near-unanimous judicial interpretation of section 504 .

The Senate, at the same time, added a new section 505(a)(1) to the Rehabilitation [*303] Act, which created a private right of action under section 501. The provision states:

The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 [42 U.S.C. @ 2000e-16], including the application of sections 706(f) through 706(k), [42 U.S.C. @ 2000e-5], shall be available, with respect to any complaint under section 501 of this Act, to any employee or applicant for employment aggrieved by the final deposition of such complaint, or by the failure to take final action on such complaint.

Section 717 of Title VII of the Civil Rights Act, 42 U.S.C. @ 2000e-16, to which section 501 is explicitly tied by the new section 505, mandates that all federal personnel actions be made "free from any discrimination based on race, color, religion, sex, or national origin." The provision further provides for a private right of action in favor of those whose claims of discrimination have not been satisfactorily resolved by administrative procedures. However, before an individual can bring a section 717 action in court, strict procedural requirements with respect to exhaustion of administrative remedies must be fulfilled. See 42 U.S.C. @ 2000e-16(c). Once administrative remedies have been exhausted, however, an individual is entitled to de novo consideration of his discrimination claims in the district court; however, prior administrative findings made with respect to an employment discrimination claim may be admitted into evidence at the trial de novo. See Chandler v. Roudebush, 425 U.S. 840, 863-64, 96 S.Ct. 1949, 1960-61, 48 L.Ed.2d 416 (1976).

The Senate Committee on Human Resources explained its reasons for granting the rights set forth in section 717 to section 501 plaintiffs:

In testimony before the Subcommittee on the Handicapped, Deborah Kaplan of the Disability Rights Center noted that she had been examining the implementation of section 501 and recommended that legislative changes be made to "make it stronger and easier to enforce and to provide the same civil rights protection to the disabled that other minorities have in employment with the Federal Government." Ms. Kaplan's group discovered that in the first 2 years after enactment of section 501 "only 12 Federal agencies have increased their rate of hiring disabled employees by more than 3 percent."

The committee believes now as it did in 1973 that the Federal Government must be "an equal opportunity employer." The amendment to section 501 will aid in attaining that goal by providing for individuals aggrieved on the basis of their handicap the same rights, procedures, and remedies provided individuals aggrieved on the basis of race, creed, color, or national origin.... Further, application of the title VII provisions makes specific the right to bring a

private right of action with respect to section 501, subject, of course, to the provision for exhaustion of administrative remedies and other rules and procedures set forth in title VII.
Sen.Rep.No.95-890, 95th Cong., 2d Sess., at 18-19 (1978). See also Cong.Rec. S15591 (Daily ed. Sept. 20, 1978) (remarks of Sen Cranston).

The scope of the federal government's obligations under section 501 received Senate attention during debate on a proposed amendment to the proposed new section 505(a)(1). An amendment offered by Senator McClure would have added the following clause at the end of section 505(a)(1): "provided, however, that no equitable relief or affirmative action remedy disproportionately exceeding actual damages in the case shall be available under this section." Cong.Rec. S15664 (Daily ed. Sept. 21, 1978). Senator McClure explained that his amendment "would provide that the federally financed affirmative action remedy... could not be used to initiate massive construction projects for relatively minor temporal damages." Id .

Senators Cranston and Stafford spoke in opposition to the McClure amendment. Senator Cranston remarked:

I believe that the requirement with respect to Federal Contractors and grantees should be no less stringent than [*304] the requirements attached to the Federal Government. The amendment offered by the Senator from Idaho would create an unwise and unrealistic distinction with respect of employment between the obligations of the Federal Government and the obligations of Federal contractors and grantees. Ironically, the Senator's amendment would limit -- with a financial test -- the Federal Government's obligation of being an equal opportunity employer. Federal contractors and grantees would -- appropriately -- continue to be required to be equal opportunity employers. Rather than a leader in this field, the Federal Government would become a distant also-ran requiring more of its grantees and contractors than it would be willing to require of itself.
Id . at S15665-66.

The dispute was resolved when Senator McClure and the managers of the bill agreed upon the following compromise language: "In fashioning an equitable or affirmative action remedy under such section [section 501], a court may take into account the reasonableness of the cost of any necessary workplace accommodation, and the availability of alternative therefor or other appropriate relief." Id . at S15667.As thus amended, the new section 505(a)(1) was enacted into law, and is now codified as 29 U.S.C. @ 794a(a)(1). n17

n17 The new section 505(a)(1), 29 U.S.C. @ 794a(a)(1), added by the Senate amendment to the Rehabilitation Act provides:

The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, incluing the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. Infashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

In summary, the 1978 amendments to the Rehabilitation Act 1) established a private right of action, subject to the same procedural constraints (administrative exhaustion, etc.) set forth in Title VII of the Civil Rights Act, in favor of section 501 claimants, and 2) extended section 504's proscription against handicap employment discrimination to cover the activities of the federal government itself.

Thus, by its 1978 amendments to the Rehabilitation Act, Congress clearly

recognized both in section 501 and in section 504 that individuals now have a private cause of action to obtain relief for handicap discrimination on the part of the federal government and its agencies. The amendments to section 504 were simply the House's answer to the same problem that the Senate saw fit to resolve by strengthening section 501. The joint House-Senate conference committee could have chosen to eliminate the partial overlap between the two provisions, but instead the conference committee, and subsequently Congress as a whole, chose to pass both provisions, despite the overlap."When there are two acts upon the same subject, the rule is to give effect to both if possible." United States v. Borden Co ., 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939). By this same principle, in order to give effect to both the House and the Senate 1978 amendments finally enacted, we must read the exhaustion of administrative remedies requirement of section 501 into the private remedy recognized by both section 501 and section 504 for federal government handicap discrimination.

2. Prewitt's Present Claim(s) of Handicap Discrimination

In the present suit, Prewitt claims that, despite his handicap, he is physically able to perform the job for which he applied, but that the postal service's physical requirements, neutral on their face, had disparate impact upon a person with his particular handicap and that they excluded him from employment that in fact he was physically able to perform. The present case was dismissed on summary judgment, through a failure to take into account the principles [*305] applicable to the federal government by the Rehabilitation Act of 1973, as amended in 1978; due to disputed issues of material fact, as will be stated, summary judgment was improvidently granted.

To anticipate issues that will arise on the remand, we will also take judicial notice of further factual developments set forth in the record of a companion suit, which was consolidated with the present one for appeal, an opinion in which is rendered this same date, Prewitt v. United States Postal Service, 662 F.2d 311 (5th Cir. 1981), Docket No. 81-4205, sl. op. p. 13277 (1981). This latter case concerns Prewitt's suit with regard to the 1980 rejection of his new application for employment for a position as a substitute rural carrier at the Greenville post office. At a hearing on Prewitt's motion for a preliminary injunction, after which the district court dismissed Prewitt's complaint (a dismissal we vacate today), testimony was submitted by the postal service that made specific the factual reasons why the postal service believes Prewitt had to be rejected because of his physical condition. The physical requirements for the substitute rural carrier position for which Prewitt applied in 1980, it should be noted, are much the same as those for the clerk-carrier position involved in the present suit. See notes 2 and 3.

One of the chief physical factors upon which the postal service bases its refusal to hire Prewitt is that, due to Prewitt's inability to lift his left arm above shoulder level, the employing authority feels that he cannot "case" (sort) the mail that he would be required to deliver on his route. Because a carrier is required to lift above shoulder level with both hands to remove stacks of mail from a six-foot-high top ledge, the postal service contends that Prewitt would not be able to do this part of the job without some workplace modification -- however, the postal service witness admitted, for instance, that Prewitt could be accommodated simply by lowering the legs to which the shelves are attached. n18 Only if Prewitt, despite his handicap, and perform the essential duties of the position in question despite his handicap, without the need for any workplace accommodation, can it be said that he was a victim of "disparate impact" discrimination.However, even if Prewitt cannot so perform, he might still be entitled to relief if he was a victim of "surmountable barrier" discrimination, i.e ., if he was rejected even though he could have performed the essentials of the job if afforded reasonable accommodation. n19

n18 The second principal factor upon which the postal service relies is the severe pain that a VA report indicates that Prewitt suffers after lifting. Prewitt denies the pain or at least its severity. This type of handicap may be either a surmountable or insurmountable employment barrier. See text and note

25 infra .

n19 Commentators have identified four distinct types of discriminatory barriers that handicapped persons must confront when seeking employment: 1. Intentional discrimination for reasons of social bias (racial, sexual, religion, handicap, etc.); 2. neutral standards with disparate impact; 3. surmountable impairment barriers; and 4. insurmountable impairment barriers. See Note, Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act, 55 N.Y.U.L.Rev. 881, 883-84 (1980). See also Gittler, Fair Employment and the Handicapped: A Legal Perspective, 27 DePaul L.Rev. 953, 958-66 (1978).

The present complaints by Prewitt involve alleged "disparate impact" and a "surmountable barrier" handicap-discrimination.

The Title VII jurisprudence is, we believe, for the most part applicable to intentional social-bias discrimination against handicapped persons. See Texas Department of Corrections v. Burdine, 405 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Likewise, as will be noted in the text, the Title VII disparate impact decisions are relevant in the determination of disparate impact handicap discrimination. Surmountable and insurmountable barriers raise issues that for the most part are peculiar to handicap discrimination.

Since both issues will arise on the remand, we will therefore note the principles applicable to judicial determination of both cases involving claims of "disparate impact" and also of "surmountable barrier" ("the duty to make reasonable accommodation") discrimination against a handicapped person. [*306]

Preliminary, however, we should observe that section 501 requires affirmative action on the part of federal agencies; unlike section 504 of the Rehabilitation Act and Title VII of the Civil Rights Act which usually require only nondiscrimination. In Ryan v. Federal Deposit Insurance Corp ., 565 F.2d 762, 763 (D.C.Cir.1977), the court held, and we agree, especially in light of the 1978 amendments, that section 501 requires that federal agencies do more than just submit affirmative plans -- section 501 "impose[s] a duty upon federal agencies to structure their procedures and programs so as to ensure that handicapped individuals are afforded equal opportunity in both job assignment and promotion." Although Ryan, which was decided prior to the 1978 amendments, did not recognize a private right of action under section 501, the court held that the defendant federal agency should amend its procedures to provide an administrative forum through which handicapped individuals could enforce their section 501 rights. Id . at 764. Subsequent to Ryan, the Civil Service Commission, and its successor enforcement agency, the EEOC, promulgated administrative regulations that define the section 501 uties of federal agencies, see 29 C.F.R. @@ 1613.701 et seq ., which for instance (see below) include the duty to make reasonable accommodation to employ a handicapped person, see 29 C.F.R. @ 1613.704. These regulations are the administrative interpretation of the Act by the enforcing agency and are therefore entitled to some deference in our attempt to determine the applications of this statute. See Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980 (1979); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431, 95 S.Ct. 2362, 2378, 45 L.Ed.2d 280 (1975); Griggs v. Duke Power Co ., 401 U.S. 424, 433-34, 91 S.Ct. 849, 854-558 28 L.Ed.2d 158 (1971).

3. "Disparate Impact" Discrimination

Griggs v. Duke Power Company, supra, may be considered the seminal decision concerning instances whereby a facially neutral employment policy has a discriminatory impact upon the employment of individuals statutorily protected against discrimination. There the Court held that an employer's use of written tests and a high school degree requirement violated Title VII of the Civil Rights Act of 1964 because the criteria were not shown to be related to job

performance. The unanimous Court reasoned: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431, 91 S.Ct. at 853.

See also Albermarle Paper Co. v. Moody, supra . In Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), the Court extended Griggs and held that the use of physical requirements (specifically, a 120 pound minimum weight requirement) as employment criteria violates Title VII if the criteria disproportionately exclude women and are not shown by the employer to be job related. Id . 433 U.S. at 328-331, 97 S.Ct. at 2726-28.

In the discriminatory impact context, a plaintiff need not prove that the employer acted with discriminatory intent. Griggs, supra, 401 U.S. at 430-32, 91 S.Ct. at 853-54; Teamsters v. United States, 431 U.S. 324 n.15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977). All a plaintiff need prove to establish a prima facie case is that the challenged standard disparately disadvantages the protected group of which he is a member, and that he is qualified for the position under all but the challenged criteria. The burden of persuasion then shifts to the employer to prove that the challenged criteria are "job related," i.e ., that they are required by "business necessity." Moody, supra, 422 U.S. at 425, 95 S.Ct. at 2375; Griggs, supra, 401 U.S. at 431, 91 S.Ct. at 853; Johnson v. Uncle Ben's, Inc ., 657 F.2d 750 (5th Cir. 1981).

The EEOC regulations adopt a Griggs -type approach in the disparate impact handicap discrimination context. They require federal agencies not to use any [*307] selection criterion that "screens out or tends to screen out qualified handicapped persons or any class of handicapped persons" unless the criterion, as used by the agency, is shown to be"job-related for the position in question." 29 C.F.R. @ 1613.705. The test is whether a handicapped individual who meets all employment criteria except for the challenged discriminatory criterion "can perform the essential functions of the position in question without endangering the health and safety of the individuals or others." If the individual can so perform, he must not be subjected to discrimination. 28 C.F.R.@@ 1613.702(f) &.703. Cf. New York State Association for Retarded Children v. Carey, 612 F.2d 644, 649-50 (2d Cir. 1979) (discriminatory exclusion of handicapped children from regular public school classes unlawful in the absence of "at least some substantial showing" by the school authorities that the exclusion is necessary).

In our opinion, in the disparate impact context, there should be only minor differences in the application of the Griggs principles to handicap discrimination claims. One difference, however, is that, when assessing the disparate impact of a facially-neutral criterion, courts must be careful not to group all handicapped persons into one class, or even into broad subclasses. This is because "the fact that an employer employs fifteen epileptics is not necessarily probative of whether he or she has discriminated against a blind person." n20

n20 Gittler, supra note 19, at 972. Thus, the postal service's reliance on the fact that the Greenville office has hired numerous handicapped persons is misplaced.

In a section 504 handicap discrimination case, the Supreme Court held that the Rehabilitation Act does not require redress of "insurmountable barrier" handicap discrimination -- that the statutory language prohibiting discrimination against an "otherwise qualified handicapped individual" means qualified "in spite of his handicap," not qualified in all respects except for being handicapped. Southeastern Community College v. Davis, 442 U.S. 397, 406, 99 S.Ct. 2361, 2367, 60 L.Ed.2d 980 (1979).

The Davis rationale is equally controlling in the employment discrimination context. Accordingly, employers subject to the Rehabilitation Act need not hire handicapped individuals who cannot fully perform the required work, even with

accommodation. However, while Davis demonstrates that only individuals who are qualified "in spite of" their handicaps need be hired, Griggs and its progeny dictate that the employer must bear the burden of proving that the physical criteria are job related. If the employer does this, then the burden of persuasion to show that he can satisfy these criteria rests on the handicapped applicant.

4. "Surmountable Barrier" Discrimination, or the Duty to Make Reasonable Accommodation

Federal employers, including the postal service, are obliged by section 501(b) to provide reasonable accommodation for the handicapped. n21 As the Davis Court pointed out, 442 U.S. at 410, 99 S.Ct. at 2369, section 501(b), unlike section 504, explicitly requires federal government employers to undertake "affirmative action" on behalf of the handicapped. And the new section 505, added by Congress in 1978, explicitly permits courts to fashion "an equitable or affirmative action remedy" for violations of section 501, with the caveat that "the reasonableness of the cost of any necessary workplace accommodation" should be taken into account. The legislative intent reflected in the creation of a handicap discrimination private action clearly shows that federal government employers must [*308] make reasonable accommodation for handicapped job applicants.

n21 This court has consistently held that section 504 also mandates reasonable accommodation, thus prohibiting surmountable barrier discrimination by federal grantees against the handicapped. See Majors v. housing Authority of the County of DeKalb Georgia, 652 F.2d 454, 457-58 (5th Cir. 1981); Tatro v. State of Texas, 625 F.2d 557, 564 (5th Cir. 1980); Camenisch v. University of Texas, 616 F.2d 127, 132-33 (5th Cir. 1980), vacated on other grounds, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981).

There is a dearth of decisional law on this issue. n22 However, the EEOC administrative regulations, which, as noted above, are entitled to deference, provide some basis for outlining the contours of the surmountable barrier accommodation duty.

n22 Outside the handicap discrimination context, the "reasonable accommodation" issue has arisen in cases involving persons who claim a right to accommodation of their religious duty to refrain from working on certain days. In Trans World Airlines v. Hardison, 432 U.S. 63, 84, 97 S.Ct. 2264, 2277, 53 L.Ed.2d 113 (1977), the Supreme Court interpreted @ 701(j) of the Civil Rights Act of 1964, 42 U.S.C.@ 2000e(j), which requires employers to accommodate such religious practices, unless to do so would impose "undue hardship." The Court held that an employer need not accommodate such persons if the accommodation would require "more than a de minimis cost."

The Hardison principles are not applicable in the federal-employer handicap discrimination context.Congress clearly intended the federal government to take measures that would involve more than a de minimis cost. As the debate over the McClure amendment shows, Congress was even unwilling to approve language that would have limited the government's duty to make reasonable accommodation to instances in which the cost of accommodation does not "disproportionately exceed[ ] actual damages." See text at note 17 supra .

The relevant EEOC regulation, 29 C.F.R. @ 1613.704, provides:

(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities 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, appropriate adjustment or modification of examinations, the provision of readers and 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 the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

Thus, under subsection (a) of this provision, the burden of proving inability to accommodate is upon the employer. The administrative reasons for so placing the burden likewise justify a similar burden of proof in a private action based upon the Rehabilitation Act. The employer has greater knowledge of the essentials of the job than does the handicapped applicant. The employer can look to its own experience, or, if that is not helpful, to that of other employers who have provided jobs to individuals with handicaps similar to those of the applicant in question. Furthermore, the employer may be able to obtain advice concerning possible accommodations from private and government sources. See Note, Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern, 80 Colum.L.Rev. 171, 187-88 (1980).

Although the burden of persuasion in proving inability to accommodate always remains on the employer, we must add one caveat. Once the employer presents credible evidence that indicates accommodation of the plaintiff would not reasonably be possible, the plaintiff may not remain silent. Once the employer presents such evidence, the plaintiff has the burden of coming forward with evidence concerning his individual capabilities and suggestions for possible accommodations to rebut the employer's evidence. See Note, supra, 80 Colum.L.Rev. at 189.

In addition, subsections (a) and (c) of 29 C.F.R. @ 1613.704, which limit the [*309] employer's duty to accommodate to instances where accommodation would not impose "undue hardship" and define the factors to be used in determining whether a particular accommodation would impose "undue hardship," accurately express congressional intent. The second sentence of section 505, which admonishes the courts to "take into account the reasonableness of the cost of any necessary workplace accommodation," was added as compromise language in response to Senator McClure's concern that federal employers might be obliged "to initiate massive construction projects." The EEOC regulations adequately respond to this concern.

Genuine Disputed Issues of Material Fact Preclude Summary Judgment

The factual showing before the district court was that the postal service rejected Prewitt's application for employment because it felt, on the basis of the medical records supplied to it, that Prewitt could not perform the "arduous" duties of the position. In view of the undisputed fact that Prewitt had satisfactorily performed a similar postal job in 1970 despite his physical handicap, as well as of his uncontradicted affidavit that his physical condition was substantially unchanged since then, Prewitt raised a genuine dispute issue of material fact as to whether the postal service's physical standards for employment are sufficiently "job related" to justify the employer's refusal to hire him.Under the applicable legal principles earlier set forth, therefore, the postal service is not shown under the facts thus far educed to have been justified as a matter of law in denying Prewitt's application. The summary judgment must therefore be reversed. n23

n23 Further, from the factual showing educed at the hearing in the companion appeal, 662 F.2d 311, sl. op. p. 13277 (1981), we know that on the remand a substantial factual issue will arise as to whether the postal service has complied with its duty to make a reasonable accommodation for Prewitt's

handicap, insofar as its refusal to employ him is based upon his inability to use his left arm to lift items off a six-foot-high ledge.

We should note that the postal service contends that the postal service rejected him because he refused its request that he take a current physical examinatin to establish his medical suitability for employment. This contention is based upon the showing that, after Prewitt was found medically unsuitable for employment, he was informally advised by the local postmaster that he would be reconsidered if he secured a new medical examination.

However, the record reveals that Prewitt's application was rejected because he was found to be medically unsuitable (without notifying Prewitt of the specific medical reasons), not because he refused to furnish any further or more current medical information. See text supra at notes 4-7. Indeed, Prewitt's essential position was that his physical condition and the effect of his disability was unchanged since 1970 and that, even accepting the disability reflected by the VA medical reports upon which the postal service relied, he was physically qualified to perform the duties of the position for which he applied, as instanced by his earlier satisfactory performance of the duties of a similar postal position. n24

n24 Further, as the hearing in the companion suit shows, the underlying reason for the postal service's rejection of Prewitt's application was the restriction in motion of the left shoulder and limitation of range of motion of the left arm, the permanent disability resulting from the 1969 shoulder injury; a current physical examination would have reflected permanent disability no less than that reflected in the medical records available to the postal service upon which it based its rejection of Prewitt's application.

On the Remand

On the basis of the factual showing thus far made, we reverse the summary judgment dismissing Prewitt's handicap-discrimination claim. We remand for further proceedings in accordance with the views set forth in this opinion. To summarize:

(1) Prewitt, the disabled claimant, may establish a prima facie of unlawful discrimination by proving that: (a) except for his physical handicap, he is qualified to fill the position; (b) he has a handicap that [*310] prevents him from meeting the physical criteria for employment; and (c) the challenged physical standards have a disproportionate impact on persons having the same handicap from which he suffers. To sustain this prima facie case, there should also be a facial showing or at least plausible reasons to believe that the handicap can be accommodated or that the physical criteria are not "job related." n25

n25 In the hearing in the companion case, a further aspect of Prewitt's shoulder disability was raised. On a 1980 VA report, made when Prewitt attempted to secure an increase in his military disability benefits, it is noted that Prewitt complains of severe pain after lifting. Prewitt denies that he suffers any such pain. If prewitt indeed suffers substantial pain in the performance of his duties, he may be unable to "perform the essential functions of the position in question without endangering the health and safety of himself or others," 28 C.F.R. @ 1613.702(f). He may for this reason be unable to make the requisite showing for a prima facie case that he is qualified to fill the position, unless he can make a plausible showing that reasonable accommodation is possible.

Therefore, if on the remand the postal service raises this issue by credible evidence, Prewitt will have the burden of persuasion that he does not suffer from substantial and disabling pain when lifting -- a matter peculiarly within his knowledge, evidence as to which is more available to him than to the employing agency. However, a failure of Prewitt to meet this burden is not necessarily fatal to his case. While Prewitt denies suffering pain when

lifting, he also argues in the alternative that reasonable accommodation is possible through an inexpensive mechanical device (a transferable handle); if the pain-causation is proved and the issue of reasonable accommodation arises, then as in other accommodation cases (see text supra), the postal service will have the burden of persuasion that such accommodation is not feasible or reasonable.

(2) Once the prima facie case of handicap discrimination is established, the burden of persuasion shifts to the federal employer to show that the physical criteria offered as justification for refusal to hire the plaintiff are "job related," i.e ., that persons who suffer from the handicap plaintiff suffers and who are, therefore, unable to meet the challenged standards, cannot safely and efficiently perform the essentials of the position in question. If the issue of reasonable accommodation is raised, the agency must then be prepared to make a further showing that accommodation cannot reasonably be made that would enable the handicapped applicant to perform the essentials of the job adequately and safely; in this regard, the postal service must "demonstrate that the accommodation would impose an undue hardship on the operation of its program," 29 C.F.R. @ 1613.704(a), taking into consideration the factors set forth by 704(c) of the cited regulation.

(3) If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection criteria without a similar discriminatory effect would also serve the employer's legitimate interest in efficient and trustworthy workmanship. Dothard v. Rawlinson, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977); Johnson v. Uncle Ben's, Inc ., 657 F.2d 750, 752 (5th Cir. 1981). When the issue of reasonable accommodation is raised, the burden of persuasion in proving inability to accommodate always remains on the employer; however, once the employer presents credible evidence that reasonable accommodation is not possible or practicable, the plaintiff must bear the burden of coming forward with evidence that suggests that accommodation may in fact be reasonably made.

Conclusion

We of course express no opinion as to the merits of Prewitt's claim. If he is unable to perform the essentials of the position for which he has applied, with or without reasonable accommodation, the postal service need not hire him. The ultimate test is whether, with or without reasonable accommodation, a handicapped individual who meets all employment criteria except for the challenged discriminatory criterion "can perform the essential functions of the position in question without endangering the health and safety of the individuals or others." 28 C.F.R. @ 1613.702(f). Since a disputed issue of material fact is shown as to this issue, the summary judgment granted by the district court must be REVERSED. [*311]

We also VACATE the court's decision to strike the class action allegations of Prewitt's complaint, which was primarily based on the perceived lack of merit of Prewitt's individual claim.We do not intimate that Prewitt's suit shows that it satisfies the prerequisites to a class action, only that no hearing has been held on pleadings directed to this issue.

SUMMARY JUDGMENT REVERSED; STRIKING OF CLASS ACTION ALLEGATIONS VACATED.

Maurice G. LUSSIER, Plaintiff-Appellant, v. Richard DUGGER, as Secretary of the Department of Corrections of the State of Florida, Louie L. Wainwright, Paul J. Uhrig, G.S. Fortner, and Gilda H. Lambert, as Secretary of the Department of Administration of the State of Florida, Defendants-Appellees

No. 89-3354

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

904 F.2d 661; 1990 U.S. App. LEXIS 10941; 53 Fair Empl. Prac. Cas. (BNA) 443; 54 Empl. Prac. Dec. (CCH) P40,067; 17 Fed. R. Serv. 3d (Callaghan) 41

July 2, 1990

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Middle District of Florida.

JUDGES: Kravitch and Johnson, Circuit Judges, and Kaufman *, Senior District Judge.

* Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

OPINIONBY: KAUFMAN

OPINION: [*663] On July 21, 1986, plaintiff, Maurice G. Lussier, a dentist formerly employed by the Department of Corrections of the State of Florida (the Department), instituted this case alleging that various officials of the State of Florida discriminated against him because of a handicap, in violation of the federal Rehabilitation Act, 29 U.S.C. @ 794 (@ 794), and also of 42 U.S.C. @ 1983 (@ 1983). After the district court granted summary judgment for defendants and denied plaintiff's motion for reconsideration, plaintiff appealed. For reasons stated in this opinion, we affirm in part, reverse in part and remand for further proceedings.

Lussier was employed as a dentist with the Department at the latter's Avon Park Correctional Institution (Avon) from April, 1979 to August, 1983. Although not a fully licensed dentist in Florida, Lussier was licensed in Massachusetts and was allowed to render general dentistry services [**2] to Avon's inmate population pursuant to a special license issued by the State of Florida.

In February, 1982, Lussier was diagnosed as having a contagious type of hepatitis disease. Because of that illness, he was hospitalized and unable to work from February, 1982 to May, 1982. Upon release from the hospital, Lussier resumed his duties at the correctional institution. By mid-June, 1982, however, he was unable to work full-time due to a recurrence of the hepatitis, and began to work only mornings. In July, 1982, he was re-admitted to the hospital with a diagnosis of chronic active hepatitis.

In October, 1982, Lussier attempted a second time to return to full-time work. However, he was unable to handle a full-time workload and, once more, began to work only mornings. In February, 1983, citing recent research with regard to the transmissible nature of hepatitis between dentists and patients, Lussier stopped practicing dentistry altogether. From May, 1983 to June, 1983, Lussier worked at Avon one day per month and was then placed on compulsory disability leave by that correctional institution.

In late July, 1983, defendant G. S. Fortner, Avon's superintendent, terminated Lussier's employment [**3] because of the latter's chronic hepatitis condition. Lussier thereupon filed for worker's compensation and disability retirement benefits. While administrative proceedings concerning those benefits were pending in the summer of 1985, n1 Lussier had seemingly achieved full recovery and sought to return to work at Avon. Lussier notified the Dental Executive Director of the Department, defendant Paul J. Uhrig, of this recovery and requested re-employment. In response, Dr. Uhrig informed Lussier that all of the Department's dental positions were filled at that time and declined to rehire him; however, Dr. Uhrig did forward to Lussier an employment application. Lussier completed and submitted the application but was never offered re-employment by the Department.

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n1 Ultimately, Lussier's applications for worker's compensation and disability retirement benefits were denied. Those claims are not involved in this appeal.

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The extent to which Lussier, after July, 1983, pursued efforts to obtain further employment with the Department, [**4] and the Department's response to such efforts, are in significant factual dispute. Lussier insists that he filed a series of applications for dental and non-dental positions after the summer of 1985, and that numerous positions in those areas have been awarded since that time to other applicants. On the other hand, defendants assert that there have been no positions available during that period for which Lussier was qualified.

In his complaint in this case, Lussier alleges that various Florida officials discriminated against him on the basis of a handicap, i.e., his hepatitis condition, in violation of @ 794 of the federal Rehabilitation Act. n2 Lussier also asserts that those officials [*664] made no effort reasonably to accommodate his condition by offering to him other suitable employment, also in violation of that Act. In addition, Lussier asserts violations by defendants under 42 U.S.C. @ 1983.

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n2 Section 794 provides in part: "No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving Federal financial assistance. . . ."

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Defendants are current and former Florida prison or other officials. Richard Dugger is the current secretary of the Department; Louie L. Wainwright is the former secretary, who held office at the time of Lussier's employment and termination by the Department; G. S. Fortner was Avon's superintendent while Lussier worked there; and Dr. Paul J. Uhrig was the Dental Executive Director of the Department throughout the relevant time period. Gilda H. Lambert was the Secretary of Florida's Department of Administration. n3

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n3 The Florida Departments of Correction and Administration, named as defendants in Lussier's original complaint, were dropped from his amended complaint. It would appear that Dugger and Wainwright are named in both their individual and official capacities, Uhrig and Fortner are named in their individual capacities, and Lambert is named in her official capacity. See n. 10, infra.

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The district court disposed of Lussier's claims in two separate orders. First, on November 18, 1987, that court determined [**6] that Lussier had a viable cause of action under @ 794 for equitable prospective relief, but struck all claims for retroactive monetary relief. Second, on October 18, 1988, after defendants presented contentions that @ 794 did not apply to them because the medical division of the Department had not received any federal funds, the district court granted judgment for defendants on all of Lussier's claims. Thereafter, Lussier moved for reconsideration, arguing for the first time that

the Civil Rights Restoration Act of 1987 extended the scope of @ 794 to defendants. n4 102 Stat. 29, P.L. 100-259 (codified with respect to the Rehabilitation Act at 29 U.S.C. @ 794(b)). The district court, on March 28, 1989, denied that motion on the grounds that Lussier had not timely raised the contention that the 1988 legislative change should be retroactively applied. Lussier then instituted this appeal from the district court's orders of October 18, 1988 and March 28, 1989.

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n4 While the Act was enacted into law in March, 1988, the hearings concerning the legislation took place in 1987, and the Act is entitled the "Civil Rights Restoration Act of 1987."

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I.

The district court concluded that it lacked jurisdiction over Lussier's @ 794 claim because the Department's Division of Medicine which employed Lussier was a separate " program or activity" within the Department. Section 794 reaches discrimination against handicapped individuals by "any program or activity receiving federal financial assistance." The district court determined on October 18, 1988 that, because Lussier had presented no evidence that the Division of Medicine, as a discrete entity, received federal funds, the provisions of the Rehabilitation Act did not extend to it. In so doing, the district court concluded that the term " program or activity" in @ 794 should be narrowly construed to encompass only those entities within an institution actually receiving federal funds.

That determination fully accords with the holding in Grove City College v. Bell, 465 U.S. 555, 570-74, 104 S.Ct. 1211, 1219-22, 79 L.Ed.2d 516 (1984), and the views expressed in Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 635-36, 104 S.Ct. 1248, 1255-56, 79 L.Ed.2d 568 (1984), and United States v. Alabama, 828 F.2d 1532, 1548 n. 63 (11th Cir. 1987), cert. denied, 487 U.S. 1210, 108 [**8] S.Ct. 2857, 101 L.Ed.2d 894 (1988). But the continued vitality of Grove City was effectively eliminated by the federal Congress in March, 1988, by the passage of the Civil Rights Restoration Act, a development ignored by both sides in this case until Lussier moved for reconsideration on October 28, 1988, ten days after the district court entered judgment for defendants. Then, on October 28, 1988, Lussier for the first time contended that the Civil Rights Restoration Act of 1987, passed six months earlier in March, 1988, statutorily [*665] overruled the Grove City holding. The district court denied said motion to reconsider on the grounds that Lussier could not raise a new legal argument after final judgment had been rendered against him when that argument had been

available to him at the time at which Lussier had earlier responded to defendants' motion for summary judgment. Moreover, the district court stated that, under any circumstances, the Civil Rights Restoration Act of 1987 should not be given retroactive application in this case.

In this appeal, Lussier asserts that the 1988 congressional action applies retroactively and that, even if it does not, the district court erred [**9] in concluding that the Medical Division constituted a separate "program" under Grove City.

The Civil Rights Restoration Act of 1987 became law on March 22, 1988, with the expressed purpose of restoring "the prior consistent and long-standing executive branch interpretation and broad, institution-wide application" of four civil rights statutes, including the Rehabilitation Act. 29 U.S.C. @ 794. n5 The preamble to the 1988 legislation states that it was enacted "to restore the broad scope of coverage and to clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964." P.L. 100-259 (1988). The Senate Report accompanying the legislation announced outright that the purpose of the statute was "to overturn the Supreme Court's 1984 decision in Grove City College v. Bell. . . ." S.Rep. No. 64, 100th Cong., 2d Sess. 2, reprinted in 1988 U.S.Code Cong. & Ad.News 3, 3-4. Lussier notes that this case was pending in the district court when the amendment was passed and contends that the amendment applies in this litigation.

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n5 The Civil Rights Restoration Act of 1987 amended the Rehabilitation Act to include in the definition of the term " program or activity" :

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

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

. . . .

@ 794(b)(1).

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Such retroactive application accords with a long-standing general rule of statutory construction. In Bradley v. School Board of Richmond, 416 U.S. 696, 94

S.Ct. 2006, 40 L.Ed.2d 476 (1973), the Supreme Court invoked what Justice Blackmun characterized as the traditional "principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Id. at 711, 94 S.Ct. at 2016, citing United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801) (Marshall, C.J.). In Bradley, Justice Blackmun also noted that "[the] Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional," id. at 720, 94 S.Ct. at 2020, and also that retroactive application may be especially likely to produce manifest injustice "in mere private cases between individuals." Id. at 717, 94 S.Ct. at 2019, quoting United States v. Schooner Peggy, 1 Cranch at 110, 2 L.Ed. 49. Citing specifically to Bradley, Judge Clark [**11] of this court has written that "a new statute should apply to cases pending on the date of its enactment unless manifest injustice would result or there is a statutory directive or legislative history to the contrary." United States v. Kolter, 849 F.2d 541, 543 (11th Cir. 1988). It is also to be noted that "statutory changes that are procedural or remedial in nature apply retroactively." United States v. Vanella, 619 F.2d 384, 386 (5th Cir. 1980). Herein, the statutory change is remedial in nature.

The district court below observed that, in situations in which retroactive application of a statute would alter the obligations and liability of federal grant recipients, manifest injustice would result. The court relied [*666] upon Bennett v. New Jersey, 470 U.S. 632, 105 S.Ct. 1555, 84 L.Ed.2d 572 (1985), in which the Supreme Court determined that certain substantive provisions of the 1978 amendments to the Elementary and Secondary Education Act should not be applied retroactively to require repayment of funds received in prior years under different statutory standards. In Bennett, Justice O'Connor concluded that "absent a clear indication to the contrary in the relevant statutes [**12] or legislative history, changes in the substantive standards governing federal grant programs do not alter obligations and liabilities arising under earlier grants." Id. at 641, 105 S.Ct. at 1561. That direction of the Supreme Court was applied by this court in National Wildlife Federation v. Marsh, 747 F.2d 616, 620 (11th Cir. 1984), in which Judge Kravitch held that a federal housing development grant recipient had a vested right in funding under terms of a prior statute -- a right which could not be disturbed by retroactive application of the amended statute without causing manifest injustice.

Neither Bennett nor National Wildlife Federation is dispositive in this appeal. Those cases involved amendments to statutory grant programs which substantively altered eligibility requirements. Bennett, 470 U.S. at 637-38, 105 S.Ct. at 1558-59; National Wildlife Federation, 747 F.2d at 620. In contrast, the Civil Rights Restoration Act of 1987 is not an amendment to a funding statute and makes no changes with respect to eligibility requirements under a preexisting grant program. Rather, the legislation is purely remedial, enacted

to "assist in the struggle to eliminate [**13] discrimination from our society by ending federal subsidies of such discrimination." S.Rep. No. 64, P.L. 100-259, reprinted in 1988 U.S.Code Cong. & Admin.News 9. Moreover, the Civil Rights Restoration Act of 1987 itself does not change prior legislation, but rather merely corrects judicial interpretations which the Congress believed "unduly narrowed or cast doubt upon the broad application" of the civil rights laws. P.L. 100-259 @ 2.

It is of course true that state officials such as defendants herein could not have anticipated the 1988 legislative disavowal of the Supreme Court's decisions. However, defendants cannot legitimately liken the situation of a state governmental agency to that of a grant recipient who possessed a statutory right "which had matured or become unconditional." Bradley, 416 U.S. at 720, 94 S.Ct. at 2020. Further, the rights of private parties, the real concern of the Court when it fashioned the Bradley "manifest injustice" exception, are in no way implicated by retroactive application herein of the amendment. Thus, retroactive application of the amendment does not herein work "manifest injustice."

In the absence of "manifest injustice," retroactive [**14] application is mandated unless contrary legislative intent is present. Bradley, 416 U.S. at 711, 94 S.Ct. at 2016. In this instance, the history of the 1988 legislation reveals no hint that Congress intended the amendment to apply prospectively only. Indeed, the language of the amendment, which makes repeated assertions that the statute will "restore" and "clarify" Congress' original intent to apply the antidiscrimination laws broadly, is strongly consistent with retroactive application. n6 Finally, and of the utmost importance, the statute's sponsors explicitly stated in debates that the bill should apply retroactively. For example, Congressman Edwards stated outright on the floor of Congress that "[this] bill applies to all pending cases." 134 Cong.Rec. H583 (daily ed. Mar. 2, 1988), cited in Leake v. Long Island Jewish Medical Center, 695 F.Supp. 1414, 1416 (E.D.N.Y. 1988), aff'd, 869 F.2d 130 (2d Cir. 1989), in which Chief Judge Platt noted that Congressman Edwards was "the floor sponsor of the Restoration Act," id., and retroactively applied the 1988 congressional change. See also, to the [*667] same effect, Bonner v. Arizona Dept. of Corrections, 714 F.Supp. 420, [**15] 422-23 (D.Ariz. 1989). In both cases, the district courts, applying Bradley, located neither manifest injustice nor contrary legislative intent. Judge Platt in Leake explicitly considered whether the Bennett exception counseled a finding of manifest injustice against the retroactive application of the Act to federal grant recipients and discussed distinctions between the amendment and the kinds of funding statutes to which the Bennett [illegible]tion attaches. Leake, 695 F.Supp. 1416-17. Cf. United States v. [illegible] F.Supp. 642, 652 (E.D.La. 1988).

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n6 The preamble to the Civil Rights Restoration Act characterizes the legislation as "[an] Act to restore the broad scope of coverage and to clarify the application of" the four enumerated civil rights statutes. Section 2, "Findings of Congress," states that "legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." (Emphases added).

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Accordingly, we conclude that the Civil Rights Restoration Act of 1987 does apply retroactively in this case.

II.

Although the Civil Rights Restoration Act became law in March, 1988, Lussier failed to argue that it should be retroactively applied herein in his response to the State's motion for summary judgment filed in August, 1988, and then supplemented by him one month later. Indeed, Lussier did not refer to the 1988 legislation until October 28, 1988 when he filed a motion for reconsideration of the district court's order dated October 18, 1988.

Motions for relief from judgment are subject to the trial court's discretion. See American Home Assurance v. Glenn Estess & Assoc., 763 F.2d 1237, 1238-39 (11th Cir. 1985). "It is certainly true that it is the policy of the law to favor a hearing of a litigant's claim on the merits. It is also true that this policy must be balanced against the desire to achieve finality in litigation." 11 C. Wright & A. Miller, Federal Practice and Procedure @ 2857 at 159.

The district court in this case balanced those interests in favor of finality, reasoning:

Here, the plaintiff, by failing to raise the amendment to @ 794 before the entry of [**17] summary judgment, when it could and should have been raised, cannot now be heard to argue for its application. The policy of finality must be respected, where, as here, plaintiff had every opportunity to present the applicability to the amendment to this case but did not so. Plaintiff had his bite at the apple, he may not have another. n7

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n7 Memorandum and Order, March 28, 1989 at p. 3.

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Motions, such as motions to amend, should not be used "to raise arguments which could, and should, have been made before the judgment is issued." Federal Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986). After a judgment has been entered, the interest in finality may be deemed "compelling," Union Planters Nat'l Leasing v. Woods, 687 F.2d 117, 121 (5th Cir. 1982), quoting Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594, 598 n. 2 (5th Cir. 1981). "A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim." Id., quoting Freeman v. Continental Gin Co., 381 [**18] F.2d 459, 469 (5th Cir. 1967). A district court's denial of reconsideration is especially soundly exercised when the party has failed to articulate any reason for the failure to raise an issue at an earlier stage in the litigation. Van Ryn v. Korean Air Lines, 640 F.Supp. 284, 286 (C.D.Ca. 1985). A district court's exercise of such discretion is not, however, without limitation. While, as a rule, parties are not entitled to "two bites at the apple", there are occasions in which reconsideration should be entertained. American Home Assurance, 763 F.2d at 1239, quoting from Union Planters, supra at 121.

In this case, the district court's refusal to alter an order, entered ten days before Lussier sought reconsideration with regard to it, occurred six months after the passage of the 1988 legislation, which was an important chapter in the development of American statutory civil rights law. Its enactment was a highly publicized event. In that context, the district court deemed Lussier's failure to discuss the amendment in his response to defendants' June, 1988, [*668] motion for summary judgment to be inexcusable. That is an understandable position. But it is equally difficult to understand [**19] why defendants similarly failed to alert the court to the new law. Accordingly, in our view, the district court's refusal to correct a ten-day-old order, when that order reached a result contrary to the clear intent of Congress, constitutes an abuse of discretion. Therefore, this case must be remanded to the district court with directions to permit Lussier to proceed with his @ 794 claim. n8

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n8 Lussier advances the alternative argument that, even if the Civil Rights Restoration Act does not apply retroactively, the district court erred in its factual finding that the medical division was a separate program or activity. That contention is without merit. While the parties agree that the Department, as a whole, received federal funds, the record supports the district court's conclusion, in the context of defendants' summary judgment motion, that the Department's medical division had neither directly received federal funds nor funds from a co-mingled general account within an entity which benefitted from federal grants. Thus, the district court correctly applied Grove City, Darrone

and United States v. Alabama. In that regard, it is to be noted that in making its determination, the district court relied on the affidavit testimony of two state prison officials. That evidence was sufficient under Fed.R.Civ.P. 56(e) which requires that "[supporting] and opposing affidavits shall be made on personal knowledge. . . ." The district court correctly concluded that the Assistant Secretary for the Office of Management and Budget and the Director of the Division of Accounting and Auditing of the Department of Banking and Finance had the requisite personal knowledge, as affiants, to fulfill Rule 56(e)'s requirement.

Moreover, Lussier presented no evidence to contradict the testimony of those state officials. In response to defendants' motion for summary judgment, Lussier stated only that the medical division was not a distinct unit, and that he was paid from general department funds. The district court determined that that evidence was inadequate under Rule 56(c), because, as Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1985), teaches, Rule 56(c) "does not allow the plaintiff to simply rest on his allegations made in the complaint; instead, as the party bearing the burden of proof of trial, he must come forward with at least some evidence to support each element essential to his case at trial." In that regard, "[mere] allegations" made by Lussier are insufficient. Memorandum and Order, October 18, 1988 at 5. Finally, the district court concluded that Lussier also lacked the competence and the personal knowledge required by Rule 56 to testify to the Department's financial structure.

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III.

Because it determined, for reasons discussed supra, that Lussier was not entitled, in any event, to any relief under @ 794, the district court did not reach the issue of whether, under that statutory provision, Lussier was "otherwise qualified" to continue working in the Department, and whether defendants had an obligation, under that section of the federal Rehabilitation Act, "reasonably [to] accommodate" plaintiff, as required by the regulations implementing @ 794, 45 CFR @ 84.12, and the Supreme Court's decision in School Board of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). However, in the light of the views expressed by this court, supra, that issue must now be considered by this court in the within appeal.

The duty of an employer "reasonably [to] accommodate" a handicapped employee was characterized by Justice Brennan in Arline as follows:

Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for

an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities [**21] reasonably available under the employer's existing policies. 480 U.S. at 289 n. 19, 107 S.Ct. at 1131 n. 19. Lussier, as the district court found on the record before it, is a handicapped individual. Thus, questions arise as to whether Lussier is otherwise qualified for a position in the Department within the standard enunciated by Justice Brennan, and, if so, whether the Department has accommodated him. That inquiry, in and of itself, requires a remand to the district court for determination of two important factual issues which cannot be decided on the basis of the present record before this court.

[*669] To begin with, the parties disagree as to whether Lussier is qualified to work as a Department dentist. Defendants contend that Lussier's chronic hepatitis condition precludes his continued dental practice, and that the Department can deny further employment to him by virtue of its legitimate interest in protecting the health and safety of its prison population. Lussier, however, argues that he recovered from hepatitis in 1985 and that, since then, he has not been a contagious carrier of the disease. In so asserting, Lussier points to a 1985 letter from his physician stating that his [**22] medical condition had abated to the point where he could safely resume the practice of dentistry. Any determination of whether Lussier was "otherwise qualified" to resume work with the Department requires amplification and resolution of that factual issue. As the Supreme Court observed in Arline, 480 U.S. at 288, 107 S.Ct. at 1131, that type of decision must be based on medical information regarding the nature of Lussier's physical impairment and the risks posed by exposing others to an employee handicapped by the condition.

Similarly, a material factual dispute exists as to whether the Department could have accommodated Lussier after his 1985 recovery from an acute episode of hepatitis. No party disputes that the Department could legitimately refuse to employ Lussier during his protracted periods of contagious illness. However, in the period after 1985, Lussier claims to have repeatedly sought employment for open positions in which he should have been placed, while defendants take the position that the Department had, during that time period, no openings for which Lussier was qualified. In so disagreeing, the parties point to different testimonial and documentary evidence in the [**23] record to support their respective contentions. The process of weighing such conflicting evidence properly must take place in the trial court upon remand.

IV.

The district court concluded that the Eleventh Amendment bars Lussier from obtaining all of the retroactive pay and retroactive benefits under @ 794 which Lussier seeks. In Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), the Supreme Court held that "the Rehabilitation Act does not abrogate the Eleventh Amendment bar to suits against the States."

Id. at 246, 105 S.Ct. at 3149. n9 Indeed, as the district court below observed, such retroactive relief would constitute the payment of money damages from the state treasury in a suit against state officials. See Edelman v. Jordan, 415 U.S. 651, 667-68, 94 S.Ct. 1347, 1357-58, 39 L.Ed.2d 662 (1974).

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n9 In Atascadero, Justice Powell wrote: "The provisions of the Rehabilitation Act fall far short of expressing an unequivocal congressional intent to abrogate the States' Eleventh Amendment immunity. Nor has the State of California specifically waived its immunity to suit in federal court." Id. at 247, 105 S.Ct. at 3150.

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However, as Lussier has pointed out in the within appeal, a 1986 amendment to the 1964 Civil Rights Act, 42 U.S.C. @ 2000d, does express the "unequivocal congressional intent to abrogate the States' Eleventh Amendment immunity" required by Atascadero, 473 U.S. at 247, 105 S.Ct. at 3150. Section 2000d-7, added to the Civil Rights Act in October, 1986, provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29. . . ." @ 2000d-7(a)(1). The statute further states that remedies for Rehabilitation Act violations "are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." @ 2000d-7(a)(2). Finally, Congress expressly provided an effective date for the application of the amendment, stating that @ 2000d-7 is to be applied "to violations occurring in whole or in part after October 21, 1986." @ 2000d-7(b). Thus, the district court was correct, under Atascadero, in denying retroactive relief to Lussier for any violation which may have occurred prior [**25] to the amendment's effective date of October 21, 1986. However, Lussier also claims that [*670] his rights under @ 794 have been violated since that date, by virtue of the State's refusal to rehire him, and that, therefore, the district court erred in striking his claims for back pay and benefits from October 21, 1986 to the present.

In this appeal, Lussier contends that, since 1986, he has made repeated, unsuccessful attempts to regain employment with the Department, but that those attempts were unsuccessful despite the fact that numerous dental and other job openings for which he is qualified were available. However, Lussier's complaint to the district court did not contain such allegations. With respect to continued employment after he regained his health in 1985, Lussier's complaint only described reemployment denials by the Department which occurred in that year.

Thus, for Lussier to seek relief for violations occurring after October 21, 1986, Lussier will need permission from the district court to supplement this complaint when the case returns to the district court upon remand. Rule 15(d) of the Federal Rules of Civil Procedure states that "transactions or occurrences or events which [**26] have happened since the date of the pleading" should be added to the complaint via a motion to supplement the pleading. A supplemental pleading is an appropriate vehicle by which to "set forth new facts in order to update the earlier pleading, or change the amount or nature of the relief requested in the original pleading," 4 C. Wright & A. Miller, 4 Federal Practice and Procedure @ 1504 at 536-37 (footnotes omitted). The district court certainly did not err in any way in holding in November, 1987, on the state of the record then before it, that Lussier was not entitled to any back pay or other monetary relief sought by Lussier. Nevertheless, as of the date of this opinion, in view of the statutory changes made by the Congress and the need, for reasons stated supra, for a remand to be ordered in any event, the district court should afford Lussier an opportunity timely further to amend his complaint with allegations of discrimination occurring after the effective date of @ 2000d-7. n10

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n10 Section 794 suits against individual state and local officials acting in their individual capacities have often been brought and entertained. See, e.g., School Board of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987), aff'g 772 F.2d 759 (11th Cir. 1985); Norcross v. Sneed, 573 F.Supp. 533, 535 (W.D.Ark. 1983), aff'd, 755 F.2d 113 (8th Cir. 1985); Jennings v. Alexander, 518 F.Supp. 877 (M.D.Tenn. 1981). However, upon remand, the district court should afford to those defendants who are named in their individual capacities the opportunity to amend their answers to Lussier's amended complaint to include the affirmative defense of qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), and its progeny, since those defendants may be entitled to such immunity for acts taken before March 22, 1988 when Congress enacted the Civil Rights Restoration Act of 1987. Seemingly, until March 22, 1988, those defendants acted in reliance upon the Supreme Court's decision in Grove City, see Part I, supra, and may, in the light of questions concerning retroactive application of that statute, have so acted thereafter. Further, the qualified immunity defense may be applicable with respect to actions taken by those defendants in their individual capacities before a contagious disease was held to be a handicap covered by @ 794. See Arline v. School Board of Nassau County, 772 F.2d 759 (11th Cir. 1985), aff'd in School Board of Nassau County v. Arline, supra. As to claims by plaintiff against defendants in their official capacities for monetary compensation, the Eleventh Amendment issues are dealt with in Part IV, supra, and, of course, the Eleventh Amendment does not bar Lussier's claims for equitable relief under @ 794 against defendants named in this case in their official capacities. See Cory v. White, 457 U.S. 85, 89, 102 S.Ct. 2325, 2328, 72 L.Ed.2d 694 (1982); Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

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[**27]

V.

The district court held that Lussier could not meritoriously state his claims for relief under 42 U.S.C. @ 1983. The court first concluded that handicapped persons are not members of a suspect class for equal protection purposes, and that the State had not infringed upon any fundamental right of Lussier. Accordingly, the district court confined its consideration to the question of whether the actions of defendants had a rational basis, n11 and determined [*671] that, in terminating a dentist who was diagnosed with chronic infectious hepatitis, the State had acted pursuant to a legitimate government interest, namely, the protection of the health and safety of the Avon prison population.

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n11 See the district court's November 17, 1989 Order at 14.

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As discussed supra, Lussier contends that he has submitted valid evidence that he is no longer contagious and, in any event, that there are non-dental jobs in the Department for which even a hepatitis carrier is qualified. In support of that position, Lussier refers to a [**28] 1985 letter from his physician stating that Lussier had recovered and could safely return to dental practice. That letter seemingly constitutes competent evidence based on personal knowledge for Rule 56 purposes. As such, it raises a dispute regarding a material fact. If it is taken as true, then a reviewing court may conclude that the record does not support a finding that the State's exclusion of a recovered, non-contagious, former hepatitis patient is "rationally related to a legitimate governmental purpose." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446, 105 S.Ct. 3249, 3258, 87 L.Ed.2d 313 (1985). In that context, further consideration by the district court of Lussier's equal protection claim is required. n12 It is to be noted, however, that in Cleburne, Justice White, writing for the majority, rejected the contention that mentally handicapped persons constitute a quasi-suspect class and are entitled to claim protection of "heightened" scrutiny. Id. at 445-46, 105 S.Ct. at 3257. Cleburne thus clearly indicates that legislation affecting persons suffering from a physical handicap such as hepatitis is to be judged, in the face of an equal protection [**29] challenge, in terms of the "rationally related," and not a higher, standard. Id.

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n12 In addition to stating contentions under @ 794 and an equal protection claim under @ 1983, Lussier alleges a @ 1983 violation arising out of defendants' alleged @ 794 violation. Because the district court granted summary judgment for defendants regarding the @ 794 claims on jurisdictional grounds, it did not consider the @ 1983 implications of Lussier's allegations under @ 794. If Lussier is entitled to relief under @ 794 itself, there seemingly will be no need to consider whether such entitlement would also enable him successfully to claim under @ 1983 for a @ 794 violation. However, if, for any reason, Lussier may not obtain relief under @ 794 for a violation of that statute, then further consideration should be given to his said @ 1983 claim for relief.

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VI.

Section 794a(b) of the Rehabilitation Act provides that the court may, as matter of discretion, "allow the prevailing party, other than the United States, a reasonable [**30] attorney's fee as part of the costs." 29 U.S.C. @ 794a(b) (emphasis added). 42 U.S.C. @ 1988 sets forth a similar provision in connection with a prevailing party in a section 1983 suit. Upon remand, if Lussier should prevail on all or some of his claims, then the district court should appropriately consider Lussier's application for attorney's fees under one or both of @ 794 and @ 1983.

AFFIRMED in part, REVERSED in part and REMANDED for further proceedings in accordance with this opinion.

DISSENTBY: JOHNSON

DISSENT: JOHNSON, Circuit Judge, dissenting:

I cannot agree with the majority's conclusion that the Civil Rights Restoration Act applies retroactively to Lussier's claim. Because I feel that the law requires this Court to affirm the district court opinion, I respectfully dissent.

A. Retroactivity

In Bennett v. New Jersey, 470 U.S. 632, 105 S.Ct. 1555, 84 L.Ed.2d 572 (1985), the Supreme Court held that "absent a clear indication to the contrary in the relevant statutes or legislative history, changes in the substantive standards governing federal grant programs do not alter obligations and liabilities arising under earlier grants." Bennett, 470 U.S. at 641, 105 S.Ct. at 1561. The Court [**31] based its decision on the fact that enforcement of

the requirements of federal grant programs must be evaluated by the law in effect at the time the grants are made. Id. at 640, 105 S.Ct. at 1560. Otherwise, the government's right to recover misspent funds would "depend on the [*672] fortuitous timing of completion of the review process." Id. In other words, "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." Id. at 639, 105 S.Ct. at 1560. Similarly, this Court has held that "statutory changes that are procedural or remedial in nature apply retroactively," United States v. Vanella, 619 F.2d 384, 386 (5th Cir. 1980), while "retrospective operation will not be given to a statute which interferes with antecedent rights." Id. at 395 (quoting Greene v. United States, 376 U.S. 149, 160, 84 S.Ct. 615, 621, 11 L.Ed.2d 576 (1964)).

Section 794a(a)(2) of the Rehabilitation Act states that anyone discriminated against in violation of section 794 shall have available the remedies found in Title VI of the Civil Rights Act of 1964 (42 U.S.C.A. @ 2000d et seq.). Section 602 of Title VI allows compliance to be effected by termination [**32] of or refusal to grant federal assistance. 42 U.S.C.A. @ 2000d-1. Thus, like the statute involved in Bennett, section 794 gives the federal government a right to rescind assistance if there is no compliance. Under the broad holding in Bennett, therefore, a substantive change in section 794 cannot alter any obligations and liabilities arising under the earlier grants.

The majority concludes that Bennett and National Wildlife Federation v. Marsh, 747 F.2d 616 (11th Cir. 1984), are not dispositive because they involve "amendments to statutory grant programs which substantively altered eligibility requirements." I disagree. Before March 1988, agencies and institutions were liable under section 794 only if a specific program or activity received federal assistance. After the amendment's passage, such agencies and institutions became liable if they themselves received any federal funding. It is clear, therefore, that the 1988 amendment alters the substantive obligations and liabilities of agencies and institutions receiving federal funds. The amendment clearly alters eligibility requirements. Under Bennett, such changes cannot apply retroactively. The majority also concludes [**33] that retroactive application of the amendment will not work manifest injustice under Bradley because the amendment affects the rights of agencies rather than the rights of individuals. I fail to see how this injustice is any more just because it disadvantages a government agency rather than an individual.

The majority finds that the Civil Rights Restoration Act works no substantive change, but is merely remedial in nature, and clarifies what Congress intended all along. I disagree for two reasons. First, while Congress may have intended section 794 to apply to any agency receiving federal funds, the Supreme Court held otherwise in Grove City College v. Bell, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), and agencies justifiably gauged their obligations under that decision. Second, even if the Restoration Act is simply remedial, this Court and

the Supreme Court also have held that a statute, even one which is remedial in nature, may not be applied retroactively to affect antecedent rights. Vanella, 619 F.2d at 395; Greene v. United States, 376 U.S. 149, 160, 84 S.Ct. 615, 621, 11 L.Ed.2d 576 (1964). I cannot reconcile the retroactive application of the Restoration [**34] Act with these principles.

Lussier's suit against Wainwright, Uhrig and Fortner is precluded for an additional reason. There is some contention between the parties, raised in the Department's motion to dismiss and addressed by the majority in footnote 10, regarding whether Lussier may sue the individual defendants under section 794. The Department argues that these individuals are shielded from liability by qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Even assuming that individuals may be sued under section 794 -- and this Circuit has not so held n1 -- it appears that qualified immunity would protect these defendants. They are government officials -- directors and officers of the correctional institute -- performing the discretionary functions of hiring and firing. [*673] Id. at 818, 102 S.Ct. at 2738. At the time of Lussier's firing in 1983, they could not have reasonably been expected to know that section 794 applied to Lussier, because this Circuit did not define contagious disease as a handicap until 1985, when it decided Arline v. School Bd. of Nassau County, 772 F.2d 759 (11th Cir. 1985); that decision was not affirmed [**35] by the Supreme Court until 1987. School Bd. of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). As the majority suggests, therefore, the individual defendants must be allowed to raise the defense of qualified immunity regardless of the outcome of the retroactivity question.

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n1 Because section 794 gives a right of action against programs or activities receiving federal funds, it is difficult to see how one could interpret the statute as providing a right of action against individuals. Individuals are not programs or activities.

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B. Section 1983

The fact that Lussier has no cause of action under section 794 also should preclude his claim that the defendants violated 42 U.S.C.A. @ 1983 by discriminating against him under section 794. I agree with the majority, however, that the summary judgment on the equal protection/rational basis claim must be reversed and that suit must be remanded to the district court for further factual development regarding this claim. The fact that the [**36] defendants did not violate section 794 does not foreclose the possibility that they may have had no rational basis for refusing to rehire Lussier after he

recovered from the hepatitis.

C. Retroactive Back Pay and Benefits

My conclusion that the Restoration Act does not apply retroactively leads me to conclude that Lussier has no claim for retroactive back pay and benefits. Even if Lussier did have a section 794 claim, however, I am hard-pressed to see how section 2000d-7 provides him the means to recover back pay and benefits. First, it does not appear from my review of the record that this issue is properly before the Court. It was in the November 18, 1987 grant of summary judgment on Lussier's section 1983 claim against Wainwright that the district court denied Lussier retroactive relief. Lussier did not appeal from that judgment. He appealed from the October 18, 1988 summary judgment on his section 794 claims, which did not address the back pay/benefits question, and from the March 28, 1989 denial of his motion to reconsider that summary judgment. Because Lussier did not appeal from the judgment which resolved these issues, it is not proper for this Court to consider them. [**37]

Had the question properly been appealed, Lussier has not supplemented his pleadings to set forth "transactions or occurrences or events that have happened since the date of the pleading. . . ." Fed.R.Civ.P. 15(d). It is not the role of this Court to instruct Lussier in the art of proper pleading. Absent such a supplement, Lussier has no claim.

For the above reasons, I conclude that this Court should affirm the district court on all issues except Lussier's equal protection claim. That issue should be remanded for further factual development.

DAISY CASON, DEBBIE DOE, and BETTY ROE, on behalf of themselves and all persons similarly situated, Plaintiffs,
v. ROCHESTER HOUSING AUTHORITY, THOMAS F. McHUGH, individually and in his capacity as Executive Director of the Rochester Housing Authority, and DONNA SMITH, individually and in her capacity as Housing Assistant,
Defendants

Civ. No. 90-250L

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

748 F. Supp. 1002; 1990 U.S. Dist. LEXIS 14229

August 6, 1990

COUNSEL: [**1]

Elizabeth L. Schneider, Esq., Monroe County Legal Assistance Corp., for Plaintiffs.

Richard A. Kaul, Esq., Fulreader, Rosenthal, Sullivan, Clifford, Santoro & Kaul, for Defendants.

JUDGES: David G. Larimer, United States District Judge.

OPINIONBY: LARIMER

OPINION: [*1003] DECISION AND ORDER

DAVID G. LARIMER, UNITED STATES DISTRICT JUDGE

For over two hundred years our Country has prospered under the principle that all men and women should have an equal opportunity to enjoy "life, liberty and the pursuit of happiness."

There was a time when the disabled did not have the same opportunities and were relegated to a kind of second class status in employment, housing and transportation. That circumstance was caused more by the community's misinformation and thoughtlessness than by the individual's actual disabling condition. Much has been done to eliminate this situation but it would be simplistic to believe that problems do not remain. Public agencies must be especially vigilant to protect the disabled from all forms of discrimination -- intentional as well as benign discrimination caused by the public's perception

of what is "best" for the disabled.

This case revolves around claims that the Rochester Housing Authority ("Authority") discriminates against disabled [**2] applicants for public housing. Three applicants who have physical and mental disabilities and whose applications for public housing were denied, commenced this action seeking declaratory and injunctive relief on behalf of themselves and a class of similarly situated applicants.

Because I believe that the Authority uses eligibility criteria for public housing that tend to discriminate against those with handicaps and because I believe those requirements cause the Authority to consider handicapped applicants by a different standard than so-called able-bodied applicants, the eligibility standards are in clear violation of federal law and must be struck down.

PROCEDURAL BACKGROUND

Plaintiffs have brought this action under the Fair Housing Act of 1968, 48 U.S.C. @ 3601 et seq., the Rehabilitation Act of [*1004] 1973, 29 U.S.C. @ 794, and the United States Housing Authority, 42 U.S.C. @ 1437 et seq. The three named plaintiffs claim that their applications for low-income public housing were denied by the Authority because of plaintiffs' handicaps in clear contravention of federal law, which makes it illegal to discriminate in housing based on the physical or mental disability of an applicant. [**3]

One of the plaintiffs is a 31 year-old woman who has been diagnosed as schizophrenic and the other two are elderly women, each of whom suffers from various physical handicaps and one of whom has also been diagnosed as schizophrenic. In spite of their handicaps, plaintiffs contend that they meet all of the legitimate eligibility requirements and that the denial of their application was based on an impermissible evaluation of their disabilities.

The matter was originally before me on plaintiffs' motion for a preliminary injunction and for class certification. At that initial appearance on the preliminary injunction motion, the parties agreed to consolidate the hearing on the motion for a preliminary injunction with trial on the merits as to some of the disputed issues. The Court gave the parties leave to supplement the record concerning any disputed factual issues and the matter has now been submitted to the Court for decision.

The complaint charges the Authority with several discriminatory practices in its application process. Plaintiffs claim that the Authority imposes an arbitrary and subjective "ability to live independently" standard in determining whether to approve an application [**4] for public housing by a disabled applicant. Plaintiffs claim that this standard violates several federal statutes

and current federal regulations that were adopted concerning fair housing and the handicapped. The Authority's application process violates federal law because it authorizes and condones detailed inquiries into the nature and scope of the applicant's disabling condition and because it requires, in some cases, that the applicant release confidential medical information. Plaintiffs also claim that the Authority fails to give adequate and proper notice of actions taken on housing applications.

FACTS

The eligibility standards for public housing controlled by the Authority are set forth in the Rochester Housing Authority Rental and Occupancy Manual, @ 124 at pp. 17-18. The Manual was promulgated in May, 1988. The "Standards for Tenant Selection Criteria" allow consideration of the following:

a) an applicant's ability to live independently, or to live independently with minimal aid;

b) an applicant's past performance in meeting financial obligations, especially rent, unless good cause can be shown for non-payment of rent;

c) a record of disturbance of neighbors, [**5] destruction of property or of living or habits at prior residences which may adversely affect the health, safety and of other tenants (sic);

d) a history of criminal activity involving crimes of physical violence to persons or property, or other criminal acts which would adversely affect the health, safety, and welfare of other tenants.

Plaintiffs challenge only the standard relating to the "ability to live independently" and the Authority's inquiries and procedures utilized to make that determination.

The "ability to live independently" is defined in the Manual as follows:

Ability to live independently shall mean that an applicant is able to perform those basic functions of adult living for and by him/her self. These activities include: ability to understand and to sign contracts and legal agreements, ability to perform basic housekeeping and personal care; ability to perform necessary daily activities ability to understand and conform to applicable standards of safety. (sic)

The facts relating to the procedures utilized by the Authority in reviewing and assessing applications are largely undisputed and are set forth in the record by affidavit and deposition testimony. The Authority [**6] [*1005] classifies all applicants for housing into two general categories. Into the

first category fall families. Individual applicants, be they elderly or handicapped, are lumped into the second.

All individual applicants undergo an in-home evaluation, performed by an employee of the Authority. Prospective tenants in this category also are asked to complete a questionnaire, which contains many of the questions challenged in this action as discriminatory and intrusive. Each individual applicant signs a form consenting to the release of otherwise confidential medical information, although that information is not obtained in all cases.

The Authority employee who reviews the application then makes a subjective determination, based on her/his observations of the applicant and the answers to the questionnaire, whether circumstances exist to justify further inquiry into the applicant's ability to live independently in public housing. If such an investigation is deemed necessary, the application is referred to a social worker, who is in some cases employed by the Monroe County Health Department. In some instances, the social worker conducts a nursing evaluation, during which a variety of specific [**7] questions concerning the applicant's disability, personal hygiene and ability to live independently are asked.

Based on all this information, the Authority then makes a decision to accept or reject the application. In many instances concerning applications from handicapped individuals, the decision to deny housing is specifically based on the applicant's perceived inability to "live independently." There were no reported rejections of non-handicapped applicants for this reason.

Plaintiffs allege that the Authority denied their applications for housing solely on the basis of their handicaps.

In the case of plaintiff Cason, she received a letter dated February 6, 1990 from defendants, which stated that her application was denied because of her need for a wheelchair, because she is able only to walk short distances with the aid of a walker, because she is incontinent and relies on adult diapers, and because she would require 10 hours of daily aide service. The letter, attached to the complaint as exhibit "F," makes repeated reference to the Authority's conclusion that Cason is unable to live on an independent basis.

The evidence relating to the denial of plaintiff Doe's application consists [**8] of a short letter dated August 24, 1989 (attached to the complaint as exhibit "G") and the deposition testimony of Donna Smith, a housing specialist employed by the Authority who testified that the decision to deny Doe's application was chiefly hers. The letter recommends that Doe attempt to live independently of her parents for a period of 18 months, after which time the Authority would re-evaluate her "independent skills."

Smith testified at her deposition that she rejected Doe's application because she exhibited an inability to live independently and because Smith feared Doe would be uncooperative and might have trouble fulfilling the obligations of tenancy, chiefly that she might fail to pay the rent on time. Smith reached her decision on the basis of her own personal observations of Doe's behavior during a home visit, as well as information provided by Doe's therapist. Smith testified that during the visit, Doe repeatedly complained about small matters unrelated to the visit and appeared unable to understand questions or directions, and that subsequent to the interview, Doe made repeated telephone calls to Smith's office regarding a variety of complaints. At her deposition, Smith [**9] denied that these calls were related to the fact that the Authority had "lost" Doe's application for two years prior to this time although an activity sheet relating to Doe's file indicated that several of the telephone calls were "about [Doe's] application."

Smith also testified that Doe's counselor at Rochester Mental Health voiced similar reservations about Doe's ability to live independently, and had recommended to Doe, apparently without success, that she move into a group home. Although Doe did submit a landlord reference stating that she had paid her rent and had created no other [*1006] problems, Smith discounted the reference because the "landlords" were Doe's parents.

The only written communication to Doe concerning her rejection consists of the letter referred to above. Smith testified that in conversations with Doe, however, she told Doe that the main reason for the denial was her perceived inability to live independently.

Attached to the complaint as exhibit "J" is a December 1988 letter to Plaintiff Roe from Donna Smith, informing her that her housing application was being denied because she required a higher level of care than the Authority could offer. Exhibit "K" is a [**10] memo to Smith directing her to remove Roe's name from the waiting list for the Enriched Housing Program because of an "involved psych history."

Further evidence concerning the denial of plaintiff Roe's application can be gleaned from the deposition testimony of Kathleen Richards, a Social Services Assistant at the Authority. Richards apparently made the decision to deny Roe's application for a program known as Extended Shared Aid Program (ESAP) housing, to which Roe's application had been referred by the Tenant Selection Division of the Authority, after Roe was rejected for Enriched Housing.

Richards testified that she based her decision in part on documentation in the nursing evaluation file, which indicated that Roe was in need of support services and had a history of resistance to such services. The applicant's assessment questionnaire revealed that Roe had been hospitalized, had felt "depressed" at times, and was bothered by noises. Finally, Richards referred to

a conversation with the director of the Enriched Housing Program, who stated that his file on Roe contained evidence that Roe had suffered for some time from a variety of physical and mental afflictions, had questionable [**11] hygiene habits, and had a history of non-cooperation with service providers.

Apparently no adverse information about plaintiff Roe was obtained from prior landlords. In fact, Donna Smith testified that Roe's prior landlord in New York City had experienced no difficulties with Roe's ability to comply with the terms of her lease.

DISCUSSION

A. Applicability of Statutes to the Authority.

Although the parties do not dispute the issue, there appears to be no question that the Fair Housing Act and the Rehabilitation Act apply to the Authority.

The Fair Housing Act, 42 U.S.C. at @ 3603, extends generally to dwellings provided in whole or in part with the aid of Federal monies. The Fair Housing Amendments Act of 1988 ("FHAA"), P.L. 100-430, for the first time extended the protections of the Fair Housing Act to the handicapped; prior to that time, it had prohibited discrimination only on the basis of race, color, religion, sex and national origin.

On the other hand, the Rehabilitation Act, @ 794 of Title 29, U.S.C., from its enactment in 1973, has prohibited discrimination against handicapped persons "under any program or activity receiving Federal financial assistance." In 1988, [**12] Congress amended this section, along with other civil rights legislation, via the Civil Rights Restoration Act, P.L. 100-259. The amendments added to @ 794 a definition of "program or activity," which definition appears to include the Authority. See 29 U.S.C. @ 794(b). It is clear, however, from the legislative history, that the amendments were not intended to extend the application of the act to entities such as the Authority, but merely to clarify what had from the beginning been Congress' intent to make the Rehabilitation Act broad and far-reaching in its application. See S. Rep. No. 100-64, 100th Cong. 2d Sess. 4, 8, reprinted in 1988 U.S. Code Cong. & Admin. News 1, 6, 8-9. The court is aware of no authority holding that the Rehabilitation Act of 1973 did not apply to the challenged practices before its amendment in 1988.

The record contains no direct evidence that the Authority receives federal monies. Defendants' documentation, however, along with representations at argument [*1007] concerning the extent to which HUD exerts control over the Authority, convinces the Court that the Authority receives some financial assistance from HUD and, therefore, must comply with [**13] all federal statutes that prohibit discrimination against the handicapped.

B. Fair Housing Act.

The court finds that the challenged practices violate the Fair Housing Act. The Fair Housing Amendments Act (FHAA), passed in 1988, extended the protections embodied in the Fair Housing Act to handicapped persons. Title 42 U.S.C. @ 3604(f)(1) now makes it unlawful "to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." Section 3602(h) defines "handicap" as including any "physical or mental impairment which substantially limits one or more . . . major life activities." The defendants do not dispute that the plaintiffs are handicapped as defined by the statute.

Huntington Branch, NAACP v. The Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988), aff'd on other grounds, 488 U.S. 15, 109 S. Ct. 276, 102 L. Ed. 2d 180 (1988) established that plaintiffs suing under the Fair Housing Act can succeed either by showing discriminatory impact or discriminatory treatment. Proof of the latter requires a showing of intent to discriminate. Plaintiffs allege only that the Authority's practices have the effect of discriminating against handicapped [**14] individuals.

Defendants point out that, since 1987, of 276 handicapped applicants for housing, only 17 have had their applications denied on the basis of conclusions reached from the application of the challenged "ability to live independently" criteria. They argue that this statistic proves that there is no discriminatory effect.

The Authority, however, improperly measures effect. A plaintiff makes out a prima facie case of disparate impact by showing that a given practice has a greater impact on handicapped applicants than on non-handicapped ones. See Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288 (7th Cir. 1977), cert. denied, 434 U.S. 1025, 98 S. Ct. 752, 54 L. Ed. 2d 772 (1978); Baxter v. City of Belleville, 720 F. Supp. 720, 732 (N.D.Ill. 1989). Thus, discriminatory effect is shown by proof that all persons negatively affected by an allegedly unlawful practice are handicapped. See Familystyle of St. Paul v. City of St. Paul, 728 F. Supp. 1396, 1403 (D.Minn. 1990). In this case, defendants deny housing only to handicapped applicants on the basis of an inability to live independently; no non-handicapped persons apparently were denied housing on the basis [**15] of their inability to live independently. I therefore find that plaintiffs have sufficiently shown discriminatory effect.

Having determined the existence of adverse impact, the question remains whether defendant somehow may avoid liability under the Act. As phrased in Town of Huntington, 844 F.2d at 936, "the defendant must prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less

discriminatory effect."

I find defendants' justifications for their actions to be without merit. Defendants contend that inquiring into a handicapped person's ability to live independently furthers the goal of ensuring that tenants will respect the property and rights of other residents. As discussed infra, the need to protect other tenants from physical dangers posed by destructive tenants surely is an important governmental interest. Nevertheless, I am not convinced that delving into an applicant's confidential medical history, or requiring that the applicant demonstrate an ability to live independently, are the least discriminatory methods of advancing that interest.

In enacting FHAA, Congress [**16] specifically considered the plight of housing applicants with mental illnesses. "In the case of a person with a mental illness . . . there must be objective evidence from the person's prior behavior that the person has committed overt acts which caused harm or which directly threatened harm." H.R. Rep. No. [*1008] 711, 100th Cong. 2d Sess. 5, reprinted in 1988 U.S. Code Cong. & Admin. News 2173, 2190 ("House Report"). The landlord's determination must not rest on "unsubstantiated inferences." See id. at 2191. In my view, there is no objective evidence concerning threatened harm that justified rejecting Cason, Roe and Doe.

The court is sympathetic to the Authority's desire not to rent public housing to persons with objectively dangerous tendencies. Nevertheless, defendants have produced no evidence that the challenged practices allow the Authority to screen out potentially dangerous tenants, nor have they shown the court that less intrusive means of investigating applicants, such as requests for landlord references, would be ineffective in achieving the desired ends.

Presumably, in renting to a non-handicapped person, the Authority takes a similar, and perhaps in some cases a greater, [**17] risk that some harm will come to the property or to other tenants. Yet such applicants' ability to live independently is never questioned, and they are not required to disclose their medical history. It would thus seem that the authority is content to rely upon information of a less intrusive and personal nature to assess the threat posed by these non-handicapped tenants. Without any objective evidence to indicate otherwise, it appears that the difference in treatment of the handicapped stems from unsubstantiated prejudices and fears regarding those with mental and physical disabilities. This is precisely the sort of situation that the fair housing laws were designed to prohibit.

Another factor relevant to a Fair Housing Act challenge is whether there exists evidence of discriminatory intent. Plaintiffs here, to the extent they base their position on a showing of adverse impact, offer no evidence of intent. This, however, is not fatal to their case. At least one court has recognized that the intent component is the least important under the test articulated in

Arlington Heights and followed by this circuit in Town of Huntington. See Baxter, 720 F. Supp. at 732. Surely, evidence [**18] of discriminatory intent would aid plaintiffs' position, but the absence of such proof weighs only slightly against granting relief.

The court in Town of Huntington followed Arlington Heights and ruled that the "balance should be struck more readily in favor of the plaintiff when it is seeking only to enjoin a municipal defendant from interfering with its own plans rather than attempting to compel the defendant itself to build housing." 844 F.2d at 940. Although the Second Circuit dealt with a challenge to a discriminatory zoning ordinance, its reasoning applies here as well. Plaintiffs seek not to compel the Authority to develop housing, but merely to change the procedure by which it selects tenants for its existing facilities.

C. Regulatory Violations.

The Authority's practice of making inquiry into an applicant's ability to live independently is clearly at odds with the regulations promulgated by the United States Department of Housing and Urban Development ("HUD"). Part 24 of the Code of Federal Regulations (C.F.R.), at @ 100.202(c), explicitly defines the permissible scope of inquiry allowed of a handicapped applicant for housing:

(c) It shall be unlawful to make an [**19] inquiry to determine whether an applicant for a dwelling . . . has a handicap or to make inquiry as to the nature or severity of a handicap of such a person. However, this paragraph does not prohibit the following inquiries, provided these inquiries are made of all applicants, whether or not they have handicaps:

(1) Inquiry into an applicant's ability to meet the requirements of ownership or tenancy.

The remaining exceptions, which allow inquiries relating to specific types of housing, as well as those aimed at determining whether an applicant is a substance abuser or engages in other illegalities, are not at issue here.

The "requirements of tenancy" referred to above may be found at 24 C.F.R. @ 966.4. This section details various lease requirements related to public housing, and [*1009] at subsection (f) lists 12 separate obligations that the lease may impose on tenants. Each concerns requirements that tenants not conduct themselves or treat the property in a manner that will interfere with other tenants' health, safety or enjoyment of the property. Tenants must, inter alia, avoid physical damage to the premises, keep them in a sanitary condition and comply with all applicable housing [**20] codes. Nowhere is there found a requirement that a resident be able to live "independently," rather than with the aid of others. n1

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n1 The Authority complains that it lacks the staff and resources to provide support services to tenants. Plaintiffs, however, stress that they require nothing of the sort from the Authority; rather, many handicapped applicants receive support from Medicaid or other assistance programs. A tenant who is able to meet the objective requirements of tenancy should not be denied housing simply because she receives medical assistance or other aid.

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Defendants do not deny that their conduct contravenes the current HUD regulations. Their position appears to be that because they annually send an outline of their procedures to HUD and that HUD has given at least tacit approval to those procedures that they are in compliance with HUD requirements.

It is clear, however, that the last "approval" of the Authority's policies was over two years ago, in 1988, and was apparently based on the 1987 HUD handbook. [**21] The applicable federal regulations that now control were promulgated after these dates. In any event, the prior approval by HUD cannot excuse the Authority from complying with all requirements of federal statutes and regulations concerning discrimination in housing. Clearly, the federal regulations cited above now control and the Authority must follow them.

C.F.R. Part 24, @ 100.202(d), tracking the language of 42 U.S.C. @ 3604(f)(9), does permit the Authority to refuse to rent a dwelling to one whose tenancy will pose a direct threat to the health and safety of others, or will result in physical damage to the property. There is no evidence in the record, however, to indicate that an inability to live independently creates the type of threat contemplated by the statute. Cf. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 450, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985) (concerns that allowing establishment of group home for retarded citizens would physically endanger community were unfounded -- similar concerns attached to locating apartment and fraternity houses in same location); see also Association of Relatives and Friends of AIDS Patients v. Regulations and Permits Administration, 740 F. Supp. 95 [**22] (D.P.R. 1990) (No evidence that tenancy of 10 terminal AIDS patients carries significant threat to safety of community).

"Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion [from housing]." House Report, at 2179.

D. Class Certification Motion.

Plaintiffs seek to certify this as a class action, with the class composed of all individuals with handicaps, as defined by the Fair Housing Act and @ 504 of the Rehabilitation Act, who have in the past three years applied for, are presently applying for or will in the future apply for, low income public housing administered by defendant Rochester Housing Authority.

Plaintiffs bear the burden of proving that this action meets the threshold requirements of Federal Rule of Civil Procedure 23 (a), which provides, in full:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses [**23] of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 163, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974).

[*1010] Plaintiffs also maintain that the class meets the requirements of Rule 23(b)(2). A class meets the requirements of this section if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Defendants oppose certification on the grounds that (1) the class is not so numerous to make joinder impracticable; (2) plaintiffs are unable to finance the action (inadequate representation); (3) the named plaintiffs' lack standing; and (4) there are no common questions of fact.

These arguments against class certification lack merit. The complaint alleges a panoply of discriminatory acts relating to discrimination against the handicapped in addition to the denial of housing, therefore, all handicapped applicants in the relevant time period, of which there were approximately 276, and not just those who were denied housing, of which there were at least [**24] 17, are included in the class. Clearly, 276 plaintiffs cannot be practicably joined in the action.

Furthermore, I find defendant's challenge to the Monroe County Legal Assistance Corporation's ("MCLAC") ability to represent the class to be without basis. Plaintiffs' attorneys are well-regarded and experienced in this type of litigation. They routinely pursue class actions; in fact, MCLAC is presently engaged as counsel in class action litigation involving the Medicaid Act before this court. The named plaintiffs plainly will adequately represent the interests

of the class.

Defendants claim that the plaintiffs have no "standing" because their claims predate the effective date of the Rehabilitation Act of 1988. Changes made to the Rehabilitation Act in 1988 are irrelevant to the issues in this case; the Act, passed in 1973, has always prohibited discrimination against handicapped individuals. Moreover, concerning the Fair Housing Act, some of the allegedly discriminatory actions were taken against each of the named plaintiffs after the effective dates of the 1988 amendments to the Fair Housing Act. Defendants also argue that even if there are common questions of law or fact among persons [**25] included in the class, individual questions predominate. Defendant, however, misconstrues the rule; predominance of common questions is only a requirement of subsection (b)(3), not (b)(2), under which plaintiffs seek certification. On the record before me, I find that common questions are present, and furthermore, that the claims of the named plaintiffs are typical of those of the members of the class.

Turning to the requirements of Rule 23(b)(2), it is beyond dispute that the actions allegedly taken by the Authority, including but not limited to living-independently standard and the requirement that all handicapped applicants sign medical releases, affect all members of the class. See Calkins v. Blum, 511 F. Supp. 1073 (N.D.N.Y. 1981) (challenge to method of determining medicaid eligibility), aff'd on other grounds, 675 F.2d 44 (2d Cir. 1982).

Moreover, I find that there exist so-called "additional reasons" for class certification under Rule 23(b)(2), as is required by courts in this circuit. See Calkins, 511 F. Supp. at 1089 (citing Davis v. Smith, 607 F.2d 535 (2d Cir. 1979)). The "additional reasons" requirement stems from the notion that injunctive relief often [**26] by its nature inures to the benefit of similarly situated persons, without the need for formal class certification. As was noted in Calkins, however, courts generally do not merely assume that defendants will comply with the terms of the injunction on a class-wide basis, but instead will find "additional reasons" for certifying a class whenever defendants fail to make positive assurances regarding future compliance as to other class members. See Calkins, 511 F. Supp. at 1089; see also Rios v. Marshall, 100 F.R.D. 395, 412 (S.D.N.Y. 1983) (where government defendants fail to represent intent to abide, as to all class members, by decision favoring named plaintiff, class certification guarantees enforceability of judgment).

For the reasons stated above, plaintiffs' motion for class certification is granted.

[*1011] CONCLUSION PAGE

Plaintiffs' motion for declaratory and injunctive relief is granted. The current procedures utilized by the Rochester Housing Authority to select tenants

clearly violates federal law because the procedure has the effect of discriminating against handicapped applicants.

Specifically, that portion of the Authority's manual entitled "Standards for Tenant Selection [**27] Criteria" that requires an applicant to demonstrate an ability "to live independently" violates federal statutes and is contrary to federal regulations concerning discrimination in housing and must not be

utilized in the tenant selection process. The Rochester Housing Authority is hereby enjoined from using this criteria in considering applications for housing. Furthermore, the Rochester Housing Authority is ordered to vacate the rejection of the applications of the three representative plaintiffs and those other members of the class that were denied housing on the basis of their inability to live independently and to immediately reconsider those applications under proper standards; and it is further

ORDERED that the Authority is to promulgate within sixty (60) days and obtain HUD approval for new standards for determining tenant eligibility that comply with all federal statutes and regulations that prohibit discrimination against the handicapped in housing.

IT IS SO ORDERED.

GEORGE LOCASCIO, et al., Plaintiffs, v. CITY OF ST. PETERSBURG, et al., Defendants

Case No. 88-962-CIV-T-17(B)

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

731 F. Supp. 1522; 1990 U.S. Dist. LEXIS 2704

March 8, 1990, Decided

COUNSEL: [**1]

GEORGE K. RAHDERT, ESQ., PATRICIA FIELDS ANDERSON, ESQ., RAHDERT, ACOSTA,
P.A., St. Petersburg, Florida, for Plaintiffs.

JANET L. GIFFORD & JACQUELINE W. HUBBARD, Assistant City Attorneys Trial Counsel, St. Petersburg, Florida.

OSCAR BLASINGAME, ESQ., St. Petersburg, Florida.

Co-Trial Counsel, JOHN M. BRECKENRIDGE, JR., Tampa, Florida, for Defendants.

JUDGES: Elizabeth A. Kovachevich, United States District Judge.

OPINIONBY: KOVACHEVICH

OPINION: [*1523] ORDER ON MOTIONS

ELIZABETH A. KOVACHEVICH, UNITED STATES DISTRICT JUDGE.

The cause is before the Court on the following motions, responses, and pleadings:

1. Defendant, city of St. Petersburg,'s motion to dismiss pendant state claims and memorandum of law, filed September 8, 1989. (Docket No. 50).

2. Defendant, City of St. Petersburg,'s motion for partial summary judgment on all federal claims, appendix thereto, and memorandum of law, filed September 8, 1989. (Docket Nos. 51 and 52).

3. Defendant, City of St. Petersburg,'s motion for oral argument, filed September 8, 1989.

4. Plaintiffs' memorandum in opposition to motion for partial summary judgment, filed September 20, 1989. (Docket No. 53).

5. Plaintiffs' memorandum in opposition to motion to dismiss pendant state claims, filed September 20, 1989. (Docket No. 54).

6. Plaintiffs' appendix [**2] to response to motion for partial summary judgment, filed September 20, 1989. (Docket No. 55).

7. Court-ordered joint memorandum of law on motion for partial summary judgment, filed October 20, 1989. (Docket No. 58).

8. Joinder of Defendant, Hellmuth, Obata & Kassabaum, Inc., in motion for partial summary judgment and memorandum in support thereof, filed November 8, 1989. (Docket Nos. 59 and 60).

9. Defendant, Hellmuth, Obata & Kassabaum,'s motion for summary judgment on all issues and memorandum of law, filed January 16, 1990. (Docket Nos. 72 and 73).

10. Affidavit of Paul L. Watson is support of motion for summary judgment, filed January 16, 1990. (Docket No. 74).

11. Notice of filing of document in support of motion for summary judgment, filed January 24, 1990. (Docket No. 76).

12. Plaintiffs' motion to strike Defendant Hellmuth, Obata & Kassabaum, Inc.'s motion for summary judgment, or, alternatively, motion for extension time to respond to motion for summary judgment, filed January 29, 1990. (Docket No. 29)

This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue [**3] as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. Sweat v. The Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. Hayden v. First National Bank of Mt. Pleasant, 595 F.2d 994, 996-7 (5th Cir. 1979), quoting Gross v. Southern Railroad Co., 414 F.2d 292 (5th Cir. 1969). Factual disputes preclude summary judgment.

The Supreme Court of the United States held, in Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548, (1986),

In our view the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. 477 U.S. at

322, 91 L. Ed. 2d at 273.

The Court also said, "Rule 56(e) therefore requires that nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing there is a genuine issue [**4] for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at p. 274.

Complaint was filed in this cause of action June 30, 1988. Plaintiffs named in the [*1524] complaint are George Locascio; Disabled American Veterans-Department of Florida, Inc.; Florida Gulf Coast Paralyzed Veterans Association, Inc.; National Spinal Cord Injury Association-Tampa Bay Area Chapter; Organization for the Promotion of Access and Travel for the Handicapped, Inc.-Tampa Bay Area Chapter; Ingrid L. Kohler; Joseph Churuti; Phillip G. Faas; J.R. Sanchez, Jr.; Dr. David H. Baras; Angus Farnum; William Culhane, as parent and next friend of Christopher Culhane; Central Florida Paralyzed Veterans Associations, Inc.; Paralyzed Veterans Association of Florida, Inc.; and Kevin Butler. (hereinafter collectively Plaintiffs). The named defendants were City of St. Petersburg (City); Robert Ulrich (Ulrich or Mayor), as Mayor; and Hellmuth, Obata & Kassabaum, Inc. (HOK)

Upon order of the Court, Plaintiffs filed an amended complaint on October 31, 1988, the named plaintiffs and defendants remained the same. However, on January 30, 1989, by stipulation, Defendant Robert Ulrich, as mayor, was dismissed, with prejudice, from the action. Subsequently, by stipulation [**5] Defendant Hellmuth, Obata & Kassabaum, Inc. was dismissed on February 28, 1990.

The amended complaint alleged that the Suncoast Dome, then under construction, failed to meet various state and federal requirements as to handicapped facilities. The amended complaint contained the following counts: 1) action under Federal law for declaratory and injunctive relief, including violation of 42 U.S.C. @ 1983; 2) violation of equal protection and due process clause of the Fourteenth amendment; and 3) state claims, violation of Sections 255.21 and 553.48, Florida Statutes, and the Florida Constitution.

On September 8, 1989, Defendant City filed a motion for partial summary judgment on the federal claims (Counts I and II) and asserted that there is no genuine issue of material fact concerning the fact that the City did not use federal financial assistance in the construction of the Florida Suncoast Dome (the Stadium); that there is no federal obligation regarding the handicapped; and that Defendant City is entitled to summary judgment as matter of law. Defendant, also on that date, moved to dismiss the pendant state claims if the motion for judgment on the federal claims were to be granted. [**6] The motion was joined by Defendant HOK on November 8, 1989.

On January 16, 1990, Defendant HOK filed a motion for summary judgment on all issues as to it. Even though HOK has been dismissed as a Defendant, the Court will address the issue in order to clarify the record.

Plaintiffs' have moved to strike the HOK motion for summary judgment. This Court ordered, on January 11, 1989, that all dispositive motions be filed on or before September 8, 1989. On December 1, 1989, on order was issued giving the parties sixty (60) days prior to trial, scheduled for March 1990, in which to file motions for summary judgment. It is the Court's position that the January 11, 1989, order takes precedence over the form order issued December 1, 1989. However, under either order, the Court finds the motion for summary judgment was untimely filed and should be stricken from the Court's consideration.

FINDINGS OF FACT

Upon instruction of the Court, the parties prepared and filed a joint memorandum of law delineating disputed and undisputed issues of fact and law on October 20, 1989. The following "facts" are undisputed between the parties, the parties do disagree on the application of the relevant law:
[**7]
A. Federal Funding

1. The City is the recipient of federal funds including Community Development Block Grant (Block Grant) funds. The Block Grant funds are administered through the Department of Housing and Urban Development (HUD) pursuant to Title I of the Housing and Community Development Act of 1974, 42 U.S.C. @ 5301, et seq.

2. The Block Grant fund application documents indicate that a portion of the Block Grants funds were used for the acquisition of land, relocation of occupants, [*1525] and demolition in the Gas Plant Redevelopment Project (the Project or Area).

3. In 1982 and 1983, the City also applied for Section 108 Loan Guarantee (@ 108) funds to complete the acquisition, relocation, and demolition in the Gas Plant Area within two years.

4. The relevant language from the Block Grant and @ 108 documents is as follows:

(a)(I) From the 1979-80 Block Grant application, the Project Summary section, covering the Project, reads:

The Gas Plant area has long been recognized as one of the worst areas of housing in St. Petersburg. Based on surveys showing that over 80% of the structures in the area were deteriorated or dilapidated, the City Council declared Gas Plant an area of slum [**8] and blight suitable for redevelopment in September of

1978 and mandated the preparation of a redevelopment plan.

A draft of the plan has now been completed and was adopted in September, 1979. The plan seeks to rid the area of slum and blight as well as to "expand the employment and economic base of the City" (City Council Goal No. 4) and "encourage and reinforce downtown development" (City Council Goal No. 7) in conformance with the City's adopted Comprehensive Land Use Plan-Intown Sector.

* * * *

Towards accomplishing these objectives, the plan proposes the acquisition of 182 properties, the relocation of 25 businesses and 45 owner-occupant and 281 tenant households, the demolition of 262 structures, and extensive sight improvements, including street and sidewalk improvements, landscaping, the construction of detention basins and some municipal parking, and rerouting of utilities to provide redevelopment parcels unencumbered by utility and access easements.

These activities, estimated to cost $ 9.5 million are proposed to be carried out utilizing the City's Community Development Block Grant as a primary funding source over the next nine years in four phases. Disposition parcels [**9] will be made available for sale to developers at the completion of each phase.

Activity during this CDBG program will include acquisition, relocation, demolition and disposition in portions of all phases of the project.

(a)(II) The assurances section of the Block Grant application states:

The applicant hereby assures and certifies that:

(k) It will require every building or facility (other than a privately owned residential structure) designed, constructed or altered with funds provided under 24 CFR 570 to comply with the "American Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by the Physically Handicapped," Number A-117.1-R 1971, subject to the exceptions contained in 41 CFR 101-19.604. The applicant will be responsible for conducting inspections to insure compliance with these specifications by the contractor. n1

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n1 In the joint-memorandum, the parties, note in footnote 1, that they disagree as to whether or not the stadium is constructed in accordance with these standards. However, later in the same memorandum, the parties stipulate that they agree that the Stadium does not completely comply with the UFAS requirements. It is unclear to the Court as to whether or not there is an issue of fact as to compliance; therefore, the Court cannot determine this issue at this time and it remains for the trial finder of fact.

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(b) From the 1980-81 Block Grant application, the Project Summary section of the application for the Project uses virtually the same language as that found in the 1979 application.

(c) From the 1981-82 Block Grant application, the language is virtually identical to the previous two grant applications.

(d) From the 1982-83 Block [**10] Grant application, the Final Statement of Community Development Objectives and Projected Use of Funds section lists as three of seven objectives:

[*1526] Develop recreational areas to their fullest potential (through rehabilitation of existing facilities, installation of new equipment, provision of recreational opportunities or implementation of related programs), according to the identified needs.

Provide additional land for economic development activities within the City, through the acquisition of blighted and underutilized areas and the relocation of any occupants. A Section 108 Loan Guarantee is being sought to assist with these activities.

Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial center.

(e) From the 1982 @ 108 loan guarantee, the cover letter dated August 12, 1982, states, in pertinent part:

The City intends to use the [Section 108 Loan Guarantee] funds for acquisition, relocation and demolition activities in the Gas Plant Redevelopment project, which was initially approved for CDBG funding in April, 1978. . . . Provision of funds under the Loan Guarantee program will allow City to accelerate land acquisition [**11] in the blighted area. . . .

The Certifications section of the @ 108 application states, in relevant part:

[The] grantee gives assurances and certifies with respect to the grant that:

(g) The grant will be conducted and administered in compliance with:

(7) Section 504 of the Rehabilitation Act of 1973 (PUB.L. 93-112), as amended, and implementing regulations and published for effect. . . .

(f) From the 1983 @ 108 loan guarantee application, the cover letter dated January 20, 1983, states:

[The Section 108 Loan Guarantee funds are to] provide further funding for the previously approved Section 108 activity, which is the acquisition, relocation and demolition in the Gas [**12] Plant Redevelopment area.

The Certification section of the application reads the same as in the 1982 application.

(g) From the 1983-84 @ 108 loan guarantee application, the final statement of objectives and use states as three of twelve objectives and uses:

Provide additional land for economic development activities which will benefit low- and moderate-income persons.

Support economic development activities in order to provide more livable communities.

Acquire property, relocate occupants and demolish structures under the Gas Plant Redevelopment Plan.

The Certifications section of the application reads the same as the 1982 and 1983 applications.

(h) From the 1984-85 Block Grant application, the Projected Use section, under the heading Gas Plant Redevelopment states:

In prior years, the City of St. Petersburg has received two Section 108 Loan Guarantees from HUD to accelerate acquisition and relocation in the Gas Plant. This budget item provides for partial repayment of those loans.

The Final Statement of Community Development Objectives section of the application lists as four of its objectives:

Support the creation of employment opportunities for low- and moderate-income [**13] persons.

Support economic development activities in low- and moderate-income areas of the City.

Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial and employment center.

Eliminate blighting conditions by acquisition of substandard structures, relocation of occupants, and demolition.

The Certifications section of the application states:

The grantee certifies that:

It will comply with the other provisions of the Act and with other applicable laws.

The section of this application titled "1982-82 Program", which discusses the use of Block Grant funds the previous year, identifies the projected use relating to providing additional land through the acquisition [*1527] of blighted areas and relocation of occupants as the only objective pertaining to a major redevelopment effort of the Gas Plant area. The projected use relating to developing recreational areas to their fullest potential, relates to expanding recreational facilities for low- income and moderate-income persons by expanding Campbell Park and Clearview Park. The projected use relating to economic development activities to expand and strengthen downtown St. Petersburg [**14] as a regional commercial center relates to the Detroit Block revitalization project.

(i) From the 1985-86 Block Grant application, the Final Statement of Community Development Objectives lists as four of twelve objectives the following:

Support the creation of employment opportunities for low- and moderate-income persons.

Support economic development activities in low- and moderate-income areas of the City.

Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial and employment center.

Eliminate blighting conditions by acquisition of substandard structures, relocation of occupants, and demolition.

Under the Projected Use section of the application the Gas Plant Redevelopment headings contains the same language as the

1984-85 grant application The certifications section contains the same language as the 1983-84 application.

The Relationship of Projects to Objectives chart accompanying this application, showing the 1984-85 objectives, states the Gas Plant Project is related to the objectives:

Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial and employment [**15] center.

Eliminate blighted conditions by acquisition of substandard structures, relocation of occupants and demolition.

(j) From the 1986-87 Block Grant application, the Final Statement of Community Development Objectives lists as four of thirteen objectives:

Support economic development activities and infrastructure improvements in low- and moderate-income areas of the City.

Support the creation of employment opportunities of low- and moderate-income persons.

Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial and employment center.

Eliminate blighting conditions by acquisition of substandard structures, relocation of occupants and demolition.

The Projected Use section contains the same language as the 1984-85 application and the Certifications section is the same as for the 1983-84 application.

The Assessment of Fiscal Year 1985-86 Program section lists as four of twelve objectives adopted by the City Counsel for Fiscal Year 1985-86:

Support the creation of employment opportunities for low- and moderate-income persons.

Support economic development activities in low- and moderate-income areas of the City.
[**16]
Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial and employment center.

Eliminate blighting conditions by acquisition of substandard structures, relocation of occupants, and demolition.

(k) From the 1987-88 Block Grant application, the Amended Final Statement of Community Development Objectives identifies as four of its thirteen goals to:

Support the creation of employment opportunities for low- and moderate-income persons.

Support economic development activities in low- and moderate-income areas of the City.

Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial and employment center.

[*1528] Eliminate blighting conditions by acquisition of substandard structures, relocation of occupants, and demolition.

The Projected Use section of the application contains essentially the same language as the 1984-85 application and the Certifications section is the same as that of the 1983-84 application.

The Assessment of Fiscal Year 1986-87 Program section, lists as four of twelve objectives adopted by the City Counsel for Fiscal Year 1985-86:

Support the creation [**17] of employment opportunities for low- and moderate-income persons.

Support economic development activities in low- and moderate-income areas of the City.

Support economic development activities which expand and strengthen downtown St. Petersburg as a regional commercial and employment center.

Eliminate blighting conditions by acquisition of substandard structures, relocation of occupants, and demolition.

(1) From the 1988-89 Block Grant application, the Final Statement of Community Development Objectives section lists as three of twelve objectives to:

Support economic development activities and infrastructure improvements in low- and moderate-income of the City.

Support the creation of employment opportunities for low- and moderate-income persons through the use of Entitlement Section 108 funds.

Eliminate blighting conditions of substandard structures, relocation of occupants and demolition.

The Projected Use of Funds section lists as projects approved for funding during the fiscal year, under the heading of "Section 108 Loan Repayment":

In prior years the City of St. Petersburg has received two Section 108 Loan Guarantees from HUD to accelerate acquisition and relocation [**18] in the Gas Plant Redevelopment area.

Under the heading of "Gas Plant Redevelopment," the application states:

The Gas Plant redevelopment project is located between First and Fifth Avenues South and Ninth and Sixteenth Streets and is a total clearance of the area. These funds will pay legal and appraisal fees for acquisition of the parcel at 1036 Third Avenue South and demolition of the properties at 204 16th Street South and 1334 First Avenue South (census tract 216.95). This project addresses the national objective of elimination of slums and blight.

The Certifications section of this application uses the same language as the 1983-84 application.

B. Federal Statutes and Regulations

1. The Block Grants are administered through the office of HUD pursuant to Title I of the Housing and Community Development Act of 1974 (the HCD Act). As originally passed by Congress, the Act did not prohibit discrimination on the basis of handicap; however, it was amended effective October 1, 1981, to add such language. Omnibus Budget Reconciliation Act of 1981, Pub.L. 97-35, 95 STAT. 392 (1981).

The Act now requires grant recipients to comply with Section 504, 29 U.S.C. @ 794, the Rehabilitation [**19] Act of 1973, as provided in 42 U.S.C. @ 5309(a). Section 504 prohibits discrimination against the handicapped in any program or activity receiving federal financial assistance and requires compliance with the Uniform Federal Accessibility Standards (UFAS) after August 1984.

2. The Architectural Barriers Act (the Barriers Act), 42 U.S.C. @ 4151, et seq., was passed in 1968 and subsequently amended. It requires that any facility constructed, leased or altered by the federal government or with the use of federal government funds be accessible to the physically handicapped. The Barriers Act provides standards for the design, construction and alteration of public buildings which are financed by federal funds, "if such building or facility is subject to standards for design, construction, or alteration issued under authority of the law authorizing such grant or a loan." 42 U.S.C. @ 4151(3).

[*1529] The legislative history of the Barriers Act indicates that it applies to grants or loans "for the purpose of financing . . . construction." The Senate Report states that the act was necessary to insure all public buildings constructed in the 'future with loans or grants from the federal government [**20] are designed and constructed in such a way that they will be accessible to and usable by the physically handicapped. S.Rep. No. 538, 90th Cong., 2d Sess. (1), Reprinted in 1968 U.S.CODE CONG.ADMIN.NEWS 3214, 3215.

The agency comments solicited by the Senate committee on Public Works also reflect the understanding that the Barriers Act applies to federal "grants or loans . . . for the purpose of financing the construction of public buildings." Id., at 3219, 3221. Congressional comments reflect that Senator Bartlett stated the Barriers Act "insures that all non-residential buildings constructed with federal funds would have to be accessible to the physically handicapped." 113 CONG.REC. S24133 (1967).

The House of Representatives, when considering the Senate Bill noted that "in making the legislative history we should make it clear that whenever tax dollars are used for constructing public buildings it [the Barriers Act] should apply." Id., at H23722 (statement of Representative Gray).

3. The Barriers Act provides for the Administrator of General Services to promulgate standards "for the design, construction, and alteration of buildings . . . to insure whenever possible [**21] that physically handicapped persons will have ready access to, and use of, such buildings." The regulations promulgated in response to this directive are the Uniform Federal Accessibility Standards found at 41 C.F.R. 101, et seq., which were adopted on August 2, 1984, by the General Services Administration and HUD. Construction which is subject to the Barriers Act and/or which is a " program or activity" subject to @ 504 must conform with UFAS.

4. The pertinent regulations, Part 41 of 28 C.F.R., define a recipient of federal financial assistance as "any 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 or a recipient, but excluding the ultimate beneficiary of the assistance." 41.3(d).

The regulations define "federal financial assistance" as "any grant, loan, contract . . ., 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 [**22] interest in or use of such property. . . ." The regulations prohibit discrimination against handicapped persons, and prohibit a recipient of federal financial assistance from affording "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," and from providing "different or separate aid, benefits, or services to handicapped persons." 41.51(iii) and (iv).

5. In 1988, Congress amended Section 504 by passing the Civil Rights Restoration Act of 1987, Pub.L. No. 100-259, 102 STAT. 28, 29 (1988). Section 2 of Public Law 100-259 provides that Congress finds that:

(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of . . . Section 504 of the Rehabilitation Act of 1973, . . .; and

(2) Legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institutionalized application of those laws as previously administered.

1988 U.S.CODE CONG. & ADMIN.NEWS, at page 3.

This bill added subsection (b) to 29 U.S.C. @ 794. In subsection (b), Congress defined [**23] program or activity as "all of the operations of -- (1)(A) a department, agency, special purpose district, or other instrumentality of a state or local government; or (B) the entity of such State or local government that distributes such assistance and [*1530] such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a state or local government."

The stated purpose of the statute is to "restore the broad scope of coverage and to clarify the application of . . . Section 504 of the Rehabilitation Act of 1973 . . ." Pub.L. No. 100-258, 102 Stat. 28. Congressman Donald Edwards of California, the floor sponsor of the Restoration Act, stated that: "This bill applies to all pending cases. It is of great concern that it has taken this long to pass this legislation. I wish no cases had been lost because of this delay." 134 CONG.REC. H583 (daily ed. Mar. 2, 1988). During the floor debate to override President Reagan's veto of the Restoration Act, Senator Robert Packwood of Oregon stated that "all we have done is change the law back to what we thought it was. We have not expanded it beyond what we thought it was." 134 [**24] CONG. REC. S2735 (daily ed. Mar. 22, 1988). Senator Robert Stafford of Vermont, an original sponsor of Section 504, stated that the "institution-wide definition [was] originally intended by legislators." Id., at S2739.

C. Stadium Site Selection and Construction

1. In September 1980, the Pinellas Sports Authority, a body created by the Florida Legislature, targeted the St. Petersburg Sod Farm as the site for the Stadium project. Subsequently, in March 1982, the City site selection was reopened because the Sod Farm site became unavailable.

Two mid-County sites and the Gas Plant site in downtown St. Petersburg were under consideration. On November 1, 1982, the St. Petersburg City Council offered to lease the 66 acre Gas Plant site to the Pinellas Sports Authority. On December 31, 1984, the Pinellas Sports Authority and the City Council approved the sale of an $ 85 million revenue bond to provide financing for Stadium construction.

2. On February 2, 1984, the City awarded the contract for design of the Stadium to architects Hellmuth, Obata and Kassabaum. On November 21, 1986, the City signed a contract to construct the stadium with Huber, Hunt and Nichols.

Thereafter, on January [**25] 5, 1987, construction on the Stadium began and it continued to the date of the motion for summary judgment. n2 During the course of the construction, there have been a number of change orders implementing design and construction alterations necessitated in the project. Some of the change orders were a direct result of the City's implementation of recommendations concerning handicap accessibility.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 The Court takes judicial notice that the Stadium was scheduled to and did officially open to the public on March 3, 1990, with the appearance of Kenny Rogers.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

3. The City began acquiring land in the Gas Plant area in 1980. The City last used Block Grant to acquire title to a parcel of land in the Gas Plant area on October 1, 1986. The City obtained title to one parcel of land on June 4, 1985, after a court entered an Order of Taking on the property pursuant to eminent domain proceedings. That court entered a final judgment on March 5, 1987, and the City paid for the property with revenue bond funds, but $ 25,000.00 of the $ 32,500.00 in attorney's fees was ultimately paid from the 1987-88 Block Grant funds. No Block Grant funds were used to acquire or demolish the three parcels of [**26] land listed under the Gas Plant Redevelopment section on the 1988-89 Block Grant application. City revenue bond funds were used to acquire or demolish these parcels. The City currently receives Block Grant and other federal funds for other projects and it has used and continues to use Block Grant funds to service the debt on the Section 108 Loan Guarantee funds.

4. Here the parties appear to agree that the Stadium does not completely comply with the Uniform Federal Accessibility Standards. They state that the seating is not thereunder appropriately dispersed in the stadium and does not provide lines of sight comparable to those for all viewing areas as required by law. The number of [*1531] wheelchair seats is less than prescribed by (UFAS). The press area is only partially accessible to mobility impaired people and the outfield bleachers are inaccessible. The Court has previously noted, footnote 1, that the joint-memorandum is contradictory. The parties state at their footnote 1 that the parties are not in agreement as to the compliance. It is the Court's position that the record is unclear as to whether or not the City was in compliance and the Court will leave the issue to the trial finder [**27] of fact.

5. Representatives of the City engaged in detailed discussions of the Stadium project with the Committee for Assistance to the Physically Impaired (CAPS) in a number of meetings starting on May 13, 1987. CAPI made several recommendations concerning the accessibility of handicapped individuals at these meetings. The City also hired a consultant, Frank M. Bosak, to advise it on handicap accessibility. He met with CAPI members and submitted a report making certain recommendations concerning handicap accessibility. The City adopted some, but not all, of these recommendations and incorporated them into stadium construction.

DISCUSSION PAGE 72

In the joint memorandum of law, the parties have defined the disputed legal issues and delineated their positions on each issue. The Court will address the issues as framed by the parties.

I. WHETHER FOR PURPOSES OF SECTION 504, THE " PROGRAM OR ACTIVITY" WAS THE ACQUISITION OF LAND, RELOCATION OF OCCUPANTS AND DEMOLITION OF EXISTING STRUCTURES OR REDEVELOPMENT ENCOMPASSING THE CONSTRUCTION OF THE STADIUM IN THE GAS PLANT AREA.

II. WHETHER, FOR THE PURPOSE OF SECTION 504 THE ACQUISITION AND PREPARATION OF THE STADIUM SITE IS A PROGRAM OR [**28] ACTIVITY DISTINCT FROM THE CONSTRUCTION OF THE STADIUM.

III. WHETHER THE CITY CONTINUES TO BE OBLIGATED UNDER SECTION 504 BECAUSE OF ITS RECEIPT OF CDBG FUNDS OR WHETHER ITS OBLIGATIONS STOPPED WHEN THE ACQUISITION, RELOCATION AND DEMOLITION OF THE LAND IN THE GAS PLANT AREA CEASED.

IV. WHETHER THE ARCHITECTURAL BARRIERS ACT IS APPLICABLE TO CONSTRUCTION WHICH IS NOT FEDERALLY FUNDED BUT WHICH IS LOCATED ON LAND ACQUIRED WITH FEDERAL CDBG FUNDS.

V. WHETHER BY PASSAGE OF THE CIVIL RIGHTS RESTORATION ACT OF 1988 CONGRESS CAN RETROACTIVELY CHANGE THE CITY'S OBLIGATIONS FOR CDBG FUNDS GRANTED PRIOR TO ITS ENACTMENT OR WHETHER IT MERELY CLARIFIED THE CITY'S EXISTING OBLIGATIONS.

VI. WHETHER THE CITY WAS OBLIGATED TO CHANGE THE DESIGN AND CONSTRUCTION OF THE STADIUM TO CONFORM TO UFAS STANDARDS AFTER THE PASSAGE OF THE CIVIL RIGHTS RESTORATION ACT OF 1988.

In addressing these issues the Court must resolve several questions regarding the applicability of the Federal standards to the construction of the Stadium. The first inquiry is whether or not under @ 504, prior to amendment, the

construction of the Stadium was, or is, a " program or activity" receiving Federal financial assistance. [**29] If the Court determines it is, the second inquiry is unnecessary, because that would be determinative of the issue of whether or not Federal Accessibility Standards are applicable to the Stadium.

If the first inquiry is answered in the negative, the Court must then determine whether or not the amendment to @ 504, the Civil Rights Restoration Act, is retroactively applicable to the construction of the Stadium. Finally, is the question of the applicability of the Architectural Barriers Act. If the Court determines that either @ 504 or the Barriers Act is applicable adherence to the Federal Accessibility Standards is required.

[*1532] As to the first issue, whether or not the construction of the Suncoast Dome Stadium is within the ambit of the " program or activity" clause of Section 504 so as to require Defendants to comply with Federal standards as to handicapped accessibility to the stadium, Section 504 states, in relevant part:

(a) No otherwise qualified individual with handicaps . . . . shall, solely by reason of her or 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. [**30] . . .

Defendants assert that the Block Grant funds were solely for the purpose of acquisition, relocation of occupants and demolition of existing structures in the Gas Plant area and were not applicable to the entire redevelopment project, including the construction of the Stadium. Therefore, Defendants conclude the construction of the Stadium does not fall under the " program or activity" of Section 504, thereby requiring application of Federal standards to the Stadium construction. Plaintiffs assert the opposite proposition.

It is the recipient of the federal funds to which Section 504 applies:

By limiting coverage to recipients, Congress imposes the obligations of @ 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to "receive" federal funds.

U.S. Dept. of Transp. v. Paralyzed Veterans of America, 477 U.S. 597, 106 S. Ct. 2705, 2711, 91 L. Ed. 2d 494 (1986). There is a difference between indirect aid to an intended recipient and an indirect benefit to a third party, not a recipient. In the Paralyzed Veterans case, the Court found that grants to airport operators to finance construction, runways, etc., did not make airlines recipients under @ 504, [**31] they were merely beneficiaries of the use of the aid by the airports.

Prior to the 1988 amendment to @ 504, effective March 22, 1988, the law relating to the definition of "program or activity" , was split. Various courts, including the United States Supreme Court indicated that the " program or activity" of @ 504 was to be applied in a program specific manner and not on an institutionalized approach.

In enforcing a program specific requirements the courts said: It is insufficient for a plaintiff to simply show that some aspect or another of the relevant entity receives or has received some form of federal financial assistance. The private plaintiff must:

[Show] that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance.

Brown v Sibley, 650 F.2d 760, 169 (5th Cir. 1981). Receipt by a multiperson or multipurpose entity of federal financial assistance to be applied to specific programs and/or activities, will not "without more, bring all of those multiple programs or activities with the reach of section 504." Bachman v. American Society of Clinical Patholog ists, [**32] 577 F. Supp. 1257, 1263 (D.N.J. 1983); Grove City College v. Bell, 465 U.S. 555, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981).

Other courts took the view that the entire recipient entity was included in the " program or activity" requirement of @ 504. See, Arline v. School Board of Nassau County, 772 F.2d 759 (11th Cir. 1985), aff'd, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987).

In 1988, @ 504 was amended by the Civil Rights Restoration Act; wherein the Legislature moved to restore the "broad, institutionalized" application of @ 504. The amendment added 29 U.S.C. @ 794(b), defining program or activity as "all of the operations" of:

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

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

[*1533] There is no question that, beginning in 1979, the City received Federal financial assistance, through the Block [**33] Grants and the Loan Guarantee funds. These funds were, in part, utilized for the acquisition of land, relocation of occupants, and demolition in the Gas Plant Project. The goals of the Project included expansion of the employment and economic base of

the city and encouragement and reinforcement of downtown development.

The facts, as stipulated by the parties in the joint memorandum, establish that the City made application for Block Grants as late as 1988-89. In that application the City indicated that the funds would be used for repayment of the Section 108 loan amounts (amounts employed to accelerate acquisition and relocation in the Gas Plant area). Additionally, the application indicated that the funds would be used to pay legal and appraisal fees for certain acquisition and demolition for the Gas Plant project, but the parties agree that Block Grant funds were not expended on those acquisitions.

The present location for the Stadium, located in the Gas Plant Project, was offered for lease to the Sports Authority November 1, 1982, and construction began on the Stadium on January 7, 1987. On December 31, 1984, the City Council and the Sports Authority approved the sale of a revenue [**34] bond for the construction.

The Court, having considered the pleadings and materials presented by both parties, finds persuasive the arguments of Plaintiffs. The Court must conclude that the construction of the Stadium was part and parcel of the Gas Redevelopment Project, which is a " program or activity" subject to the provisions of Section 504, 29 U.S.C. @ 794, the Rehabilitation of Act of 1973. In so finding, the Court cites with approval Plaintiffs' responsive memorandum of law, particularly pages 7, and 11 through 15.

Based on the conclusion that @ 504 is applicable to the Stadium construction, the Court need not determine whether or not the 1988 amendment, the Civil Rights Restoration Act, is to be retroactively applied. Nor, must the Court address the issue of the application of the Architectural Barrier Act, since the Barrier Act would require the same application of the Federal Accessibility Standards required by Section 504. The Court declines to address these two issues.

Several of the remaining issues raised by the joint-memorandum address Count II of the amended complaint, violation of Plaintiffs' due process and equal protection of the Fourteenth Amendment. The issues [**35] as framed by the parties are:

I. WHETHER, PURSUANT TO THE EQUAL PROTECTION CLAUSE, THE HANDICAPPED CONSTITUTE A PROTECTED CLASS.

II. WHETHER, PURSUANT TO THE EQUAL PROTECTION CLAUSE, ACCESS TO THE STADIUM IS A FUNDAMENTAL CONSTITUTIONAL RIGHT.

III. WHETHER, PURSUANT TO THE EQUAL PROTECTION CLAUSE, THE ACTIONS OF THE CITY IN THE DESIGN AND CONSTRUCTION OF THE STADIUM, WITHSTAND A RATIONAL BASIS ANALYSIS.

Defendants seek the dismissal of the equal protection claims of Count II of the amended complaint because they contend that Plaintiffs do not comprise a suspect class and do not allege violation of any fundamental right.

Where there is no fundamental constitutional right involved and the class is not a suspect class, the actions of state officials are constitutionally valid if there is a rational basis for the actions or classifications challenged. Dopico v. Goldschmidt, 518 F. Supp. 1161 (S.D.N.Y 1981). "Some particularly invidious distinctions are subject to more rigorous scrutiny." Zobel v. Williams, 457 U.S. 55, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982).

To withstand equal protection review, actions that distinguish between a discrete group and others must be rationally related to a legitimate [**36] governmental purpose. The governmental entity may not rely on a classification or distinction whose relationship to the alleged purpose is so attenuated as [*1534] to render the distinction arbitrary or irrational. City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Defendants seemingly assert that the rational basis for their actions here is the conservation of public resources, which may be a legitimate governmental interest. Dopico, 518 F. Supp. at 1179.

Having already determined that the City was obligated, pursuant to @ 504, to comply with the Federal Accessibility Standards in the design and construction of the Stadium, the question is whether the failure to do so was in violation of Plaintiffs' equal protection rights. The focus must be upon the validity of the governmental interest at the time of the planning and design of the Stadium, not on the City's interest at this time in conservation of funds by not having to rectify the alleged problems in the construction.

There is nothing before the Court, on this motion for partial summary judgment, that establishes a rational basis for the City's decision, at the time of inception and implementation [**37] of the Stadium design and construction, to segregate the handicapped. This is an issue to be addressed by the trial finder-of-fact.

The Court must agree with Defendants that Plaintiffs have not stated a claim for violation of any due process right under the Fourteenth Amendment. Plaintiffs apparently concede the point in their response to the motion for partial summary judgment as they do not address or oppose the contention.

Count I of the amended complaint asserts a claim for violation of 42 U.S.C. @ 1983. The issue regarding this claim is stated by the parties as:

I. WHETHER PLAINTIFFS CAN BRING A SECTION 1983 ACTION IF THE COURT DISMISSES THE FEDERAL STATUTORY AND CONSTITUTIONAL CLAIMS.

The Court's determination that Plaintiffs have constitutional and federal statutory claims to assert is dispositive of this issue. The motion for summary judgment on this issue will be denied.

Motion to Dismiss

The motion to dismiss is predicated on the assumption that the Court would grant Defendant's motion for partial summary judgment and dismiss the federal claims of the amended complaint. Defendants ask for the dismissal of pendant state claims, in that instance. The Court, having [**38] denied the motion for summary judgment, will deny the motion to dismiss.

At this time, the Court would take the opportunity to commend the parties in this action for the quality of their presentations, individually and jointly. The pleadings which the Court has reviewed are well-written and organized, giving the Court the assistance which facilitates the review and resolution of the issues presented. Accordingly, it is

ORDERED that the motion for oral argument be denied; that Plaintiffs' motion to strike Defendant Hellmuth, Obata & Kassabaum's motion for summary judgment be granted and Docket Nos. 72, 73, 74, and 76 be stricken from this file; that Defendant's motion for summary judgment as to the issue of the applicability of Section 504, 29 U.S.C. @ 794 be denied and the Clerk of the Court is directed to enter summary judgment in favor of Plaintiffs, stating that Section 504, 29 U.S.C. @ 794 is applicable to the construction of the Suncoast Dome Stadium; Defendant's motion for summary judgment as to Count II of the amended complaint be granted, in part, and denied, in part, and the due process claim of Count II be dismissed; in all other respects Defendants motion for partial summary [**39] judgment be denied; and that the motion to dismiss be denied.

DONE and ORDERED in Chambers, in Tampa, Florida, this 8th day of March, 1990.

A federal employee may assert the Fifth Amendment privilege against compulsory self-incrimination in an administrative investigation to protect against any disclosure that an individual reasonably believes could be used in his own criminal prosecution or could lead to other evidence that might be so used. See Weston v. United States Department of Housing and Urban Development, 724 F.2d 943, 947-48 (Fed. Cir. 1983). The possibility of criminal action against appellant existed at the time the agency required him to complete the financial disclosure form. Since appellant was not in a custodial situation, however, the agency was not required to provide appellant with warning of his Fifth Amendment rights. See Wilkes v. Veterans Administration, 6 M.S.P.R. 732, 735 (1981) (Fifth Amendment "Miranda" warning is required when an individual is subjected to a custodial interrogation).

4. The penalty of removal is reasonable in light of appellant's offenses.

Under Douglas [*10] v. Veterans Administration, 5 M.S.P.R. 280 (1981), the Board must determine whether the penalty of removal is reasonable under the circumstances of this case. Douglas at 302. Appellant's offenses are extremely serious. The sustained charge of conflict of interest has a direct impact upon appellant's responsibilities and the public trust. The charge of falsification is inherently destructive of the agency's faith in an employee's trustworthiness and honesty, essential elements in the relationship of an employer and employee. Although appellant had a long and satisfactory service record with no other disciplinary actions and his official duties involved only peripheral contact with contractors, these factors in appellant's favor are outweighed by the other factors that support appellant's removal for these offenses.

Order

The initial decision is hereby AFFIRMED as MODIFIED and the agency's removal of appellant from his position is SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. @ 1201.113(c).

Notice

The appellant is hereby notified of the right under 5 U.S.C. @ 7703 to seek judicial review, if the Court has jurisdiction, [*11] of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the Court no later than thirty (30) days after the appellant's receipt of this order.

LEVEL 1 - 3 OF 3 CASES

VIRGINIA A. LANE v. DEPARTMENT OF THE ARMY

DOCKET NUMBER SL07528210164

MERIT SYSTEMS PROTECTION BOARD

19 M.S.P.R. 161; 1984 MSPB LEXIS 3428

January 23, 1984

OPINION:
[*1]

OPINION AND ORDER

Virginia A. Lane (appellant) was removed from her position as Administrative Officer by the Department of the Army's Kansas Ammunition Plant (agency) on the grounds that her status as wife of the Controller of the contractor operating the government-owned plant constituted a conflict of interest. n1

n1 The appellant was first provided an opportunity to eliminate the conflict. The record reflects that resignation was the only manner in which the agency believed the conflict could be eliminated. The appellant chose not to resign and the instant removal action was thereafter initiated by the agency.

On appeal to the St. Louis Regional Office, the presiding official in his initial decision found that the agency action effecting appellant's removal was based on a nonexistent conflict of interest and was therefore unwarranted.

The agency has filed a timely petition for review alleging that the decision of the presiding official is based on an erroneous interpretation of agency regulations and the existence of a new revision of Army regulations, not available when the record was closed which more clearly defines agency policy. n2

n2 It should be noted that the new regulation does not establish a new or different policy rather it emphasizes and clarifies the prior requirement that employees not engage in conduct which has the "appearance" of a conflict of interest [*2]

More specifically, the agency argues that the presiding official erred in applying the wrong standard when he found that none of appellant's duties "had a direct and predictable effect upon the operating contractor." The agency alleges that this " direct and predictable effect" standard is a criminal standard which is excessively restrictive and not in consonance with the provisions of agency regulations which preclude the mere "appearance of a conflict of interest. " This allegation is without merit. The agency's final decision letter specifically based the removal on the grounds that there was a real conflict between her private interests (her husband's position with the operating contractor) and her official duties as administrative officer. After a thorough review of the record, the presiding official correctly found that there had been no evidence presented by the agency that any of the appellant's duties as administrative officer or any decision in which she participated in or with respect to which she advised would reasonably have a direct and predictable effect upon the operating contractor which employed her husband. n3 Nor will the record support a finding of an appearance [*3] of a conflict of interest which requires a showing that the performance of official functions will reasonably have or create the appearance of having an effect on the outside interest. Since the appellant's official functions did not involve contractor negotiations or place her in a position where she would be privy to any information involving negotiations with her husband's employer, it cannot be concluded that performance of her official function would reasonably create an appearance of having an effect on outside interests. United States v. Mississippi Valley Generating Co. 364 U.S. 520 (1961) Lavelle v. Department of the Air Force, Docket No. DA075209157 (December 10, 1981) Thus appellant's

@ 208

relates to appearance regulation

removal based on a non-existent real or apparent conflict of interest is unwarranted. Accordingly, the petition for review is GRANTED, and the initial decision is AFFIRMED as MODIFIED. The agency is hereby ORDERED to cancel appellant's removal. n3

n3 It should be noted that appellant had been employed by the Department of the Army at the Kansas Army Ammunition Plant for 14 years, during five of which she occupied the administrative officer position. Appellant's husband had been employed with the operating contractor for fifteen years. It was the promotion of appellant's husband to the position of controller in 1981 which triggered the removal of appellant. However, as the presiding official correctly noted appellant's husband's promotion to the position of controller did not give rise to a change of circumstances which could reasonably be interpreted to constitute a conflict of interest. [*4]

reasonable standard applied

The agency is ORDERED to submit written verification of its compliance with this Order to the Secretary of the Board within twenty (20) days of the date of this Order. In the event of agency noncompliance, a petition for enforcement may be filed with the St. Louis Regional Office pursuant to 5 C.F.R. @ 1201.181(a).

This is the final decision of the Merit Systems Protection Board in this appeal. 5 C.F.R. @ 1201.113(c)

The appellant is hereby notified of the right under 5 U.S.C. @ 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

1ST CASE of Level 1 printed in FULL format.

UNITED STATES of America, Plaintiff-Appellee, v. Robert Lewis HEDGES, Defendant-Appellant

No. 89-7705

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

912 F.2d 1397; 1990 U.S. App. LEXIS 16914

September 26, 1990

SUBSEQUENT HISTORY: As Amended.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Middle District of Alabama. No. CR 88-229-N; Dubina, Judge.

DISPOSITION: REVERSED.

COUNSEL: George L. Beck, Jr., Montgomery, Alabama.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, Robert S. Bennett, Saul Pilchen, Mitchell S. Ettinger, Washington, D.C.

James Eldon Wilson, U.S. Attorney, Charles R. Niven, AUSA, Montgomery, Alabama.

Col. Al Rotach, The Pentagon, Washington, D.C.

JUDGES: Kravitch and Cox, Circuit Judges, and Dyer, Senior Circuit Judge.

OPINIONBY: DYER

OPINION: [*1398] DYER, Senior Circuit Judge.

Hedges appeals his conviction of taking government action while having a conflicting financial interest in violation of Title 18, United States Code, Section 208(a). We agree with the district court that the statute is properly construed as a strict liability offense and is not unconstitutionally vague as applied to Hedges. We reverse, however, because it was error to refuse to instruct the jury on Hedges' entrapment by estoppel defense.

Statement of the Case

Hedges served in the United States Air Force for over 23 years and attained the rank of Colonel. He was a regulated federal employee under Section 208. He assumed command of the Automated System Project Office (ASPO) in July 1981. In late 1983, he decided to retire from Government service and to seek civilian employment. In January 1984, he notified his superior officer of this decision and sought permission to work in the private sector during his 60-day terminal leave period. His request was granted. His terminal leave was to commence on June 2, 1984, and his full [**2] retirement was to be effective on August 1, 1984.

In Hedges' position as Commander and Program Manager of ASPO, he was responsible for the conduct and implementation of two programs, i.e., Phase IV and the Inter-Service/Agency Automated Message Processing Exchange (I-S/AAMPE). Phase IV was a large contract which was to take the existing computer systems used by all Air Force bases world-wide, analyze them and develop new systems which would operate new hardware and software with enhanced expansion and workload capabilities. The estimated life-cycle cost was $ 1 billion. I-S/AAMPE, another large contract, which had yet to be released for bids, was designed to provide a computerized data and communications network between all Services. The estimated life-cycle cost was between $ 4 and $ 5 billion.

Sperry Corporation was one of many potential bidders for the award of the I-S/AAMPE contract and was the prime contractor for Phase IV.

Hedges was also the chairman of the Source Selection Evaluation Board for the I-S/AAMPE Program. The Board was responsible for preparing the formal contracting Requests For Proposals (RFP) released to industry and evaluating proposals submitted by contractors. [**3]

Captain Lehman was Staff Judge Advocate for the ASPO and was responsible for program and contract matters. He was also Standards of Conduct Counselor charged with advising personnel about conflict of interest matters and issues involving violations of regulations. Lehman worked closely with Hedges on Phase IV [*1399] and I-S/AAMPE and was fully familiar with Hedges' efforts and responsibilities.

Hedges took several actions in late May and on June 1, 1984 (prior to his terminal leave which began on June 2, 1984) concerning Phase IV and I-S/AAMPE. On May 17, 21, 23, 25, 31 and June 1, 1984 he signed several contract change proposals for Phase IV. On May 14 and 25, 1984, he approved an I-S/AAMPE Report and Decision Memorandum, and on May 24, 1984, he attended a briefing related to the I-S/AAMPE RFP. These actions did not result in the payment of any money to Sperry or pertain to the award of any contract and were in the best interests of the Air Force since they resulted in substantial savings to the Air Force.

Hedges' corporate counterpart at Sperry on the Phase IV program was Traylor, Vice President of Sperry's Federal Projects Operations, located in McLean, Virginia. They spoke with each [**4] other regularly on the telephone and at meetings. Hedges first raised the subject of his impending retirement in April 1984 in a telephone conversation with Traylor during which Hedges asked for general advice about entering private industry. Traylor understood that Hedges was considering either teaching or seeking private employment in the aerospace industry. In addition to giving Hedges general advice, Traylor also told him that if Hedges wanted to go into the data processing industry, he would appreciate it if he would tell Traylor about it and give the Sperry Corporation an opportunity to hire him. Hedges indicated that he had no interest in working for Sperry.

Despite Hedges' disinterest in working for Sperry, Traylor had his personnel manager prepare a draft consulting agreement so that he would be ready if, later on, Hedges changed his mind and decided to go into data processing or communications with a private corporation. Hedges did not know about this.

In mid-May 1984, Hedges decided to consider defense consulting work, in addition to teaching. About this time, Hedges had another telephone

conversation with Traylor and told him that he had opened his options to include consulting [**5] and that he might discuss the possibility of employment with Teledyne or Compusec. Traylor indicated that he would be interested in Hedges consulting for Sperry, but Hedges did not respond to this suggestion.

On May 29, 1984, Traylor spoke again with Hedges and raised the possibility of Hedges' employment with Sperry. He told Hedges that he was preparing to send a boiler-plate consulting agreement to him. In terms of salary, Traylor said he was looking at a range of about $ 65,000. Hedges responded that he expected $ 75,000. Traylor told Hedges that he had no authority to offer Hedges a job, a salary, or consulting agreement, but that he thought he could get the salary requirement from his superiors at Sperry. During this conversation, Traylor and Hedges also discussed the fact that Hedges would be working for the Sperry I-S/AAMPE Program Manager.

Hedges told Traylor that he had been receiving guidance from his Standards of Conduct Counselor, Lehman, and that he could not and would not consider accepting employment with Sperry until Lehman reviewed the draft for compliance with all conflict of interest laws and regulations and gave him the green light to proceed. Traylor told Hedges [**6] that any future offer of employment would also have to be cleared for potential conflicts by Sperry's legal department. Traylor subsequently spoke with his corporate superiors and they approved a salary of $ 75,000.

Hedges received the letter consulting agreement draft at his home on May 31, 1984. It contained no salary or terms of employment. On June 1, 1984, Hedges' last day prior to terminal leave, he asked Lehman to review the draft. Lehman raised several substantive objections and either edited or redrafted portions of the draft in order to satisfy the conflict of interest concerns. Lehman did not tell Hedges that the consulting agre

Whoever, [being covered by this section] participates personally and substantially . . . in . . . [a] particular matter in which, to his knowledge . . . any . . . organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest . . . [shall be guilty of a felony].

On the eve of trial, the government filed a Motion In Limine which sought to exclude any evidence that Hedges received and relied upon legal advice from Lehman. The government argued, and the district court ruled, that Section 208(a) is a strict liability offense that does not include an element of [**8] scienter. Under this construction, Hedges' awareness was not in issue, and any guidance that Hedges received from his Standards of Conduct Counselor was held irrelevant. This also precluded consideration of Hedges' claim that he fully complied with Air Force Regulations, that he followed the advice of Lehman, and generally exercised extreme care to avoid breaking the law.

Prior to trial, the court modified its order to permit limited testimony concerning conversations that Hedges had with Lehman, but only insofar as those conversations bore on a jury question of whether in fact Hedges' conversations with Traylor amounted to negotiations.

The first issue that we are called upon to determine is whether Section 208(a) is a strict liability offense or whether general intent or scienter is necessary to be shown before there can be a violation of the statute. The indictment did not allege, nor did the government prove, Hedges' intent to violate Section 208(a).

A fair reading of the record shows that with respect to the government's case, Hedges was an officer of the executive branch of the United States Government; that he participated personally and substantially as a government [**9] officer in a particular matter in which, to his knowledge, Sperry had a financial interest.

This left an issue only as to whether Hedges, while still on active duty, was negotiating for prospective employment. Under the strict liability offense construction of the statute, the government adduced sufficient evidence without proof of scienter to withstand Hedges' motion for a directed verdict at the close of the government's case. For the reasons which follow, we hold that Section 208(a) is a strict liability offense statute.

Analysis

Hedges argues that by its terms Section 208(a) is a general intent statute. He suggests that this statute is not easy to parse, but that we should find scienter applicable to each statutory element. He reasons that although the statute's "knowledge" clause is segregated from the remaining elements of the offense by commas, this setoff of the knowledge clause does not limit its reach, as the district court held, so as to apply only to the financial interest. On the contrary, he submits that since Section 208(a) contains a scienter clause, it [*1401] indicates that knowledge is an element of the offense.

Hedges relies on Liparota v. United States, [**10] 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985) and United States v. Nofziger, 878 F.2d 442 (D.C.Cir.), cert. denied, U.S. , 110 S.Ct. 564, 107 L.Ed.2d 559 (1989), as being analogous to this case and as requiring proof of knowledge as to each

element of the offense. We do not view these cases as supportive of Hedges' argument. In these cases, the court was called upon to analyze Congressional intent where the mental state requirement was placed before all the elements in question. Here, however, the syntax of Section 208(a) is clear. Moreover, in Liparota, it was necessary for the Supreme Court to construe the intent of Congress as to the mental state required for an offense under one subsection of the Code in light of the more clearly articulated mental state requirement in the immediately succeeding and related subsection of the Code set out in the statute. Section 208(a) has no companion criminal subsection, let alone one that might appear inconsistent. Also, concern was expressed that the lack of mental state at issue would result in "criminalizing a broad range of apparently innocent conduct". 471 U.S. at 426, 105 S.Ct. at 2088. In contrast, Section 208(a) [**11] is "the most crystallized expression of the concept of conflict of interest" . United States v. Irons, 640 F.2d 872, 876 (7th Cir. 1981). It has a narrow application regulating only certain official conduct of federal employees in their official capacity.

In Nofziger, the court pointed to the fact that the lack of the mental state at issue would result in "criminalizing the actions of any former government official who lobbies his agency on a matter in which, unknown to him, the agency has acquired a direct and substantial interest". 878 F.2d at 453. It refused to find that the statute was a public welfare statute because of its potential for chilling speech. These two significant concerns have no parallel application to Section 208(a). Here, however, the statute specifically places the mental state requirement of knowledge in the last element and thus requires that the government official have knowledge of the conflicting financial interest. As to the other elements, the individual should know that: (1) he is an officer and/or employee, (2) he is participating personally and substantially, and (3) he is negotiating or having an arrangement for employment.

Next, Hedges draws [**12] our attention to the waiver provision set forth in Section 208(b) n1 as an indication that Section 208(a) is not a strict liability offense. This section sets up a process whereby an employee of the government can obtain a written opinion which could waive the provisions of Section 208(a) if full disclosure is made. Hedges did not attempt to procure such a statutory waiver. We are unable to follow Hedges' argument that Section 208(b) is helpful to him. On the contrary, it is no more than a safety valve which under the prescribed conditions eliminates criminal conduct that could ensue as a result of the stringent provisions of Section 208(a).

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n1 18 U.S.C. @ 208 (b) provides in pertinent part:

(b) Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the . . . application . . . and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee. . . .

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[**13]

The Legislative History

In the seminal case of the United States v. Mississippi Valley Generating Co., 364 U.S. 520, 548, 81 S.Ct. 294, 308-10, 5 L.Ed.2d 268, 288-89 (1961), in considering Section 208's predecessor statute, 18 U.S.C. @ 434, the Supreme Court reviewed the legislative history of the conflict of interest statute. It observed that "the obvious purpose of the statute is to insure honesty in the Government's business dealings by preventing federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of the public welfare." Although [*1402] the statute, enacted in 1863, has been reenacted several times, "the broad prohibition contained in the original statute has been retained throughout the years."

208's predecessor

Actual corruption or actual loss suffered by the government are not elements of the crime. "This omission indicates that the statute establishes an objective standard of conduct, and that whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, regardless of whether there is positive corruption." Thus the statute establishes "a rigid rule of conduct." 364 U.S. at 549-51, [**14] 81 S.Ct. at 309-10.

Later, Section 208 was enacted to replace @ 434 for the reasons set forth in United States v. Irons, 640 F.2d 872, 878 (7th Cir.1981). There the court said:

Notwithstanding the Supreme Court's expansive reading of Section 434, Congress replaced it with Section 208 in 1962. The intended broad scope of Section 208 is emphasized in passages from both the House and Senate Reports. The House Report explained:

Section 208 supplants 18 U.S.C. @ 434 which disqualifies government officials who are pecuniarily interested in business entities from transacting business with such entity on behalf of the Government. Section 208(a) would prohibit not merely 'transacting business' with a business entity in which the government employee is interested but would bar any significant participation in government action in the consequences of which to his knowledge the employee has a financial interest.

H.R.Rep. No. 748, 87th Cong., 1st Sess. 24 (1961). Similarly, the Senate Report noted:

. . . Subsection (a) improves upon the present law [@ 434] by abandoning the limiting concept of the 'transaction of business.' The disqualification of the subsection embraces any participation [**15] on behalf of the Government in a
matter in which the employee has an outside financial interest, even though his participation does not involve the transaction of business.

S.Rep. No. 2213, 87th Cong., 1st Sess., (1961), reprinted in [1962] U.S.Code Cong. & Ad.News 3852, 3862.

INTENT

The intent element of Section 208 is clearly set forth in United States v. Gorman, 807 F.2d 1299, 1304 (6th Cir. 1986), cert. denied, 484 U.S. 815, 108 S.Ct. 68, 98 L.Ed.2d 32 (1987), where the court held:

Section 208 sets forth an objective standard of conduct which is directed not only at dishonor, but also at conduct which tempts dishonor. United States v. Mississippi Valley Generating Co., 364 U.S. 520, 81 S.Ct. 294, 5 L.Ed.2d 268

(1960). The specific standard applicable in the present case is that the defendant must have known that the person with whom he was negotiating concerning employment had a financial interest in the defendant's official work. See K & R Engineering Co. v. United States, 616 F.2d 469, 472 (Ct.Cl. 1980).

We conclude that Congress has made it clear that Section 208(a) does not require a mental state for the first three elements while placing a mental state requirement [**16] on the last element.

The Principle of Lenity

Hedges argues that if there is ambiguity, the rule of lenity prescribes adoption of the construction most favorable to the accused. We do not disagree with this statement of the rule. We, however, find the rule inapplicable in this case because we see no ambiguity in the statute. United States v. Green, 904 F.2d 654 (11th Cir. 1990). As this court held in United States v. Curry, 902 F.2d 912, 915 (11th Cir. 1990):

The rule of lenity . . . is applicable only where there exists some ambiguity in both the statutory language and legislative history concerning the breadth of activity prohibited by a criminal statute. See United States v. Rodgers, 466 U.S. 475, 104 S.Ct. 1942, 1948, 80 L.Ed.2d 492 (1984) (statute not sufficiently ambiguous to permit rule of lenity to control); Bifulco v. United States, 447 U.S. 381, [*1403] 100 S.Ct. 2247, 2252, 65 L.Ed.2d 205 (1980) ("Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent"). When the statute's provisions clearly delineate the manner in which congressional objectives are to be realized, then the need to interpret a statute in the narrowest [**17] possible manner dissipates. McElroy v. United States, 455 U.S. 642, 102 S.Ct. 1332, 1341, 71 L.Ed.2d 522 (1982) ("although 'criminal statutes are to be construed strictly . . . this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.'") (quoting United States v. Bramblett, 348 U.S. 503, 509-10, 75 S.Ct. 504, 508, 99 L.Ed. 594 (1955) (footnotes omitted)).

Vagueness of the Statute As Applied

Hedges contends that if Section 208 is construed to impose strict liability, then it is unconstitutionally vague as applied to his conduct. He argues that the strict liability offense ruling resulted in an overbroad construction of "negotiations". We reject Hedges' "I didn't know I was negotiating argument". It was made clear that on May 29, 1984, Hedges and Traylor of Sperry were talking about entering into a consulting agreement and that Hedges indicated that he was looking for $ 75,000 a year. That all of the terms of the agreement were not settled at that time, does not foreclose the fact that negotiations for employment were discussed. At the close of the government's case, there was a colloquy [**18] between Hedges' counsel and the court concerning Hedges' motion for judgment of acquittal:

The Court: They were talking about money, as I -- my notes reflect. Wouldn't that be a jury question whether they were negotiating? I mean, here you've got a
man who says first we can't offer you but 65 and he comes back and says well I'm looking in the $ 75,000 range. Doesn't that make that a jury question?

Mr. Bennett: I think it does, your honor. . . .

"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." United States v. National Dairy Products Corp., 372 U.S. 29, 32-33, 83 S.Ct. 594, 598, 9 L.Ed.2d 561, 565 (1963). In United States v. Conlon, 628 F.2d 150, 154 (D.C.Cir. 1980), cert. denied, 454 U.S. 1149, 102 S.Ct. 1015, 71 L.Ed.2d 304 (1982), the court held that ". . . the terms 'negotiating' and 'arrangement' are not exotic or abstruse words requiring detailed etymological study or judicial analysis. They are common words of universal usage. People of ordinary intelligence would have fair notice of the conduct proscribed by the statute". The word "'negotiation' [**19] is to be given its common everyday meaning. . . ." United States v. Gorman, 807 F.2d 1299, 1303 (6th Cir. 1986), cert. denied, 484 U.S. 815, 108 S.Ct. 68, 98 L.Ed.2d 32 (1987). The term is to be broadly construed. United States v. Lund, 853 F.2d 242, 246 (4th Cir. 1988). See also United States v. Petrillo, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877, 1883 (1947); United States v. Irons, 640 F.2d 872, 878-79 (7th Cir. 1981); United States v. Nasser, 476 F.2d 1111, 1115 (7th Cir. 1973).

Finally, we observe that the court gave Hedges' requested instruction on negotiation. n2

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n2 The court instructed:

Negotiation is a communication between two parties with a view to reaching an agreement. Negotiation connotes discussion and active interest on both sides. Preliminary or exploratory talks do not constitute negotiation. Rather, to find a negotiation, you must find that there was a process of submission and consideration of offers.

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We conclude that the statute was not vague as applied to Hedges' conduct. [**20]

Hedges' Defense

Hedges mounted a two-prong defense. First, he denied that his conversations with Traylor of Sperry and his actions preceding his terminal leave were "negotiations" within the meaning of Section 208(a). He insists that they were no more than [*1404] preliminary and exploratory actions. We dispose of that contention by our finding that this was a jury issue.

The second prong to Hedges' defense is his reliance upon the legal advice of a public official charged with interpreting the law, or entrapment by estoppel. Notwithstanding the fact that the court granted the government's Motion In Limine that any guidance that Hedges received from Lehman, his Standards of Conduct Counselor, was not a defense and evidence on that was not relevant, the court without any objection by the government allowed all testimonial evidence on this issue, the only exception being that neither Hedges or Lehman was permitted to give an opinion on the ultimate issue of whether Hedges' conduct was legal.

Lehman was Hedges' Standards of Conduct Counselor assigned as such by General McCarthy, and was charged with the duty and responsibility of precluding any

conflict of interest that might arise.

According [**21] to Hedges, he told Lehman in January or February 1984 that he wanted Lehman to advise him on his actions until the time he retired. He often consulted with Lehman because he was sensitive to the possibility of a conflict of interest in dealing with contractors. He talked with Lehman about his discussions with Traylor in mid-May. He was told there was no problem about his Washington briefing on May 23. When, on May 29, Traylor told him about sending a boiler-plate draft of a consulting agreement, Hedges said he would give it to Lehman for review of any conflict of interest problems. The draft was mailed May 30, and Hedges gave it to Lehman on June 1 for review. Lehman edited it and made changes and was in the room during Hedges' telephone conversation with Reisman, the attorney for Sperry, concerning the changes made to avoid a conflict of interest. At that time, Lehman did not tell Hedges that his actions might amount to a conflict of interest and that he should wait until June 2 when his terminal leave would begin, and then there could not be any problem about a conflict of interest. Hedges maintained that he sought and was given advice from Lehman about both pre- and post-retirement [**22] possible conflicts of interest, and that he relied on Lehman for such advice.

FYI. this is what I did do with Mrs. [illegible]

In rebuttal, Lehman was called by the government. He testified that Hedges consulted him only with reference to what he could or could not do with respect to post-retirement activities -- that pre-retirement activities were not discussed. Lehman denied that Hedges ever had a discussion with him about his exploratory talks with contractors, nor did he seek his advice about the Washington meeting. Lehman said he spent only about five or ten minutes reviewing and editing the Sperry draft agreement on June 1 because he thought it was simply a letter that might be reduced to a contract at some later date. He did not tell Hedges that he should not have anything to do with Sperry until June 2 when he was on terminal leave. He observed that Hedges had a sensitivity to conflict of interest issues, was a man of outstanding character and of the highest personal integrity.

A very substantial portion of the record consists of Hedges' evidence of reliance on Lehman's advice concerning both pre- and post-retirement and the rebuttal evidence contradicting Hedges on various points. Without objection, all of this evidence [**23] was submitted to the jury. Nevertheless, the court declined to grant Hedges' request that the court instruct the jury that reasonable reliance upon the legal advice of a public official charged with interpreting the law is a defense, but instead the court charged the jury that "any advice given by Major Lehman to the defendant on the subject of whether certain activities were permissible on the part of the defendant before he left the Air Force, if you believe such advice was in fact given, is not a defense to the charge in this case."

The government seeks to support the court's ruling and charge by arguing that: (1) Lehman was not a public official; (2) he was a subordinate military officer who worked directly for Hedges who was his rating officer; (3) reliance on counsel is unavailing except in cases involving specific [*1405] intent; and (4) Lehman did not have actual authority to waive the provisions of Section 208(a).

We note at the outset that entrapment by estoppel applies when an official tells a defendant that certain conduct is legal and the defendant believes that official. Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965);

Raley v. Ohio, 360 U.S. 423, [**24] 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959); United States v. Tallmadge, 829 F.2d 767 (9th Cir. 1987); United States v. Clegg, 846 F.2d 1221 (9th Cir. 1988); see also United States v. Hsieh Hui Mei Chen, 754 F.2d 817 (9th Cir.), cert. denied, 471 U.S. 1139, 105 S.Ct. 2684, 86 L.Ed.2d 701 (1985).

We take up the government's contentions seriatim. Its first contention that Lehman's status is not that of a public official is not supportable. In Cox v. Louisiana, supra, Cox was advised by the Chief of Police that a demonstration could be held, though not near the courthouse. It was held at an approved location, and Cox was later convicted of violating a Louisiana statute prohibiting picketing near a courthouse. The Supreme Court reversed, holding that the police chief was a public officer and that such an action "would be to sanction an indefensible sort of entrapment by the State". 379 U.S. at 571, 85 S.Ct. at 484 (citing Raley, supra, 360 U.S. at 426, 79 S.Ct. at 1260).

In United States v. Tallmadge, supra, a federally licensed gun dealer sold a firearm to Tallmadge after advising him that his status under the circumstances then prevailing took him outside the legal [**25] proscription against felons owning firearms. The court reversed his conviction, holding that "the United States Government has made licensed firearms dealers federal agents in connection with the gathering and dispensing of information on the purchase of firearms. Under these circumstances, we believe that a buyer has the right to rely on the representations of a licensed firearms dealer . . .". 829 F.2d at 774. See also United States v. Clegg, supra.

In our view, a Standards of Conduct officer in the Air Force who by regulations and direct orders of his superior is given the charge of advising officer personnel of conflict of interest problems is as much a responsible public officer as a police chief and a licensed firearms dealer.

We need not pause long to consider the argument that since Lehman was a military subordinate of Hedges, he cannot be a public officer on whom Hedges could rely. Injection of rank in the military hierarchy as having something to do with the carrying out of his duties and professional advice as a Standards of Conduct officer is entirely irrelevant. There is also no foundation in this record that any unfavorable inference can be drawn because of military [**26] rank.

The government next submits that Section 208(a) has no requirement of specific intent as a requisite mental state, and accordingly, reliance on advice of counsel is not a defense. This argument misses the point. We have already pointed out that this is not a reliance on advice of counsel case. It is a reliance on a public officer's advice raising an entrapment by estoppel defense. This rests upon principles of fairness rather than the defendant's mental state and thus it may be raised even in strict liability offense cases. United States v. Tallmadge, supra at 773.

Finally, the government, assuming for the sake of argument that Lehman was a public officer, urges us to find that he did not have actual authority to waive or authorize the proscribed activity under Section 208(a). The premise is faulty. There has never been a suggestion that Lehman could waive or authorize a
violation of the statute. On the contrary, the only issue before us, clearly, is whether Hedges acted on advice that he was not violating the statute.

Hedges properly and timely requested the court to instruct the jury on the defense theory. The court refused the request. "A defendant is entitled to have [**27] the court instruct the jury on the theory of the defense, as long as it has some basis in the evidence and has legal support". United States v. Orr, 825 F.2d 1537, 1542 (11th [*1406] Cir. 1987). See also United States v. Terebecki, 692 F.2d 1345, 1351 (11th Cir. 1982). The evidence must be reviewed

in the light most favorable to the defendant in determining whether a basis for the instruction exists. Richardson v. United States, 403 F.2d 574, 575 (D.C.Cir. 1968). "The defendant 'is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility.'" United States v. Lively, 803 F.2d 1124, 1126 (11th Cir. 1986) (quoting United States v. Young, 464 F.2d 160, 164 (5th Cir. 1972)).

The failure to give the requested charge on the theory of the defense, and giving the charge that any advice given by Lehman to Hedges was not a defense to the offense charged was reversible error. No kidding!

The judgment of conviction is REVERSED. n3

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n3 Our disposition of the case makes it unnecessary for us to reach Hedges' assignment of error that the rebuttal argument of the government was prejudicial.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[**28]

State of Nebraska, appellee, v. Dwight E. Reddick, appellant

No. 87-941

Supreme Court of Nebraska

230 Neb. 218; 430 N.W.2d 542; 1988 Neb. LEXIS 386

October 21, 1988, Filed

PRIOR HISTORY: [***1]
Appeal from the District Court for Lancaster County: Robert R. Camp, Judge.

DISPOSITION: Affirmed.

HEADNOTES:
1. Postconviction: Proof. A defendant seeking postconviction relief has the burden of establishing a basis for such relief.

2. Constitutional Law: Postconviction. Postconviction relief is available only when a constitutional right has been infringed or violated.

3. Constitutional Law: Right to Counsel: Effectiveness of Counsel. A criminal defendant has a constitutional right not only to counsel, but to the effective assistance of counsel.

4. Effectiveness of Counsel: Pleas. The voluntariness of a plea entered upon the advice of counsel depends on whether the advice was within the range of competence demanded of attorneys in criminal cases.

5. Effectiveness of Counsel: Proof. To assert a successful claim of ineffective assistance of counsel, a criminal defendant must prove (1) that his or her attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area; (2) that the defendant's interests were not conscientiously protected; and (3) that if the defendant's attorney had been effective, there is a reasonable probability [***2] that the results would have been different; in order to satisfy the third, or prejudice, requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, defendant would not have pled and would have insisted upon going to trial.

6. Effectiveness of Counsel: Conflict of Interest: Words and Phrases. The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another; a conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties.

7. Right to Counsel. The right of an indigent defendant to have counsel does not give such a defendant the right to be represented by counsel of his or her own choosing, and the mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.

8. Postconviction. An evidentiary hearing may properly be denied on a motion for postconviction relief when the records and files in the case affirmatively establish that defendant is entitled to no relief.

9. Postconviction: Appeal and Error. A motion for postconviction relief [***3] may not be used to obtain review of issues which could have been raised on direct appeal.

10. Pleas: Waiver: Indictments and Informations: Effectiveness of Counsel. A voluntary plea of no contest waives every defense to the charge, whether the defense is procedural, statutory, or constitutional, except the defenses that the information is insufficient to charge an offense and that the plea was the result of ineffective assistance of counsel.

11. Judges: Recusal: Appeal and Error. A motion to disqualify a judge on the ground of bias or prejudice is addressed to the judge's sound discretion, and an order overruling such a motion will ordinarily be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.

12. Judges: Recusal: Prosecuting Attorneys. A judge is not disqualified merely because he at some earlier time and in a different case prosecuted the criminal defendant appearing before him.

COUNSEL: Dwight E. Reddick, pro se.

Robert M. Spire, Attorney General, and LeRoy W. Sievers for appellee.

JUDGES: Hastings, C.J., Boslaugh, White, Caporale, Shanahan, Grant, and Fahrnbruch, JJ.

OPINIONBY: CAPORALE

OPINION: [*220] [**544] Defendant, Dwight E. Reddick, appeals the denial of an [***4] evidentiary hearing and dismissal of his motion, made under the provisions of the Postconviction Act, Neb. Rev. Stat. @@ 29-3001 through 29-3004 (Reissue 1985), to vacate or set aside the judgment affirmed in State v. Reddick, 221 Neb. 322, 376 N.W.2d 797 (1985) (Reddick I). He has assigned six errors to the ruling on his postconviction motion, which meld to assert that the postconviction court erred in denying him an evidentiary hearing and dismissing his motion, inasmuch as the records and files establish that the trial court erred (1) in failing to dismiss the public defender and appoint substitute counsel because of the public defender's conflict of interest and failure to zealously pursue Reddick's defense and (2) in failing to find one of the trial judges to have lacked impartiality. Reddick has also filed a motion to expand the record, claiming that a certain statement made by him has been omitted from the trial court bill of [**545] exceptions. We overrule Reddick's motion and affirm the postconviction court's judgment dismissing his motion for postconviction relief.

Reddick, pursuant to his no contest plea, was adjudged guilty of attempted first [***5] degree sexual assault. He was thereafter determined to be a nontreatable mentally disordered sex offender and sentenced to imprisonment. Reddick's direct appeal of his conviction and sentence to this court in Reddick I resulted in the rejection of his claims that the trial court had erred in finding his condition to be nontreatable and in finding constitutional the requirement of Neb. Rev. Stat. @ 29-2914 (Reissue 1985) that nontreatable mentally disordered sex offenders be imprisoned.

We begin by recalling that a defendant seeking postconviction relief has the burden of establishing a basis for such relief, State v. Harton, ante p. 167, 430 N.W.2d 313 (1988), and State v. Painter, 229 Neb. 278, 426 N.W.2d 513 [*221] (1988), which is available only when a constitutional right has been infringed or violated. Kerns v. Grammer, 227 Neb. 165, 416 N.W.2d 253 (1987); @
29-3001.

Reddick's first claimed trial error rests on the fact that he wrote a number of letters to the trial judges, complaining about the representation afforded him by the attorneys assigned to him through the office of the Lancaster [***6] County public defender, and that he questioned the ethics of one of those attorneys. He argues that these complaints, coupled with his unsuccessful effort to have substitute counsel appointed, created a conflict of interest between his appointed attorneys and himself such as to have deprived him of the effective assistance of counsel.

There is no question but that a criminal defendant has a constitutional right not only to counsel, but to the effective assistance of counsel. State v. Scholl, 227 Neb. 572, 419 N.W.2d 137 (1988); State v. Grotzky, 222 Neb. 39, 382 N.W.2d 20 (1986); U.S. Const. amend. VI.

The voluntariness of a plea entered upon the advice of counsel depends on whether the advice was within the range of competence demanded of attorneys in criminal cases. State v. Harton, supra; Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). We have said that to assert a successful claim of ineffective assistance of counsel, a criminal defendant must prove (1) that his or her attorney failed to perform as well as an attorney with ordinary training and [***7] skill in the criminal law in the area; (2) that the defendant's interests were not conscientiously protected; and (3) that if the defendant's attorney had been effective, there is a reasonable probability that the results would have been different. State v. Harton, supra; State v. Painter, supra; State v. Propst, 228 Neb. 722, 424 N.W.2d 136 (1988); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to satisfy the third, or prejudice, requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, defendant would not have pled and would have insisted upon going to trial. State v. Harton, supra; Hill v. Lockhart, supra. A reasonable probability consists of a probability sufficient to undermine confidence in the outcome. [*222] State v. Harton, supra; State v. Broomhall, 227 Neb. 341, 417 N.W.2d 349 (1988).

The phrase "conflict of interest" denotes a situation in which regard for one duty tends [***8] to lead to disregard of another; a conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties. State v. Nance, 227 Neb. 581, 418 N.W.2d 598 (1988). Assuming for purposes of argument, but not concluding, that Reddick's complaints against his attorneys created the awkward situation he claims, there is nothing to indicate that this situation was "inherently conducive to divided loyalties." If anything, the attorneys' best defense against Reddick's allegations would have been made by providing Reddick with the very best defense to the criminal charges facing him that was possible. Thus, Reddick's interests and those of his attorneys were in harmony, not at odds.

[**546] The fact that Reddick may have been uncomfortable with the situation he himself created provides no basis for the appointment of substitute counsel. The right of an indigent defendant to have counsel does not give such a defendant the right to be represented by counsel of his or her own choosing, and the mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. State v. McCoy, 228 Neb. 178, 421 N.W.2d 780 (1988); [***9] State v. Jones, 213 Neb. 1, 328 N.W.2d 166 (1982).

The record not only fails to demonstrate the conflict of interest claimed by Reddick, but demonstrates that the attorneys assigned to represent him competently protected his interests. Indeed, in entering his plea Reddick himself told the trial judge then presiding that the attorney representing and appearing with him was competent and had performed satisfactorily. It is noteworthy that Reddick had originally been charged with a second offense, that of using a firearm in the commission of a felony, which was dismissed as part of his negotiated plea.

An evidentiary hearing may properly be denied on a motion for postconviction relief when the records and files in the case affirmatively establish that defendant is entitled to no relief. State v. Propst, supra; State v. Galvan, 222 Neb. 104, 382 N.W.2d 337 (1986). The records and files affirmatively show [*223] Reddick was not deprived of the effective assistance of counsel; he therefore is not entitled to relief on the claimed ground. Thus, the first assignment of error is without merit. [***10]

Reddick next argues that one of the trial judges should have disqualified himself as Reddick requested because the questioned judge, while serving as a deputy county attorney, had prosecuted Reddick in a different case several years earlier. The gravamen of Reddick's contention appears to be that the failure of said judge to disqualify himself offended Reddick's constitutional right to due process of law by depriving him of an impartial judge.

The first difficulty Reddick encounters is that this is an issue which could have been raised in his direct appeal. It is the well-settled rule in this state that a motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal. State v. Painter, 229 Neb. 278, 426 N.W.2d 513 (1988). Moreover, a voluntary plea of no contest waives every defense to the charge, whether the defense is procedural, statutory, or constitutional, except the defenses that the information is insufficient to charge an offense and that the plea was the result of ineffective assistance of counsel. State v. Maeder, 229 Neb. 568, 428 N.W.2d 180 (1988); [***11] State v. Falcone, 212 Neb. 720, 325 N.W.2d 160 (1982). Additionally, the record shows that while the trial judge in question overruled Reddick's motion to discharge the lawyers assigned to him and appoint substitute counsel, and refused to release Reddick on his own recognizance, that judge had nothing to do with accepting Reddick's plea or determining his status or sentence. Moreover, a motion to disqualify a judge on the ground of bias or prejudice is addressed to the judge's sound discretion, and an order overruling such a motion will ordinarily be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. State v. Bird Head, 225 Neb. 822, 408 N.W.2d 309 (1987). A judge is not disqualified merely because he at some earlier time prosecuted the criminal defendant appearing before him. See, State v. Bird Head, supra; State v. Burnside, 185 Neb. 234, 175 N.W.2d 1 (1970). Thus, even if the issue could

be raised at this time, the trial record would fail to establish error in the failure of the questioned judge to disqualify himself [***12] and, [*224] consequently, would present no basis for granting postconviction relief. Accordingly, the second assignment of error is also without merit.

This brings us to Reddick's motion that the record be expanded. In essence, he claims that the trial bill of exceptions, as considered by the postconviction court, is deficient in that it does not contain a statement he made under oath. Specifically, he claims to have testified that he had heard from one of his attorneys that the prosecuting [**547] attorney expressed the belief that Reddick's victim lied when she said she had not engaged in prostitution. Assuming for the purposes of argument, but not finding, that Reddick so testified and that for some reason the testimony was omitted from the trial bill of exceptions, such occurrences would not change the outcome of this proceeding. The prosecutor's hearsay belief as to the victim's truthfulness, whatever it may have been, is not shown by the record and could have nothing to do with Reddick's decision to plead no contest to the attempted sexual assault, for the prosecutor's belief would not have been admissible in a trial should Reddick have chosen to forgo the benefit of the plea [***13] bargain. This resolution must not be read, however, as indicative of any dilution of this court's absolute intolerance of any editing of the record by anyone.

Accordingly, Reddick's motion to expand the record is overruled, and the judgment of the postconviction court denying Reddick's motion for postconviction relief is affirmed.

Affirmed.

Case not applicable

11 M.S.P.R. 370 printed in FULL format.

JERRY DEAL v. DEPARTMENT OF JUSTICE

Docket Number SL07528010006

See last page

MERIT SYSTEMS PROTECTION BOARD

11 M.S.P.R. 370; 1982 MSPB LEXIS 1118

May 10, 1982

OPINION:
[*1]

OPINION AND ORDER

Appellant was removed from his position as Supply Technician with the Bureau of Prisons' U.S. Penitentiary in Leavenworth, Kansas, based on two charges of violating agency regulations concerning the outside employment of agency employees. n1 On appeal to the Board's St. Louis Regional Office, the presiding official sustained the first charge which dealt with appellant's failure to obtain prior approval for outside employment. He concluded that appellant did not prove his affirmative defense of disparate treatment to this charge. As to the second charge, the presiding official concluded that appellant's business dealings with his employer did constitute a prohibited conflict of interest, n2 but that appellant proved he was treated in a disparate fashion from other employees who were involved in business dealings with the penitentiary. Finding such disparate treatment to be a prohibited personnel practice under 5 U.S.C. @ 2302(b)(6), he reversed the second charge and, based on the sustained charge, mitigated the removal to a 30-day suspension.

n1 Appellant was charged with violating Paragraphs 9. a.5 and 9. a.2 of the agency's Standards of Employee Conduct and Responsibility which state in pertinent part as follows:

Prior approval for engaging in outside employment is mandatory. The employee must file a written request to the head of the institution, or Personnel Officer in the Central Office, no later than five (5) days before commencing the outside employment....

Outside Employment (including self-employment) must not constitute or give the appearance of a conflict of interest with official duties; nor must the identification of an employee with such employment be likely to bring disrepute upon the Prison Service or the Federal Government.

n2 The presiding official did not, however, sustain that portion of the specification supporting the second charge which reads as follows:

(1) Your identification with such employment has brought disrepute on the Prison Service.

(2) Your actions in this matter have destroyed your credibility as a correctional worker and have demonstrated that you are not one to whom the care, custody and correction of Federal criminal offenders may be entrusted. [*2]

The agency filed a timely petition for review asserting that appellant was not treated disparately, n3 and that the presiding official's finding that the agency had engaged in a prohibited personnel practice as to the second charge was an erroneous interpretation of statute. We hereby GRANT the agency's petition under 5 U.S.C. @ 7701(e)(1). n4

n3 The agency also offered "new and material evidence" to prove that appellant had not been treated in a disparate fashion. We need not consider this evidence in light of the Board's findings infra.

n4 The Office of Personnel Management intervened in this case to contest the Board's authority to mitigate penalties. Since that issue has been fully addressed in Douglas v. Veterans Administration, MSPB Docket No. AT075299006 (April 10, 1981), however, we decline to consider it further here.

Appellant, a receiving clerk at the prison commissary warehouse, formed a partnership with the commissary supervisor to establish Leavenworth Wholesale Outlet, a catalogue business which sold gift items to inmates, and Midwest Wholesale Company, through which the commissary supervisor purchased goods to be sold in the commissary. The [*3] specification in support of the second charge stated that appellant's business relationship constituted a conflict of interest in that the partnership was directly involved in selling goods to appellant's employer and further that the purchaser was his business partner. Appellant did not dispute the charge but alleged that other agency employees were also engaged in business dealings with the penitentiary and were not disciplined.

The record reflects that other employees sold goods to inmates. However, they did not benefit from their government jobs in so doing. n5 On the other hand, as receiving clerk at the commissary warehouse, appellant's duties included invoicing items delivered by shippers and checking them against purchase orders. As commissary supervisor, his business partner was the sole approving authority for buying merchandise. He determined the needs of the commissary, as well as the companies from which to purchase goods, and was responsible for the commissary trust fund. The effect of the business arrangement in Midwest was that appellant's business partner purchased goods for the commissary from his own partnership. Appellant's partnership in Midwest had, [*4] as its central purpose, a function so closely related to the duties imposed by his Federal employment that on its face it gave rise to a prohibited conflict of interest. Upon review, the Board finds that the agency established that other employees who were not disciplined were not similarly situated. See Woody v. General Services Administration, MSPB Order No. SF0752811088 (June 2, 1981). We conclude that appellant's claim of disparate treatment is lacking in merit, and that the applicability of 5 U.S.C. @ 2302(b)(6) is thus rendered moot.

n5 Mr. Leslie Hunnell, counselor at the penitentiary, owned Leavenworth Rock Pile which sold lapidary items to the inmates. Tr. 70, 132. Mr. Robert Lang, relief clerk, performed outside janitorial work. Tr. 152. Although Appellant testified that several other individuals had outside employment, he was unable to give any dates nor did he specify which jobs the individuals held at the prison. Tr. 180-190, 193. Appellant's testimony consists of general unsupported allegations to which we give little weight.

The remaining issue for consideration is the propriety of the penalty based on the two sustained charges. The Board [*5] decided in Douglas v. Veterans Administration, MSPB Order No. AT075299006 at 1 (April 10, 1981), that "the Board does have authority to mitigate penalties when the Board determines that the agency penalty is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable. However, the Board is not free simply to substitute its judgment for that of management, which has the primary responsibility for maintenance of the productivity and discipline of the Federal work force.

In this case, appellant's wrongdoing was a serious breach of trust. The Government clearly has an interest in prohibiting such conduct, and in ensuring that its agents and employees are not compromised in the performance of their duties as a result of any outside influences. See Lavelle v. Department of the Air Force, MSPB Order No. DA075209157 (December 10, 1981); Smith v. Department of the Interior, MSPB Order No. DA07520913 (May 6, 1981). We note that appellant had worked for the penitentiary almost 17 years with no prior disciplinary record. n6 However, in light of the Government's compelling interest in avoiding conflicts of interest [*6] on the part of its employees, and in upholding the integrity of the Federal service, the Board cannot find that the agency's punishment of removal is too harsh.

n6 Since the agency has presented no evidence indicating that appellant's performance on the job was deficient, appellant is entitled to the presumption that his performance has been satisfactory.

Accordingly, the initial decision dated August 11, 1980, is REVERSED and the removal action is SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. @ 1201.113(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. @ 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

LEVEL 1 - 1 OF 3 CASES

RICHARD A. FONTES, Appellant, v. DEPARTMENT OF TRANSPORTATION, Agency.

DOCKET NUMBER BN07529010085

MERIT SYSTEMS PROTECTION BOARD

51 M.S.P.R. 655; 1991 MSPB LEXIS 2136

December 23, 1991

[*1]

William J. Lafferty, Esquire, Boston, Massachusetts, for the appellant.

Paul D. Snyder, Esquire, Burlington, Massachusetts, for the agency.

OPINIONBY: TAYLOR

OPINION:
BEFORE

Case is re: receipt of a Gratuity -

Daniel R. Levinson, Chairman

Antonio C. Amador, Vice Chairman

Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision, issued May 16, 1990, that sustained the agency's action removing him from the position of Manager, Civil Aviation Security Field Office, effective January 10, 1990. For the reasons discussed below, we GRANT the appellant's petition, AFFIRM the initial decision as modified by this Opinion and Order, and MITIGATE the removal action to a demotion.

BACKGROUND

The agency based its removal action on three charges of misconduct: Engaging in conduct resulting in a conflict of interest; accepting gratuities; and falsifying time and attendance records. Agency File, (A.F.), Tab 6. With the exception of one of the five specifications of falsification, all of the allegations of misconduct stemmed from the appellant's actions as the Team Leader of an inspection, conducted in August 1988 under the agency's Civil Aviation Security National Airport Inspection [*2] Program (CASNAIP), at the Luis Munoz Marin Airport, San Juan, Puerto Rico.

In its conflict of interest charge, the agency alleged that the appellant directed that the team's lodging arrangements in San Juan be made at a Travelodge hotel controlled by a personal friend of his, Mr. Tony Santana, who also controlled Airport Aviation Services (AAS), the firm responsible for security at the airport being inspected. The administrative judge found that the reservations were made, at the appellant's direction, by Victor Leon, an AAS corporate officer and a friend of the appellant, even though the Lead Agent at

go to page 4

the agency's San Juan office had recommended other lodging arrangements. The administrative judge further found that the appellant's actions constituted a conflict of interest, or at least the appearance of a conflict of interest.

In so finding, she acknowledged that AAS could not be fined directly by FAA for security deficiencies disclosed during the CASNAIP inspection, but stated that it would obviously be beneficial to AAS to pass inspection since its employer, the air carrier, could be fined for any AAS violation. The administrative judge also rejected the appellant's argument [*3] that this charge could not be sustained because the agency had not submitted any evidence of its standards of conduct. She found that such evidence was not required because the agency had not cited the standards of conduct in its notice of proposed removal or decision letter, and because the standards of conduct were public information contained in the Code of Federal Regulations.

The charge of accepting gratuities included two specifications. The agency first alleged that the appellant accepted a wrist watch from the Travelodge management without paying for it. The appellant testified that a dress watch, worth $280, was taken from his hotel room at the Travelodge while he was preparing for the CASNAIP inspection, and that he reported the incident to the hotel management. It was undisputed that the hotel manager, at Tony Santana's direction, replaced the watch with a new one costing $275. Crediting testimony indicating that the appellant either knew or should have known that the hotel would not be reimbursed by its insurance carrier for the cost of the replacement watch, the administrative judge found that the appellant had improperly accepted a gratuity from Santana.

The second [*4] specification of accepting gratuities concerned the appellant's five-day stay at the Travelodge, on personal time, after completion of the CASNAIP inspection. Although the appellant was charged $55 per night for lodging while on official government business, he was charged only $27.50 per night during his personal stay, pursuant to a personal notation on his bill by Tony Santana. The normal room rate was $73.00 per night.

The appellant stated that he recalled thinking that he had gotten a "good deal," but that he did not notice the notation on the bill by Mr. Santana. A.F., Tab 7B. The administrative judge found, however, that the appellant must have been aware that he was receiving a substantial reduction from the government rate, which is in turn generally lower than the commercial rate. She therefore found that the appellant had received a gratuity as charged.

The charge of falsifying time and attendance records included five specifications: That the appellant reported eight hours of overtime for August 28, 1988, and three hours of overtime for August 29, 1988, when he did not in fact work the hours claimed; that he submitted time and attendance reports showing himself in [*5] a duty status on September 1 and 2, 1988, and received compensation therefor, when he was in fact on vacation; and that he falsely showed himself in a duty status for three hours on January 10, 1989, during which time he was attending a funeral.

The appellant admitted that he did not work any overtime on August 28. He claimed, however, that he worked eight hours of overtime on Sunday, August 21, and listed the time on a subsequent time report so that he would not have to amend his earlier time report. A.F., Tab 7B. n1 The administrative judge found this explanation implausible, since the weekend of August 20-21 fell in the middle of a pay period, and there was thus no reason for the appellant not to

have simply reported overtime worked on August 21 on the correct time and attendance report. n2

n1 He said he also worked overtime on Saturday, August 20, for which he never claimed compensation. See id.

n2 The matter of the three hours of overtime claimed for August 29, 1988, is discussed below.

The appellant acknowledged that his time and attendance report, which showed him in a duty status on September 1 and 2, 1988, was inconsistent with his travel voucher, submitted [*6] September 12, which showed him on annual leave on both days. Although the formal CASNAIP inspection ended on August 31, the appellant claimed that he returned to the airport on September 1 to return his rental car and to conduct a final "look around inspection" at the terminal area, and that he then returned to the hotel and started working on his inspection report. A.F., Tab 7B. He admitted that he did not work on September 2, and said that the contrary entry on his timesheet was an innocent oversight.

The administrative judge noted that the appellant's conflicting entries for September 1 constituted the third instance of inaccurate time reporting within the space of five days. She found his explanation to be implausible, given his experience with time and attendance procedures as a supervisor and as a time and attendance clerk for his office, and concluded that the appellant submitted a false report with the intent to defraud the government. The administrative judge similarly found the admittedly incorrect entry for September 2 to be a deliberate falsification, finding it inherently improbable that an individual with several years experience as a supervisor and investigator, [*7] plus experience as a police officer, could forget so much factual information within the space of two weeks.

The appellant admitted that he should have taken three hours of annual leave on January 10, 1989, in order to attend a funeral, and said his failure to do so was an oversight on his part. The administrative judge found this explanation implausible in light of the undisputed testimony of the time and attendance clerk
hat she gave the appellant a written reminder about taking leave for that date.

After finding that the agency had sustained its charges of misconduct, the administrative judge considered the appellant's allegation of race discrimination based on disparate treatment, which she found to be unsupported because the white employees cited were not shown to have been charged with similar offenses. The administrative judge then considered and rejected several additional affirmative defenses raised by the appellant: (1) That the agency had delayed unduly in proposing the adverse action; (2) that the agency failed to afford him a fair opportunity to defend himself at the oral reply; (3) that the agency failed to respond fully and in a timely fashion to his discovery [*8] requests; (4) that agency officials engaged in prohibited ex parte communications with the deciding official; and (5) that the agency submitted inflammatory material in its response to the Board's Acknowledgment Order, which portrayed the appellant in a bad light. Finally, the administrative judge found that the removal penalty was within the bounds of reasonableness.

In his petition for review, the appellant questions the sufficiency of the evidence with respect to each of the charges and specifications sustained

against him, and asks for reversal or mitigation of the removal penalty on the following additional grounds: (1) That the agency could not sustain its charges of a conflict of interest and acceptance of gratuities without introducing into evidence its written standards of conflict, and proving that his conduct violated those standards; (2) that the agency's failure to comply fully with his discovery requests denied him evidence to support his allegation of disparate treatment; (3) that the administrative judge erred in finding no evidence of discrimination; and (4) that the deciding official's decision to remove him was the product of another official's improper influence [*9] rather than of the deciding official's own independent judgment. n3 In addition, the appellant has submitted what he characterizes as new and material evidence -- a state agency decision granting him unemployment benefits. n4

n3 The Board will not undertake a full review of the record to consider a party's mere disagreement with the administrative judge's factual findings and credibility determinations, where the administrative judge properly evaluated the evidence in accordance with the standards set forth in Hillen v. Department of the Army, 35 M.S.P.R. 453, 458 (1987). See Jeffers v. Veterans Administration, 40 M.S.P.R. 567, 570-71, aff'd, 892 F.2d 1050 (Fed. Cir. 1989) (Table), cert. denied, 110 S. Ct. 1815 (1990); Weaver v. Department of the Navy, 2 M.S.P.R. 129, 133-34 (1980), review denied, 669 F.2d 613 (9th Cir. 1982) (per curiam). Our review of the initial decision, in light of the objections raised by the appellant in his petition for review, persuades us of the propriety of the administrative judge's factual findings, and the legal conclusions she drew therefrom, in sustaining the specifications of falsifying time and attendance records, with the exception of the three hours of overtime on August 29, 1988 (discussed subsequently in this opinion and order). We similarly find that the administrative judge properly found that the appellant failed to establish his affirmative defenses that he was discriminated against because of race or that he was prejudiced by the agency's delay in bringing an adverse action.

n4 The Board has held that decisions by state unemployment tribunals constitute evidence worthy of consideration, but that such decisions are not binding on the Board. Herring v. U.S. Postal Service, 40 M.S.P.R. 342, 346 (1989). The state agency decision here has little probative value because the statutory standard applied by the state agency -- whether the employee was discharged for deliberate misconduct in willful disregard of the employer's interest -- is very different from the statutory standard applicable to the Board's decision -- whether the removal action was for such cause as would promote the efficiency of the service. In addition, the state decision contains very little factual or legal analysis. We therefore find that it does not warrant a different outcome than the one reached by the administrative judge. [*10]

ANALYSIS

The agency was not required to introduce into evidence its ethical standards of conduct.

The appellant contends that the charges of conflict of interest and acceptance of a gratuity should not have been sustained because the agency failed to introduce into evidence the specific standards of conduct which he supposedly violated. As the administrative judge pointed out, however, the agency did not charge the appellant with violating its standards of conduct; it charged him with specific behavior that it characterized as constituting a conflict of interest and the acceptance of a gratuity. See A.F., Tab 6.

Contrary to the appellant's unsupported assertion, there is no requirement that an employee must violate a specific written policy before he can be disciplined under chapter 75. The sole criterion under chapter 75 is that the adverse action be "for such cause as will promote the efficiency of the service." See 5 U.S.C. @ 7513(a); Goode v. Defense Logistics Agency, 31 M.S.P.R. 446, 449 (1986) (the efficiency of the service is the ultimate criterion for determining both whether any disciplinary action is warranted and whether a particular penalty may [*11] be sustained). n5

n5 Even if proof of the agency's standards of conduct had been required, the administrative judge could properly have taken official notice of them because they are published in the Code of Federal Regulations. See 5 C.F.R. @ 1201.64; Gilliam v. Department of Commerce, 6 M.S.P.R. 57, 59 (1981) (since agency circular was not published in the Code of Federal Regulations, its issuance or revocation was a matter for evidentiary proof). As we discuss below, the appellant's acceptance of a reduced room rate from Mr. Santana violated applicable regulations and satisfied the efficiency of the service criterion. The agency failed to establish a conflict of interest by a preponderance of the evidence.

The appellant contends that there was nothing inherently improper in arranging for lodging for himself and the members of his inspection team at Mr. Santana's hotel, noting that the agency did not claim that the accommodations at the Travelodge were unsuitable. He also points out that Flor Ramos, the head of the agency's local security office, has also been friendly with Mr. Santana's general manager, and has also reserved rooms at Mr. Santana's Travelodge [*12] for agency employees. In sustaining the charge, the administrative judge stressed Mr. Ramos's testimony that he has never directed the agency's lodging needs to Mr. Santana's Travelodge when the airport security operations of Mr. Santana's other company were being inspected.

To prove the existence of a conflict of interest, an agency must establish that its employee was acting in two separate capacities, at least one of which involved his official duties, and that the nature of his interests or duties in one capacity had a " direct and predictable effect" on his interests or duties in his other capacity. See Lane v. Department of the Army, 19 M.S.P.R. 161, 162 (1984); Deal v. Department of Justice, 11 M.S.P.R. 370, 372 (1982) (employee's private business was so closely related to the duties imposed by his Federal employment as to give rise to a prohibited conflict of interest) ; State v. Reddick, 230 Neb. 218, 430 N.W.2d 542, 545 (1988) (a conflict of interest denotes a situation that is "inherently conducive to divided loyalties"). To prove the existence of an appearance of a conflict of interest, an agency must show that the individual's interests or duties in one [*13] capacity would "reasonably create an appearance" of having an effect on his interests or duties in the other capacity. See Lane, 19 M.S.P.R. at 162-63.

case is attached

case attached

appearance

In sustaining the agency's charge of a conflict of interest in this case, the administrative judge found that "the appellant's conduct did create a conflict of interest or at least an appearance of a conflict of interest. " Initial Decision at 6. Proof of an appearance of a conflict of interest is insufficient where the agency, as here, charges an employee with an actual conflict of interest. Id. at 162. The agency's charge can therefore be sustained only if it proved the existence of an actual conflict of interest.

As a government employee in need of lodging for himself and his team members while performing duties away from his usual post of duty, the appellant's interest was in procuring suitable accommodations at a reasonable cost and at a convenient location. As Team Leader of the CASNAIP inspection, the appellant's duty was to conduct a rigorous and impartial inspection of operations at the San Juan airport, including the security system operated by AAS. We fail to see how arranging for and being a guest at Mr. Santana's [*14] hotel, at the customary room rate and level of accommodations for government lodging, would have a " direct and predictable effect" on the ability of the appellant, or his team members, to conduct a rigorous and impartial inspection of the operations of Mr. Santana's security firm.

If there was an actual conflict of interest in this case, it lay in the conflict inherent in conducting a regulatory inspection of a friend's business operations. The agency did not charge the appellant with a conflict of interest for failing to recuse himself from participating in the CASNAIP inspection, however, or with conducting that inspection in a biased manner. Since the Board is required to review the employing agency's action solely on the grounds invoked by the agency, Gottlieb v. Veterans Administration, 39 M.S.P.R. 606, 609 (1989), we cannot sustain a charge of a conflict of interest.

The agency proved that the appellant received an improper gift or gratuity by accepting a reduced room rate.

The Office of Personnel Management (OPM) has mandated that Federal executive agencies issue regulations governing their employees' ethical obligations regarding conflicts of interest and standards [*15] of conduct. 5 C.F.R. Part 735. Part 735 prescribes the minimum standards that such regulations must meet, including the following standards regarding the acceptance of gifts and gratuities:

Except as provided in paragraphs (b) and (f) of this section, n6 an employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with his agency;

(2) Conducts operations or activities that are regulated by his agency; or

(3) Has interests that may be substantially affected by the performance or nonperformance of his official duty.

5 C.F.R. @ 735.202(a). The Department of Transportation's regulation concerning gifts and gratuities is virtually identical to section 735.202(a), except that it also proscribes the acceptance of food or lodging from the listed persons. 49 C.F.R. @ 99.735-9.

n6 None of the exceptions of subsections (b) and (f) are applicable to the facts of this case.

It was undisputed that Mr. Santana controlled the company responsible for security at the Luis Munoz Marin Airport, [*16] that the appellant was the leader of the FAA inspection team checking the adequacy of security at that airport, and that, at Mr. Santana's direction, the appellant was charged only half the government rate for his five-day personal stay at Mr. Santana's hotel

following the completion of the CASNAIP inspection. The appellant argues that it was not improper to accept a gratuity from Mr. Santana because only the air carrier was directly regulated by and subject to fines imposed by the agency. We concur with the administrative judge that Mr. Santana had an obvious interest in having his security company pass muster in the FAA inspection, because the disclosure of deficiencies could jeopardize the firm's contract with the air carrier. Under these circumstances, we conclude that Mr. Santana was a person who "conducts operations or activities that are regulated by the agency," and that he "ha[d] interests which may be substantially affected by the performance or nonperformance of [the appellant's] official duty." The appellant's acceptance of a reduced room rate at Mr. Santana's hotel therefore violated 5 C.F.R. @ 735.202(a) and 49 C.F.R. @ 99.735-9. n7

we could argue this ?

n7 We further find that, even in the absence of these regulations, there was an adequate nexus between the charged conduct and the efficiency of the service to warrant disciplinary action. An adverse action promotes the efficiency of the service when the grounds for the action relate to either an employee's ability to accomplish his duties satisfactorily or to some other legitimate government interest. Hatfield v. Department of the Interior, 28 M.S.P.R. 673, 675 (1985). Accepting a gratuity from someone whose business operations are subject to inspection by the agency could undermine the agency's interest in assuring that its employees refrain from actions that might result in or create the appearance of losing complete independence and impartiality in its inspection activities. See Krbec v. Department of Transportation, 21 M.S.P.R. 239, 242-44 (1984) (the acceptance of food, travel, and lodging from a receipient of agency grants, by an employee with responsibility for monitoring agency grants, reflected negatively on the agency and undermined agency confidence in the employee's integrity), aff'd, 770 F.2d 180 (Fed. Cir. 1985) (Table). [*17]

on the gratuity

The agency failed to prove that the wrist watch accepted by the appellant constituted an improper gift or gratuity.

The evidence cited by the administrative judge shows that the hotel was not legally obligated to replace the appellant's watch, and that the appellant had no sound basis for his stated belief that the loss was covered by the hotel's insurance. See Initial Decision at 7-10. It was undisputed, however, that a watch was missing from the appellant's hotel room, and that the hotel replaced it with a watch of approximately equal value.

Since the loss and replacement of the watch resulted in no net gain to the appellant, we conclude that the replacement watch would constitute an improper gift or gratuity only if the hotel would not have replaced the watch but for the appellant's position with the FAA. The evidence on this point was inconclusive. The appellant testified that Gil Diaz, the resident manager of the hotel, told him that Mr. Santana was very upset because the watch had been taken from an FAA employee. Initial Decision at 8-9. Mr. Diaz said in his statement that it is hotel policy to replace missing and stolen items in order to keep a good customer. [*18] A.F., Tab 7C. Although he was unaware of any other similar incidents during his employment with the hotel, Mr. Diaz said that he would take the same course of action in the future if he thought a theft claim was true. Id. Fernando Jaubert, the general manager, said in his statement that he approved the replacement of the watch because he knew the appellant and did not question his integrity. Id. Mr. Jaubert recalled only one other incident in which a guest reported a missing item, a ring valued at $300-400. Unlike the present case, the missing ring was reported to the police and to the insurance

carrier, which assumed responsibility for reimbursing the guest. n8

n8 The record does not reflect whether Mr. Jaubert was personally acquainted with the individual who lost the ring.

Under the existing record, we find that the agency failed to prove by a preponderance of the evidence that it was the appellant's status as an FAA employee, and not some other factor, that impelled the hotel to replace the missing watch. We therefore conclude that the replacement watch did not constitute an improper gift or gratuity.
The agency failed to prove that the appellant did not [*19] work three hours of overtime on August 29, 1988.

In his written statement given to agency investigators, the appellant said he worked the three hours overtime reported on his timesheet for Monday, August 29, but he could not recall whether he worked the overtime on that date, or on Monday, August 22. A.F., Tab 7C. Two team members, Elkins and Gallatin, testified that they recalled seeing the appellant one evening at the airport, but neither could recall whether this occurred on August 29. The appellant testified that, upon hearing Gallatin's testimony, he remembered that his conversation with Gallatin occurred after the team picnic on August 28, and that he worked the overtime on August 29, as reported. The administrative judge found the appellant's sudden recollection to be "convenient," and concluded that there was "no evidence" to support his claim of three hours of overtime. Initial Decision at 13.

The agency has the burden to prove each of its charges and specifications by a preponderance of the evidence. See 5 C.F.R. @ 1201.56(a)(1)(ii). The apparent basis for this specification of misconduct were the statements by team members Coghill and Elkins that they did [*20] not recall seeing the appellant working overtime at any time during the CASNAIP inspection. See A.F., Tab 7C. n9 If unrebutted, these statements may have met the preponderant evidence standard. They were rebutted, however, not only by the appellant's testimony, but by the corroborating testimony of Elkins and Gallatin, that they had a conversation with the appellant at the airport during the evening hours. The testimony of Elkins was particularly important, because it contradicted his earlier written statement that he did not recall seeing the appellant at the airport on any evening. Based on all the evidence of record, we conclude that the agency failed to prove that the appellant did not work three hours of overtime on August 29, 1988.

n9 The statements obtained from the other two team members, Gallatin and Flores, did not address this issue. See id.
The appellant failed to establish that the deciding official's decision to remove him was the product of another official's improper influence.

William Jaillet, the appellant's immediate supervisor, was both the proposing and deciding official in the removal action against the appellant. n10 The appellant alleges [*21] that the actual decision to remove the appellant was made, not by Jaillet, but by Jaillet's superior, Raymond Salazar, Manager of the FAA Civil Aviation Security Division. In support of this contention, he cites Mr. Jaillet's testimony that he discussed the appellant's case with Salazar, and that Salazar concurred with Jaillet's judgment that removal was the appropriate penalty. Hearing Tape No. 6 (April 18, 1990). Mr. Jaillet further testified that, had Mr. Salazar not concurred with his own judgment, he would not have

decided to remove the appellant. Id. The appellant also cites Mr. Jaillet's action rating the appellant's performance as fully successful for the one-year period ending July 31, 1989, and thereafter authorizing a merit pay increase, as evidence that Mr. Jaillet would not have decided to remove the appellant but for Mr. Salazar's influence.

n10 It is not error for the same individual to act as both the proposing and deciding official in an adverse action. See Belanger v. Department of Transportation, 16 M.S.P.R. 304, 309 (1983).

The Board has held that there is no statutory or regulatory prohibition against ex parte communications between the [*22] proposing and deciding officials or any other officials or persons during the agency's decision-making process. Appling v. Social Security Administration, 30 M.S.P.R. 375, 381 (1986). The ultimate decision must be made by the deciding official, however, not by some other individual. Cf. Andersen v. Department of State, 27 M.S.P.R. 344, 350-51 (1985) (in a performance-based action, it is the deciding official's independent judgment on the merits that is required by statute, regulation, and judicial precedent), aff'd, 790 F.2d 91 (Fed. Cir. 1986) (Table).

We by no means approve of Mr. Jaillet's statement that he would not have exercised his independent judgment had his supervisor expressed a contrary opinion. The appellant has failed to establish, however, that Mr. Jaillet's judgment in fact differed from that of Mr. Salazar. Mr. Jaillet testified at length of how he applied each of the Douglas factors n11 to the facts of the case, and why he ultimately decided that removal was the appropriate penalty. See H.T. No. 3 (April 18, 1990). He also testified that Mr. Salazar told him that the decision was his (Jaillet's) to make. We do not find the favorable performance [*23] rating given the appellant by Jaillet, or the merit pay increase resulting from that rating, to indicate that Jaillet thought removal was inappropriate. The appellant was not removed for unsatisfactory performance of his job duties; he was removed for misconduct. We accordingly conclude that the decision to remove the appellant was made by Mr. Jaillet, not by Mr. Salazar.

n11 See Douglas v. Veterans Administration, 5 M.S.P.R. 280, 305-06 (1981). The appellant failed to establish that the agency's failure to comply fully with his discovery requests denied him evidence to support his allegation of disparate penalties.

The appellant asserts in his petition for review that, during the hearing, the agency representative stated that, in addition to the disciplinary actions the agency disclosed in the discovery process, the agency had "produced" either 30 or 36 additional adverse actions. The agency has denied this allegation in its response to the petition for review.

The appellant has not cited to any particular portion of the hearing transcript to support his allegation. We decline to review the entire hearing record, comprising 30 audio tapes, to determine if any [*24] reference was made to 30 or 36 other disciplinary actions, and, if so, what the significance of these cases might be. The appellant has simply referred to no record evidence to support his claim in this regard. The appellant's mere disagreement with the administrative judge's findings and credibility determinations does not warrant full review of the record by the Board. See Eikenberry v. Department of the Interior, 37 M.S.P.R. 438, 442-43 (1988) (exceptions without specific

record citations and persuasive argument of error are insufficient to alter the administrative judge's findings and will not be considered); Weaver v. Department of the Navy, 2 M.S.P.R. 129, 133 (1980) (the petitioner must identify the specific evidence in the record which demonstrates the error), review denied, 669 F.2d 613 (9th Cir. 1982) (per curiam).
Removal exceeds the bounds of reasonableness under the circumstances of this case.

The Board will generally review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. See Douglas v. Veterans Administration, 5 M.S.P.R. [*25] 280, 306 (1981). However, when the agency's action is based on multiple charges, some of which are not sustained, the Board will carefully consider whether the sustained charges merit the penalty imposed by the agency. See id. at 308.

Here, we have not sustained the conflict of interest charge, one of the two specifications of the charge of accepting gratuities, and one specification of the charge of falsifying time and attendance records. While the sustained charges are serious, we find that the mitigating circumstances in this case require a lesser penalty than removal. The appellant has 17 years of service with many commendations, and no prior disciplinary actions. The record contains no indication that the appellant falsified his CASNAIP inspection report or that the agency found it necessary to re-inspect the airport. In addition, one of the factors relied upon by the deciding official was the "notoriety of the offense since the employees in San Juan were aware of the watch and the hotel reservations." Reliance on this factor was improper, as we have determined that these two specifications of misconduct cannot be sustained. Finally, the amount of the gratuity accepted [*26] by the appellant was substantially less than the agency charged. Under all these circumstances, we find that the maximum reasonable penalty that could be imposed is a demotion to the next highest nonsupervisory position for which the appellant is qualified. See Davis v. Department of the Treasury, 8 M.S.P.R. 317, 320-21 (1981) (when the Board finds a penalty excessive, the penalty specified by the Board is not necessarily the one that, in the Board's view, is "best," or "most reasonable," but rather the maximum penalty the Board would find to be within the parameters of reasonableness).

ORDER

We ORDER the agency to cancel the appellant's removal and to replace it, effective January 10, 1990, with a demotion to the next highest nonsupervisory position for which the appellant is qualified. See Kerr v. National Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar [*27] days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar

days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the Board's final decision in this [*28] appeal. See 5 C.F.R. @ 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review, as follows:
Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. @ 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission, Office of Federal Operations, P.O. Box 19848, Washington, DC 20036
You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. @ 7702(b)(1).
Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. @ 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order [*29] by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. @ 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. @ 2000e5(f); 29 U.S.C. @ 794a.
Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. @ 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, DC 20439
The court must receive your request for review no later than 30 calendar days

after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. @ 7703(b)(1).

CONCURBY: [*30]

LEVINSON (In Part)

DISSENTBY: LEVINSON (In Part)

DISSENT:
SEPARATE OPINION OF CHAIRMAN DANIEL R. LEVINSON CONCURRING-IN-PART AND DISSENTING-IN-PART

In Fontes v. Department of Transportation BN07529010085

I join the majority's opinion, except its conclusion that demotion is the appropriate penalty in this case. In my view, the maximum reasonable penalty is removal.

As the majority recognizes, the sustained charges are serious. The government has a clear interest in ensuring that its employees are not compromised in the performance of their duties as a result of any outside influences. Deal v. Department of Justice, 11 M.S.P.R. 370, 373 (1982). The appellant's acceptance of a reduced room rate from an individual whose business operations were subject to inspection by the agency was a serious breach of the trust and responsibility placed in him by the agency. Similarly, an employee's falsification of time and attendance records is inherently destructive of the agency's faith in his trustworthiness and honesty, essential elements in the employer-employee relationship. See Connett v. Department of the Navy, 31 M.S.P.R. 322, 328 (1986), aff'd, 824 F.2d 978 (Fed. Cir. 1987) (Table). [*31] In addition, the agency was entitled to hold the appellant to a higher standard of conduct than other employees because of the supervisory nature of his position. Jones v. Department of the Navy, 23 M.S.P.R. 174, 175-76 (1984).

Contrary to the majority, I do not view the lack of evidence that the appellant falsified his CASNAIP inspection report relevant to the penalty. The appellant was not charged with falsification of the report. Further, the majority offers no support for the finding that the amount of the gratuity accepted by the appellant was substantially less than the agency charged. Moreover, the appellant's argument on petition for review was not that the gratuity was less than charged but rather, that accepting a reduced room rate was not intrinsically improper. Accordingly, considering all the circumstances, I believe that removal is not an unreasonable penalty.

Daniel R. Levinson, Chairman

DEC 23 1991

LEVEL 1 - 2 OF 3 CASES

CHARLES M. CONNETT, appellant, v. DEPARTMENT OF THE NAVY, agency.

DOCKET NUMBER SF07528510912

YVONNE OLIVER, as Administratrix of the Estate of Clarence Oliver, deceased, PLAINTIFF, v. THE UNITED STATES ARMY, and MICHAEL P.W. STONE, Secretary of the Army; THE UNITED STATES AIR FORCE and DONALD B. RICE, Secretary of the Air Force; the ARMY and AIR FORCE EXCHANGE SERVICE, and MERVIN ROBINSON, Each and All in Their Official Capacities, DEFENDANTS

No. LR-C-90-41

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

758 F. Supp. 484; 1990 U.S. Dist. LEXIS 18506

December 13, 1990, Decided
December 13, 1990, Filed

SUBSEQUENT HISTORY: Supplemental Opinion Reported at 1991 U.S. Dist. LEXIS 3317.

PRIOR HISTORY:
Reported at 758 F. Supp. 484 at 487.

COUNSEL: [**1]

Ms. Arkie Byrd, Little Rock, Arkansas, for Plaintiff.

Ms. Lesa Jackson, Asst. U.S. Atty., Little Rock, Arkansas, for Defendants

JUDGES: Elsijane T. Roy, United States District Judge.

OPINION BY: ROY

OPINION: [*484] ORDER

ELSIJANE T. ROY, UNITED STATES DISTRICT JUDGE

Before the Court is the defendants Motion to Dismiss and Motion to Strike. The plaintiff has responded and the defendants have filed a reply brief.

As grounds for the motion, the defendants state that plaintiff is deceased and no party may be substituted for him under the Rehabilitation Act; that plaintiff has failed to exhaust administrative remedies; and that the United States Army, the United States Air Force, the Army & Air force Exchange Service ("AAFES"), and Mr. Mervyn Robinson are not proper party defendants.

[*485] The plaintiff filed a Suggestion of Death with this Court on May 9, 1990, and filed a timely Motion for Substitution of Party, which was granted by the Court. Therefore, the defendants' argument relating to the timeliness of the filing of the Motion for Substitution of Party is moot.

In his amended complaint, the plaintiff alleges that defendants discriminated against him because of his handicap, Acquired Immune Deficiency Syndrome (AIDS) Related Complex, in violation of the Vocational [**2] Rehabilitation Act of 1973 [hereinafter cited as the Rehabilitation Act], 29 U.S.C. @ 794. Plaintiff claimed that defendants failed to accommodate his disease while employed with the AAFES and that he was forced to terminate his employment because of the failure to accommodate. More specifically, plaintiff contends that when it was discovered he had AIDS, he was transferred from his position in Food Services to a retail clerk's position, and then to work outside mowing the lawn of the defendant AAFES facilities. Plaintiff contends that his condition was severely aggravated by this position due to AIDS related problems.

The defendants argue that under the authority of Robertson v. Wegmann, 436 U.S. 584, 56 L. Ed. 2d 554, 98 S. Ct. 1991 (1978) and Parkerson v. Carrouth, 782 F.2d 1449 (8th Cir. 1986), the Arkansas survivorship statute, Ark.Code Ann. @ 16-62-101 (formerly Ark.Stat.Ann. @ 27-901) does not allow survival of a civil rights action. In Wegmann, the Supreme Court decided that 42 U.S.C. @ 1988 requires courts to apply state law to questions of survival of federal civil rights actions, as long as the state law is not inconsistent with the Constitution and the laws [**3] of the United States. In Parkerson, plaintiff filed a civil rights action under 42 U.S.C. @@ 1983, 1985 and 1986, stating a claim for libel, slander, malicious prosecution, and intentional injury to the plaintiff's medical practice. Plaintiff sought damages for monetary loss and the anxiety and mental anguish he allegedly suffered. The Eighth Circuit Court of Appeals affirmed the district court decision that, stripped of the libel and slander claims that plaintiff conceded did not survive, the action for malicious prosecution and intentional injury to plaintiff's medical practice did not survive the plaintiff's death.

The Court finds Parkerson to be distinguishable from the case sub judice. In this case, the plaintiff is alleging injury directly to his person, which places the plaintiff's cause of action squarely within the scope of the Arkansas survival statute. This is consistent with the earlier Arkansas case construed by the Eighth Circuit in Parkerson, that of Ward v. Blackwood, 41 Ark. 295 (1883). In referring to Ward, the Court in Parkerson stated:

that statutory language identical to Ark.Stat.Ann. @ 27-901 included only actions involving [**4] 'bodily injury, or damage of a physical character, but [did] not extend to torts which do not directly affect the person, but only the feelings or reputation, such as malicious prosecution.' 41 Ark. at 298 (emphasis added). Parkerson, 782 F.2d at 1452.

Since there are no Arkansas cases directly on point, this Court must speculate as to how the Arkansas Supreme Court would treat this issue. Based upon the authority cited above, the Court is of the opinion that they would allow the present cause of action to survive the plaintiff's death. n1

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 This holding is consistent with the argument made by the plaintiff in a case similar to this one, Glanz v. Vernick, 750 F. Supp. 39, 1990 U.S. Dist. LEXIS 15101 (D. Mass. 1990), that given the high mortality of AIDS patients, programs receiving federal funds may in fact feel free to discriminate against them, taking sanctuary in the knowledge that the @ 504 cause of action will likely abate.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Defendants next argue that the [**5] plaintiff failed to exhaust his administrative remedies, and refer to several steps required to be taken administratively under specific regulations applicable to certain federal employees. Plaintiff argues that nonappropriated fund employees are not legally deemed to be employees of the Federal Government under Chapter 1 Section 1 of Army Regulation 215-3 and are therefore not required to exhaust administrative remedies. [*486] In her supplemental response, plaintiff has attached a copy of the Army Regulation 215-3, and under the provision entitled "1-1 Purpose" it states as follows:

Inasmuch as nonappropriated fund (NAF) employees are not legally deemed to be employees of the Federal Government (see para 1-6), the policies, procedures, and entitlements relating to employees paid from appropriated funds and those relating to NAF employees are different.

Plaintiff also refers to 5 U.S.C. @ 2105(c), which states that "An employee paid from nonappropriated funds of the Army and Air Force Exchange Service . . . . is deemed not an employee for the purpose of-(1) laws . . . administered by the Office of Personnel Management;. . ."

Defendant contends that 5 U.S.C. @ 2105(c) goes on [**6] to state that "This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities" and that Title VII and the Rehabilitation Act of 1973 are both administered by the Equal Employment Opportunity Commission (EEOC) rather than the OPM. Therefore, it is argued by defendants that plaintiff's reliance on particular language in 5 U.S.C. @ 2105(c) is misplaced.

There is much discussion among the various circuits regarding the requirement of exhaustion of administrative remedies in cases brought under the Rehabilitation Act. In Morgan v. United States Postal Service, 798 F.2d 1162 (8th Cir. 1986), cert. denied, 480 U.S. 948, 94 L. Ed. 2d 794, 107 S. Ct. 1608 (1987), the Eighth Circuit describes the two separate private causes of action for discrimination based on handicap and the exhaustion requirement:

Section 501 requires federal agencies to implement affirmative action programs in employment for handicapped individuals. 29 U.S.C. @ 791(b) (1982 & Supp. 1985). Section 505(a)(1) makes Title VII remedies available to persons having complaints under @ 501. 29 U.S.C. @ 794(a)(1) (1982). Accordingly, an express private cause of action exists [**7] under @ 501 for handicap discrimination claims in employment by federal agencies. (citations omitted).

Section 504 provides that:

* * * * * *

29 U.S.C. @ 794. Courts have implied a private cause of action from @ 504. (citations omitted).

Section 501 claims clearly must be exhausted before filing suit. 29 U.S.C. @ 794a(a)(1). Whether the same is true for a @ 504 claim, which Morgan asserts, however, is not as clear. . . . In cases where the federal government is not a defendant, several courts have held that exhaustion is not required because Title VI remedies do not provide individual relief. (citation omitted). In cases involving the federal government, however, courts have required exhaustion of Title VII remedies in @ 504 actions. (citations omitted). The difference appears to lie with the identity of the defendant.

Id., 798 F.2d at 1164-1165.162

In Honeycutt v. Long, 861 F.2d 1346 (5th Cir. 1988), an AAFES employee brought suit against the major general who was commander of AAFES, under the Age Discrimination in Employment Act, Title VII, and the Rehabilitation Act. In Honeycutt, the Court held:

The AAFES is a Nonappropriated [**8] Fund Instrumentality ("NAFI") of the United States operating under the Department of Defense. It is directed by a board of directors composed of Army and Air Force members. In the Department of Defense Directive 1401.1-M, Personnel Policy Manual for NAFI's, NAFI employees are stated to be federal employees within the Department of Defense.

Id., 861 F.2d at 1349, n. 3.

Based upon the nature of the plaintiff's complaint and the language contained in Morgan and Honeycutt, the Court is inclined to think that exhaustion of

remedies would be required. However, the Court would like further briefing from the parties on this issue.

The Court in Honeycutt further held:

Both Title VII and the ADEA specifically state that this law identifying the [*487] proper defendant applies to personnel actions affecting employees in military departments as defined in 5 U.S.C. @ 102, and in executive agencies as defined by 5 U.S.C. @ 105. See 42 U.S.C. @ 2000e-16(a) and 29 U.S.C. @ 633(a). Military departments are defined as the Department of Army, the Department of Air Force, and the Department of Navy. 5 U.S.C. @ 102. An executive agency means an executive department, a government [**9] corporation, and an independent establishment. 5 U.S.C. @ 105. The Department of Defense is an executive department. 5 U.S.C. @ 101. An independent establishment means an establishment in the executive department, military department, or part thereof. 5 U.S.C. @ 104. The AAFES is a part of the Department of Defense. (footnote omitted). Thus, the AAFES by statutory definition is not an executive department, military department, executive agency, or independent establishment.

Id., 861 F.2d at 1349.

The Court would like the parties to provide it with supplemental briefs addressing the issue of exhaustion of administrative remedies, taking into consideration all of the language set out in the Army regulation the language in Morgan, and the language in Honeycutt. The parties should also state whether the same administrative remedies previously referred to by the defendants in their brief are applicable in light of the language contained in Honeycutt. The plaintiff will also have another opportunity to persuade the Court why exhaustion should not be required.

Finally, regarding the proper party defendant, the Court in Honeycutt found that a proper defendant [**10] would be the head of the Secretary of Defense, since the Department of Defense is an executive department. By way of footnote, the Court also stated that since the AAFES is run jointly by the Department of the Air Force and the Department of the Army, Honeycutt could properly have sued the Secretary of the Air Force and the Secretary of the Army jointly. Based upon this language, it appears that only the Secretary of the Air Force and the Secretary of the Army are proper party defendants in this case. The remaining defendants are therefore dismissed.

The supplemental briefs herein requested should be filed by no later than January 7, 1990.

ORDERED this 13th day of December, 1990.

TRAYNOR v. TURNAGE, ADMINISTRATOR, VETERANS' ADMINISTRATION, ET AL.

No. 86-622

SUPREME COURT OF THE UNITED STATES

485 U.S. 535; 108 S. Ct. 1372; 1988 U.S. LEXIS 1874; 99 L. Ed. 2d 618; 56 U.S.L.W. 4319; 46 Empl. Prac. Dec. (CCH) P37,924

December 7, 1987, Argued
April 20, 1988, Decided
* Together with No. 86-737, McKelvey v. Turnage, Administrator of Veterans' Affairs, et al., on certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

DISPOSITION: No. 86-622, 791 F.2d 226, reversed and remanded; No. 86-737, 253 U. S. App. D. C. 126, 792 F.2d 194, affirmed.

SYLLABUS: [***1] Petitioners in these cases are honorably discharged veterans who did not exhaust their "G. I. Bill" educational assistance benefits within 10 years following their military service, as required by 38 U. S. C. @ 1662(a)(1). Under that section, veterans may obtain an extension of the delimiting period if they were prevented from using their benefits earlier by "a physical or mental disorder which was not the result of [their] own willful misconduct." Petitioners sought to continue receiving benefits after the expiration of the 10-year period on the ground that they were disabled by alcoholism during much of that period. The Veterans' Administration (VA) found that, under its regulation defining "primary" alcoholism (that which is unrelated to an underlying psychiatric disorder) as "willful misconduct," petitioners were not entitled to the requested extensions. Petitioners filed separate federal-court actions to review the VA's decisions. In No. 86-622, the District Court held that it was not foreclosed from exercising jurisdiction by 38 U. S. C. @ 211(a), which bars judicial review of "the decisions of the Administrator on any question of law or fact under any law administered [***2] by the Veterans' Administration providing benefits for veterans." The court then concluded that alcoholism is a handicap within the meaning of the Rehabilitation Act of 1973, and that the VA thereforeviolated @ 504 of that Act, which requires that federal programs not discriminate against handicapped

persons solely because of their handicap. The Court of Appeals for the Second Circuit reversed on the ground that @ 211(a) barred judicial review of the RehabilitationAct claim. In No. 86-737, the District Court held that judicial review was not foreclosed by @ 211(a), and then invalidated the VA's alcoholism regulation as being contrary to the RehabilitationAct. The Court of Appeals for the District of Columbia Circuit agreed that judicial review was not foreclosed by @ 211(a), but reversed on the merits, holding that, consistently with the RehabilitationAct, the VA could reasonably conclude, pursuant to its regulation, that primary alcoholism is a "willfully caused handicap."

Held:

1. The question whether the VA's alcoholism regulation violates the RehabilitationAct is not foreclosed from judicial review by @ 211(a). The [***3] presumption in favor of judicial review of administrative action may be overcome only upon a showing of clear and convincing evidence of a contrary legislative intent. The prohibitions of @ 211(a) are aimed at review only of those decisions of law or fact that arise in the administration by the VA of a statute providing benefits for veterans. The text and legislative history of @ 211(a) provide no clear and convincing evidence of any congressional intent to preclude a suit claiming that @ 504 of the RehabilitationAct, a statute applicable to all federal agencies, has invalidated an otherwise valid regulation issued by the VA and purporting to have the force of law. The present cases involve the issue whether the law sought to be administered is valid in light of a subsequent statute whose enforcement is not the exclusive domain of the VA. Permitting these cases to go forward will not undermine @ 211(a)'s purposes. Pp. 541-545.

2. Section 504 of the RehabilitationAct is not violated by the VA's characterizing, for purposes of 38 U. S. C. @ 1662(a)(1), petitioners' primary alcoholism as "willful misconduct" precluding the allowance [***4] of petitioners' requested time extensions. Congress did not use the term "willful misconduct" inadvertently in 1977 when it amended @ 1662(a)(1) to create the exception to the delimiting period. The same term had long been used in other veterans' benefits statutes, and the VA had long construed the term as encompassing primary alcoholism. The legislative history confirms that Congress intended that the VA apply the same test of "willful misconduct" in granting extensions of time under @ 1662(a)(1). In 1978, when @ 504 was amended to extend its discrimination prohibition to programs conducted by federal agencies, Congress did not affirmatively evince any intent to repeal @ 1662(a)(1)'s "willful misconduct" provision. Moreover, petitioners have not overcome the cardinal rule that repeals by implication are not favored. The 1978 legislation did not expressly contradict the more narrow and specific 1977 legislation, and is not rendered meaningless, even with respect to those who claim to have been handicapped as a result of alcoholism, if the "willful misconduct" provision of @ 1662(a)(1) is allowed to retain the import originally intended by Congress.

There is [***5] no inconsistency between @ 504 and a conclusive presumption that alcoholism not motivated by mental illness is necessarily "willful." Pp. 545-551.

COUNSEL: Keith A. Teel argued the cause for petitioners. With him on the briefs were Margaret K. Brooks, Catherine H. O'Neill, John A. Powell, Arthur B. Spitzer, Elizabeth Symonds, and Steven R. Shapiro.

Jerrold J. Ganzfried argued the cause for respondents. With him on the brief

were Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Wallace, Anthony J. Steinmeyer, and Robert V. Zener.

+ Elizabeth Bartholet filed a brief for the National Council on Alcoholism, Inc., as amicus curiae urging reversal in both cases.

Briefs of amici curiae were filed in both cases for the American Medical Association et al. by Benjamin W. Heineman, Jr., Carter G. Phillips, and Joel I. Klein; and for Vietnam Veterans of America by Samuel M. Sipe, Jr., and Barton F. Stichman.

JUDGES: WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS and O'CONNOR, JJ., joined, and in Parts I and II of which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, post, p. 552. SCALIA and KENNEDY, JJ., took no part in the consideration or decision of the cases.

OPINION BY: WHITE

OPINION: [*537] [**1376] JUSTICE WHITE delivered the opinion of the Court.

These cases arise from the Veterans' Administration's refusal to grant two recovered alcoholics extensions of time in which to use their veterans' educational benefits. We must decide whether the Veterans' Administration's decision is subject to judicial [***6] review and, if so, whether that decision violates @ 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U. S. C. @ 794, which requires that federal programs not discriminate against handicapped individuals solely because of their handicap. n1

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n1 Section 504, 29 U. S. C. @ 794, provides, in pertinent part, that "no otherwise qualified handicapped individual . . . 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 or under any program or activity conducted by any Executive agency. "

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[*538] I

Veterans who have been honorably discharged from the United States Armed Forces are entitled to receive educational assistance benefits under the Veterans' Readjustment Benefit Act of 1966 ("G. I. Bill") to facilitate their readjustment to civilian life. See 38 U. S. C. @ 1661. These benefits generally must be used within 10 years following discharge or release from active duty. @ 1662(a)(1). Veterans may obtain an extension of the 10-year delimiting period, however, if they were prevented from using their benefits earlier by "a physical or mental disability which was not the result [***7] of [their] own willful misconduct." Ibid.

Petitioners are honorably discharged veterans who did not exhaust their educational benefits during the decade following their military service. They sought to continue to receive benefits after the expiration of the 10-year delimiting period on the ground that they had been disabled by alcoholism during much of that period. The Veterans' Administration determined that petitioners' alcoholism constituted "willful misconduct" under 38 CFR @ 3.301(c)(2) (1987), n2 and accordingly denied the requested extensions.

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n2 The applicable regulation, 38 CFR @ 3.301(c)(2) (1987), provides:

"Alcoholism: The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately [sic] and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin."

This regulation was intended by the Veterans' Administration to incorporate the principles of a 1964 administrative decision. 37 Fed. Reg. 20335, 20336 (1972) (proposed regulation); 37 Fed. Reg. 24662 (1972) (final regulation). The 1964 decision provided that alcoholism that is "secondary to and a manifestation of an acquired psychiatric disorder" would not be characterized as willful misconduct. Administrator's Decision, Veterans' Administration No. 988,

Interpretationof the Term "Willful Misconduct" as Relatedto the Residuals of Chronic Alcoholism, Aug. 13, 1964, App. 142-143. The Veterans' Administration refers to this type of alcoholism as "secondary," and to alcoholism unrelatedto an underlying psychiatric disorder as "primary." See ibid.; Veterans' AdministrationManual M21-1, change 149, subch. XI, @ 50.32 (Dec. 23, 1979) (hereinafterVA Manual). Petitionerswere found to have suffered from primary alcoholism.

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[***8]

[*539] [**1377] PetitionerTraynor sought review of the Veterans' Administration's decision in the UnitedStates District Court for the Southern District of New York. The District Court held that it was not foreclosed from exercising jurisdiction over the case by 38 U. S. C. @ 211(a), which bars judicial review of "the decisions of the Administratoron any questionof law or fact under any law administeredby the Veterans' Administrationproviding benefits for veterans," n3 becausethe complaint"requires us to examine constitutionaland statutory questions and not merely issues of VA policy." Traynor v. Walters, 606 F.Supp. 391, 396 (1985). The court rejectedTraynor's claim that the Veterans' Administration's refusal to extend his delimiting period violated the Due Process Clause and the equal protectioncomponentof the Fifth Amendment.n4 However, the court concluded that alcoholism is a handicap within the meaning of the RehabilitationAct, and that the Veterans' Administrationthereforehad engaged in the sort of discrimination on the basis of handicapthat is forbidden by that Act.

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n3 Title 38 U. S. C. @ 211(a) provides, in pertinentpart:

"The decision of the Administratoron any questionof law or fact under any law administeredby the Veterans' Administrationproviding benefits for veterans and their dependentsor survivors shall be final and conclusive and no other official or any court of the UnitedStates shall have power or jurisdiction to review any such decision by an action in the nature of mandamusor otherwise."
[***9]

n4 Petitionershave not raised constitutionalclaims before this Court.

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A divided panel of the Court of Appealsfor the Second Circuit reversed on the ground that @ 211(a) barred judicial review [*540] of the Rehabilitation Act claim. Traynor v. Walters, 791 F.2d 226 (1986). The court reasonedthat, while "many veterans have in the service of our country suffered injuries that

qualify them as 'handicappedindividual[s]' for purposes of [the Rehabilitation Act]," Congress evinced no intent in enacting that statute "to grant to 'handicapped' veterans the judicial review traditionally denied all other veterans" under @ 211(a). Id., at 229. n5

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n5 The dissent maintained that @ 211(a) was inapplicable both because the Rehabilitation Act neither provides benefits to veterans nor is administered by the Veterans' Administration and because the Administrator had not issued a decision as to whether the challenged regulation violated that Act. 791 F.2d, at 232. Neither the majority nor the dissent reached the merits of Traynor's Rehabilitation Act claim.

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Meanwhile, petitioner McKelvey sought review of the Veterans' Administration's decision in the District Court for [***10] the District of Columbia. The District Court exercised jurisdiction over McKelvey's claims on the ground that @ 211(a) permits judicial review of decisions rejecting claims that Veterans' Administration regulations of general applicability violate a federal statute that is "completely independent of the complex statutory and regulatory scheme for dispersing veterans' benefits." McKelvey v. Walters, 596 F.Supp. 1317, 1321 (1984). The court then invalidated 38 CFR @ 3.301(c)(2) (1987) as contrary to the Rehabilitation Act. The court ordered the Veterans' Administration to determine without resort to the regulation whether McKelvey had suffered a disability attributable to his own misconduct.

[**1378] On appeal, the Court of Appeals for the District of Columbia Circuit agreed that judicial review was not foreclosed by @ 211(a), which was held to apply only to claims "resolved by an actual 'decision of the Administrator.'" 253 U. S. App. D. C. 126, 130, 792 F.2d 194, 198 (1986) (per curiam) (quoting Johnson v. Robison, 415 U.S. 361, 367 (1974)). The court found that no such decision had been rendered by the Veterans' Administration as to the validity of 38 CFR @ 3.301(c)(2) [***11] [*541] (1987) under the Rehabilitation Act. n6 On the merits, however, the Court of Appeals reversed, holding that the Veterans' Administration could consistently with the Rehabilitation Act distinguish between veterans who are at least to some extent responsible for their disabilities and veterans who are not. n7 With respect to alcoholism, this distinction could be effected by means of @ 3.301(c)(2), said the court, because the Veterans' Administration could reasonably conclude that alcoholism is a "willfully caused handicap" unless attributable to an underlying psychiatric disorder. 253 U. S. App. D. C., at 132-133, 792 F.2d, at 200-201. The court expressed disagreement with Tinch v. Walters, 765 F.2d 599 (CA6 1985), which had invalidated the regulation in light of the Rehabilitation Act. See 253 U. S. App. D. C., at 133, n. 4, 792 F.2d, at 201, n. 4.

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n6 The court acknowledged that the Veterans' Administration had decided the Rehabilitation Act issue while the case was on appeal. However, the court held that "Section 211(a)'s application is to be determined firmly and finally as of the date that plaintiff commences litigation." 253 U. S. App. D. C., at 131, 792 F.2d, at 199. Otherwise, the court reasoned, "the agency could allow a challenge to its action to proceed in the district court secure in the knowledge that if the VA lost there, it could retroactively shield the action from judicial review." Ibid. [***12]

n7 The panel was divided on both the jurisdictional issue and the merits.

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We granted certiorari to resolve the conflicts between the Courts of Appeals as to whether Veterans' Administration decisions challenged under the Rehabilitation Act are subject to judicial review and, if so, whether that Act bars the Veterans' Administration from characterizing petitioners' alcoholism as "willful misconduct" for purposes of 38 U. S. C. @ 1662(a)(1). 480 U.S. 916 (1987).

II

We must first consider whether @ 211(a)'s bar against judicial review of "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans" extends [*542] to petitioners' claim that the Veterans' Administration regulation defining primary alcoholism as "willful misconduct" discriminates against handicapped persons in violation of the Rehabilitation Act.

We have repeatedly acknowledged "the strong presumption that Congress intends judicial review of administrative action." Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986); see also Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); Barlow v. Collins, 397 U.S. 159, 166-167 [***13] (1970). The presumption in favor of judicial review may be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967) (citations omitted). We look to such evidence as "'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is 'fairly discernible in the detail of the legislative scheme.'" Bowen v. Michigan Academy of Family Physicians, supra, at 673 (quoting Block v. Community Nutrition Institute, 467 U.S. 340, 349, 351 (1984)).

[**1379] In Johnson v. Robison, supra, we held that the federal courts could entertain constitutional challenges to veterans' benefits legislation. We determined that "neither the text nor the scant legislative history of @ 211(a)" provided the requisite "clear and convincing" evidence of congressional intent to foreclose judicial review of challenges to the constitutionality of a law administered by the Veterans' Administration. 415 U.S., at 373-374. In that case, the Veterans' Administration, acting under 38 U. S. C. @@ 101(21), 1652(a)(1), and 1661(a), [***14] denied educational benefits to a conscientious objector who had completed the required alternative civilian service. The claimant brought suit in the District Court, challenging those statutory sections on First and Fifth Amendment grounds. The District Court denied a motion to dismiss based on @ 211(a) and gave judgment to the plaintiff. [*543] Robison v. Johnson, 352 F.Supp. 848 (Mass. 1973). We agreed that @ 211(a) did not bar the suit, but reversed the judgment on the merits. On the @ 211(a) issue, we reasoned that "the prohibitions [of @ 211(a)] would appear to be aimed at review only of those decisions of law or fact that arise in the administration by the Veterans' Administration of a statute providing benefits for veterans." 415 U.S., at 367. The questions of law presented in that case, however, arose under the Constitution rather than under the veterans' benefits statute and concerned whether there was a valid law on the subject for the Veterans' Administration to execute. We went on to conclude that the principal purposes of @ 211(a) -- "(1) to insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation, [***15] and (2) to insure that the technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions will be adequately and uniformly made," id., at 370 -- would not be frustrated if federal courts were permitted to exercise jurisdiction over constitutional challenges to the very statute that was sought to be enforced. We noted that such challenges "cannot be expected to burden the courts by their volume, nor do they involve technical consideration of Veterans' Administration policy." Id., at 373.

The text and legislative history of @ 211(a) likewise provide no clear and convincing evidence of any congressional intent to preclude a suit claiming that @ 504 of the Rehabilitation Act, a statute applicable to all federal agencies, has invalidated an otherwise valid regulation issued by the Veterans' Administration and purporting to have the force of law. Section 211(a) insulates from review decisions of law and fact "under any law administered by the Veterans' Administration," that is, decisions made in interpreting or applying a particular provision of that statute to a particular set of facts. Id., at 367. But the cases now before [***16] us involve the issue whether the law sought to be administered is valid in light of [*544] a subsequent statute whose enforcement is not the exclusive domain of the Veterans' Administration. n8 There is no claim that the regulation at issue is inconsistent with the statute under which it was issued; and there is no challenge to the Veterans' Administration's construction of any statute dealing

with veterans' benefits, except to the extent that its construction may be affected by the Rehabilitation Act. Nor is there any reason to believe that the Veterans' Administration has any special expertise in assessing the validity of its regulations construing veterans' benefits statutes under a later-passed statute of general application. Permitting these cases to go forward will not undermine the purposes of @ 211(a) any more than did the result in Johnson. It [**1380] cannot be assumed that the availability of the federal courts to decide whether there is some fundamental inconsistency between the Veterans' Administration's construction of veterans' benefits statutes, as reflected in the regulation at issue here, and the admonitions of the Rehabilitation Act will enmesh the courts in "the technical and complex [***17] determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions" or "burden the courts and the Veterans' Administration with expensive and time-consuming litigation." Id., at 370. n9 Of course, if [*545] experience proves otherwise, the Veterans' Administration is fully capable of seeking appropriate relief from Congress.

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n8 The President has designated the Department of Justice as the federal agency responsible for coordinating and enforcing @ 504 of the Rehabilitation Act. Exec. Order No. 12250, 3 CFR 298 (1981).

n9 Indeed, petitioners submit that, in the four Circuits that have held that @ 211(a) does not bar judicial review of statutory challenges to Veterans' Administration regulations, only eight such challenges have been filed. See Brief for Petitioners 46-47, n. 32 (citing American Federation of Government Employees, AFL-CIO v. Nimmo, 711 F.2d 28 (CA4 1983); Plato v. Roudebush, 397 F.Supp. 1295 (Md. 1975); Tinch v. Walters, 573 F.Supp. 346 (ED Tenn. 1983), aff'd, 765 F.2d 599 (CA6 1985); Taylor v. United States, 385 F.Supp. 1035 (ND Ill. 1974), vacated and remanded, 528 F.2d 60 (CA7 1976); Arnolds v. Veterans' Administration, 507 F.Supp. 128 (ND Ill. 1981); Burns v. Nimmo, 545 F.Supp. 544 (Iowa 1982); Waterman v. Cleland, No. 4-77-Civ. 70 (Minn., Oct. 24, 1978)).

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[***18]

Accordingly, we conclude that the question whether a Veterans' Administration regulation violates the Rehabilitation Act is not foreclosed from judicial review by @ 211(a). We therefore turn to the merits of petitioners' Rehabilitation Act claim.

III

Congress historically has imposed time limitations on the use of "G. I. Bill" educational benefits. Veterans of World War II were required to use their benefits within nine years after their discharge from military service, while

Korean Conflict veterans had eight years in which to use their benefits. See S. Rep. No. 93-977, p. 13 (1974) (letter to Hon. Vance Hartke from Veterans' Administrator Johnson). The delimiting period under the current "G. I. Bill" was raised from 8 years to 10 years in 1974. Pub. L. 93-337, @ 2(1), 88 Stat. 292, 38 U. S. C. @@ 1712(b)(1), (2). In 1977, Congress created an exception to this 10-year delimiting period for veterans who delayed their education because of "a physical or mental disability which was not the result of [their] own willful misconduct." Pub. L. 95-202, Tit. II, @ 203(a)(1), 91 Stat. 1429, 38 U. S. C. @ 1662(a)(1).

Congress did not use the term "willful misconduct" inadvertently in @ 1662(a)(1). [***19] The same term had long been used in other veterans' benefits statutes. For example, veterans are denied compensation for service-connected disabilities that are "the result of the veteran's own willful misconduct." 38 U. S. C. @ 310. See also @ 521 (compensation for disabilities not connected with military service). The Veterans' Administration had long construed the term "willful misconduct" for purposes of these statutes as encompassing primary alcoholism (i. e., alcoholism that is not "secondary to and a manifestation of an acquired psychiatric disorder"). See n. 2, supra.

[*546] "It is always appropriate to assume that our elected representatives, like other citizens, know the law." Cannon v. University of Chicago, 441 U.S. 677, 696-697 (1979). Hence, we must assume that Congress was aware of the Veterans' Administration's interpretation of "willful misconduct" at the time that it enacted @ 1662(a)(1), and that Congress intended that the term receive the same meaning for purposes of that statute as it had received for purposes of other veterans' benefits statutes. See Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 489 (1985); Morrison-Knudsen Construction Co. v. Director, Office of [***20] Workers' Compensation Programs, 461 U.S. 624, 633 (1983); Bob Jones University v. United States, 461 U.S. 574, 586-587, and n. 10 (1983). In these cases, however, we need not rely only on such assumptions. The legislative history confirms that Congress intended that the Veterans' Administration apply the same test of "willful misconduct" in granting extensions of time under @ 1662(a)(1) as the agency already was applying in granting disability compensation under @ 310 and @ 521. Specifically, the report of the Senate Veterans' Affairs Committee on the 1977 legislation states:

"In determining whether the disability sustained was a result of the veteran's own 'willful misconduct,' the Committee intends that the same standards be applied as are utilized in determining eligibility for other VA programs under title 38. In this connection, see 38 CFR, part III, paragraphs 3.1(n) and 3.301, and VA Manual M21-1, section 1404." S. Rep. No. 95-468, pp. 69-70 (1977).

The cited regulations include 38 CFR @ 3.301(c)(2) (1987), the regulation that

characterizes primary alcoholism as "willful misconduct." The Veterans' Administration Manual provision states, inter alia, that "basic principles for application in [***21] deciding cases involving alcoholism are stated in Administrator's Decision No. 988," the decision on which @ 3.301(c)(2) is based. VA Manual M21-1, change 132, subch. I, @ 14.04c (Jan. 29, 1976). See n. 2, supra. These sources set forth [*547] the criteria for determining whether a veteran's alcoholism is the result of "willful misconduct." These criteria therefore are among the "standards" that, according to the Senate Report, Congress intended to be utilized in determining eligibility for extended educational benefits.

It is thus clear that the 1977 legislation precluded an extension of time to a veteran who had not pursued his education because of primary alcoholism. If Congress had intended instead that primary alcoholism not be deemed "willful misconduct" for purposes of @ 1662(a)(1), as it had been deemed for purposes of other veterans' benefits statutes, Congress most certainly would have said so.

It was the same Congress that one year later extended @ 504's prohibition against discrimination on the basis of handicap to "any program or activity conducted by any Executive agency. " Pub. L. 95-602, Tit. IV, @@ 119, 122(d)(2), 92 Stat. 2982, 2987, 29 U. S. C. @ 794. Yet, in enacting the [***22] 1978 Rehabilitation Act amendments, Congress did not affirmatively evince any intent to repeal or amend the "willful misconduct" provision of @ 1662(a)(1). Nor did Congress anywhere in the language or legislative history of the 1978 amendments expressly disavow its 1977 determination that primary alcoholism is not the sort of disability that warrants an exemption from the time constraints of @ 1662(a)(1).

Accordingly, petitioners can prevail under their Rehabilitation Act claim only if the 1978 legislation can be deemed to have implicitly repealed the "willful misconduct" provision of the 1977 legislation or forbade the Veterans' Administration to classify primary alcoholism as willful misconduct. They must thereby overcome the "'cardinal rule . . . that repeals by implication are not favored.'" Morton v. Mancari, 417 U.S. 535, 549-550 (1974) (quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936); Wood v. United States, 16 Pet. 342, 363 (1842); Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n, 393 U.S. 186, 193 (1968)). "It is a basic principle of statutory construction [*548] that a statute dealing with a narrow, precise, and specific [***23] subject is not submerged by a later enacted statute covering a more generalized spectrum," Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976), unless the later statute "'expressly contradict[s] the original act'" or unless such a construction "'is absolutely [**1382] necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.'" Ibid. (quoting T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874)). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes

are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton v. Mancari, supra, at 551.

As we have noted, the 1978 legislation did not expressly contradict the more "narrow, precise, and specific" 1977 legislation. Moreover, the 1978 legislation is not rendered meaningless, even with respect to those who claim to have been handicapped as a result of alcoholism, if the "willful misconduct" provision of @ 1662(a)(1) is allowed to retain the import originally intended by Congress.

First, the "willful [***24] misconduct" provision does not undermine the central purpose of @ 504, which is to assure that handicapped individuals receive "evenhanded treatment" in relation to nonhandicapped individuals. Alexander v. Choate, 469 U.S. 287, 304 (1985); Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979). This litigation does not involve a program or activity that is alleged to treat handicapped persons less favorably than nonhandicapped persons. Cf. School Board of Nassau County v. Arline, 480 U.S. 273 (1987); Southeastern Community College, supra. Rather, petitioners challenge a statutory provision that treats disabled veterans more favorably than able-bodied veterans: The former may obtain extensions of time in which to use their educational benefits so long as they did not become [*549] disabled as a result of their own "willful misconduct"; the latter are absolutely precluded from obtaining such extensions regardless of how compelling their reasons for having delayed their schooling might be. In other words, @ 1662(a)(1) merely provides a special benefit to disabled veterans who bear no responsibility for their disabilities that is not provided to other disabled veterans or to [***25] any able-bodied veterans.

There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons. Hence, the regulations promulgated by the Department of Health, Education, and Welfare in 1977 with regard to the application of @ 504 to federally funded programs provide that "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. 42 Fed. Reg. 22676, 22679 (1977), promulgating 45 CFR @ 84.4(c) (1986). n10 It is therefore not inconsistent with the Rehabilitation Act for only those veterans whose disabilities are not attributable to their own "willful misconduct" to be granted extensions of the 10-year delimiting period applicable to all other veterans. Congress is entitled to establish priorities for the allocation of the limited resources available for veterans' benefits, cf. McDonald v. Board of Election Comm'rs of Chicago, 394 U.S. 802, 809 (1969), and thereby to conclude that veterans who bear some responsibility for their disabilities have no [***26] stronger claim to an extended eligibility period than do able-bodied veterans. Those [**1383] veterans are not, in

the words of @ 504, denied benefits [*550] "solely by reason of [their] handicap," but because they engaged with some degree of willfulness in the conduct that caused them to become disabled.

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n10 We have previously recognized that the regulations promulgated by the Department of Health, Education, and Welfare (later the Department of Health and Human Services) to implement the Rehabilitation Act "were drafted with the oversight and approval of Congress," School Board of Nassau County v. Arline, 480 U.S. 273, 279 (1987), and therefore constitute "'an important source of guidance on the meaning of @ 504.'" Ibid. (quoting Alexander v. Choate, 469 U.S. 287, 304, n. 24 (1985)).

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Furthermore, @ 1662(a)(1) does not deny extensions of the delimiting period to all alcoholics but only to those whose drinking was not attributable to an underlying psychiatric disorder. It is estimated by some authorities that mental illness is responsible for 20% to 30% of all alcoholism cases. Brief for American Medical Association as Amicus Curiae 7. Each veteran who claims to have been disabled by [***27] alcoholism is entitled under @ 1662(a)(1) to an individualized assessment of whether his condition was the result of a mental illness.

Petitioners, however, perceive an inconsistency between @ 504 and the conclusive presumption that alcoholism not motivated by mental illness is necessarily "willful." They contend that @ 504 mandates an individualized determination of "willfulness" with respect to each veteran who claims to have been disabled by alcoholism. It would arguably be inconsistent with @ 504 for Congress to distinguish between categories of disabled veterans according to generalized determinations that lack any substantial basis. If primary alcoholism is not always "willful," as that term has been defined by Congress and the Veterans' Administration, some veterans denied benefits may well be excluded solely on the basis of their disability. We are unable to conclude that Congress failed to act in accordance with @ 504 in this instance, however, given what the District of Columbia Circuit accurately characterized as "a substantial body of medical literature that even contests the proposition that alcoholism is a disease, much less that it is a disease for which the victim [***28] bears no responsibility." 253 U. S. App. D. C., at 132-133, 792 F.2d, at 200-201. Indeed, even among many who consider alcoholism a "disease" to which its victims are genetically predisposed, the consumption of alcohol is not regarded as wholly involuntary. See Fingarette, The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of [*551] Alcoholism," 83 Harv. L. Rev. 793, 802-808 (1970). As we see it, @ 504 does not demand inquiry into whether factors other than mental illness rendered an individual veteran's

drinking so entirely beyond his control as to negate any degree of "willfulness" where Congress and the Veterans' Administrationhave reasonably determinedfor purposes of the veterans' benefits statutes that no such factors exist. n11

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n11 Our decision in School Board of Nassau County v. Arline, supra, is not to the contrary. In Arline, we recognized that the district courts should "in most cases" undertakean individualized inquiry into whether a handcappedperson has been denied a job for which he is otherwise qualified. 480 U.S., at 287. In contrast to the instant case, Arline did not involve a handicappingcondition as to which Congress had specifically determinedthat no individualized inquiry was necessary. We might well have reached a different conclusion in Arline had the employer relied on a congressional determinationsupportedby substantial medical evidence that all employees suffering from acute tuberculosis pose a serious health threat to others in the workplace.

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[***29]

In sum, we hold that a constructionof @ 1662(a)(1) that reflects the original congressional intent that primary alcoholics not be excused from the 10-year delimiting period for utilizing "G. I. Bill" benefits is not inconsistent with the prohibition on discrimination against the handicapped containedin @ 504 of the RehabilitationAct. n12 Accordingly, since we "are not at liberty to pick and choose among congressional enactments. . . when two statutes are capable of co-existence," Morton v. Mancari, 417 U.S., at 551, we must conclude that the earlier, more specific provisions of @ 1662(a)(1) were neither expressly nor implicitly repealedby the later, more general provisions of @ 504.

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n12 If the position urged by the dissent were to prevail, the Veterans' Administrationwould be hard put to avoid making an individualized determination as to whether a veteran's alcoholism is sufficiently "willful" to disqualify him from disability compensationunder @@ 310 and 521. Such a requirementwould saddle the Governmentwith additional administrative and financial burdens that Congress could not have contemplatedin extending @ 504 to federal programs.

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[*552] IV

This litigation does not require [***30] the Court to decide whether alcoholism is a disease whose course its victims cannot control. It is not our

role to resolve this medical issue on which the authorities remain sharply divided. Our task is to decide whether Congress intended, in enacting @ 504 of the Rehabilitation Act, to reject the position taken on the issue by the Veterans' Administration and by Congress itself only one year earlier. In our view, it is by no means clear that @ 504 and the characterization of primary alcoholism as a willfully incurred disability are in irreconcilable conflict. If petitioners and their proponents continue to believe that this position is erroneous, their arguments are better presented to Congress than to the courts.

The judgment of the Court of Appeals for the District of Columbia Circuit in No. 86-737 is affirmed. The judgment of the Court of Appeals for the Second Circuit in No. 86-622 is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA and JUSTICE KENNEDY took no part in the consideration or decision of this case.

CONCUR BY: BLACKMUN (In Part)

DISSENT BY: BLACKMUN (In Part)

DISSENT: JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL
[***31] join, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion, for I agree that, under @ 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. @ 794, the "final and conclusive" language of 38 U. S. C. @ 211(a) does not bar judicial review of petitioners' claims. Similarly, I acknowledge the legality (a) of the 10-year delimiting period imposed by 38 U. S. C. @ 1662(a) upon veterans' educational assistance, and (b) of that statute's alleviation of the delimiting period in cases of disability except where that disability is the result of a veteran's "own willful misconduct."

[*553] My dispute with the Court centers in its upholding of the regulation, 38 CFR @ 3.301(c)(2) (1987), whereby the Veterans' Administration (VA) presumes, irrebuttably, that primary alcoholism always is the result of the veteran's "own willful misconduct." This is the very kind of broad social generalization that @ 504 of the Rehabilitation Act is intended to eliminate. The petitioners in these cases ask only that their situations be given individualized evaluation. Because I think this is what the Rehabilitation Act clearly requires, I dissent from the Court's [***32] conclusion to the contrary. n1

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n1 It perhaps is worth noting that, despite much comment in the popular press, these cases are not concerned with whether alcoholism, simplistically, is or is not a "disease."

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I

Petitioner Eugene Traynor began drinking when he was eight or nine years old. He drank with increasing frequency throughout his teenage years, and was suffering alcohol-related seizures by the time he was on active military duty in Vietnam. During the four years following his honorable discharge in 1969, Mr. Traynor was hospitalized repeatedly for alcoholism and related illnesses.

By the end of 1974, however, petitioner Traynor had conquered his drinking problem. He attended college part-time beginning in 1977, and continued working toward his degree until the 10-year period for using his veteran's educational benefits expired for him in 1979. Mr. Traynor applied for the extension of time available under 38 U. S. C. @ 1662(a)(1) to one whose disability had prevented him from completing a program of education within the 10-year period. Because he was unable to [**1385] establish that his alcoholism was due to an underlying psychiatric disorder, his condition was labeled "primary alcoholism." [***33] Pursuant to the regulation cited above, Mr. Traynor was presumed to have brought his alcoholism upon himself through "willful misconduct." The requested extension therefore was denied.

[*554] Petitioner James P. McKelve also started drinking as a child. He was 13 when he began to develop the alcohol dependency that was common among members of his family. His drinking problem plagued him while he was in the Army, and he was hospitalized frequently during the nine years that followed his honorable discharge in 1966. Despite his disability, however, McKelvey managed, between hospital stays, to attend two educational institutions under the veterans' educational-benefits program.

Mr. McKelvey took his last drink in 1975, only a year and a half before his 10-year delimiting period expired. Like Traynor, McKelvey sought an extension under 38 U. S. C. @ 1662(a)(1) on the ground that his alcoholism had prevented him from using, within the period, the benefits to which he was entitled. And, like Traynor, McKelvey was denied the extension because his disability, primary alcoholism, was conclusively presumed to have been caused by his "own willful misconduct." The VA's regulation deprived each of these [***34] veterans of any opportunity to establish that, in his particular case, disabling alcoholism was not willfully incurred.

II

The VA's reliance on its irrebuttablepresumptionthat all primary alcoholism is attributableto willful misconduct cannot be squaredwith the mandateagainst discrimination containedin @ 504 of the RehabilitationAct. Just last year, in School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987), this Court explained in no uncertainterms that @ 504 bars the generic treatmentof any group of individuals with handicapsbased on archaic or simplistic stereotypesabout attributesassociatedwith their disabling conditions. Instead, @ 504 requires an individualized assessmentof each person's qualifications, based on "reasoned and medically sound judgments." Id., at 285. In sanctioning the VA's irrebuttablepresumptionthat any veteran suffering from primary alcoholism [*555] brought the ailment upon himself through willful misconduct, the Court ignores the lesson of Arline, and the clear dictate of the RehabilitationAct.

In these cases, the Court is called upon, not to make its own medical judgments about the causes of alcoholism, but to interpret [***35] @ 504. That statutesets forth a simple rule:

"No otherwise qualified individual with handicaps. . . shall, solely by reason of his handicap, be excluded from the participationin, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conductedby any Executive agency. . . ."n2

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n2 Section 103(d)(2)(B)of the RehabilitationAct Amendmentsof 1986, 100 Stat. 1810, struck the words "handicappedindividual" wherever they appearedin the 1973 Act and replacedthem with the words "individual with handicaps." See H. R. Rep. No. 99-571, p. 17 (1986). Section 504, as quotedin the text above, embracesthe change effectedby this 1986 amendment.

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It is beyond dispute that petitioners, as alcoholics, were handicapped individuals covered by the Act. See 43 Fed. Reg. 2137 (1978) (guidelines issued by Departmentof Health, Education, and Welfare (later the Departmentof Health and HumanServices) reflecting the Attorney General's specific conclusion, 43 Op. Atty. Gen. No. 12, p. 2 (1977), that an alcoholic is covered by the Act); see also Brief for Respondents33. Nor is it disputedthat @ [***36] 504 of the Act prohibits federal agencies, such as the VA, from denying benefits to petitionerssolely [**1386] becausethey are alcoholics. See, e. g., 38 CFR @@ 18.403(j)(1) and (2)(i)(c)(1987).

In 38 U. S. C. @ 1662(a)(1), Congress declared that one whose disability resulted from "willful misconduct" is not entitled to the benefit of the extension-of-time provision. As stated above, the VA, by its regulation, has established an irrebuttable presumption that primary alcoholism is the result of willful misconduct. This presumption appears to be a clear violation of @ 504's mandate requiring individualized [*556] assessment of each claimant's qualifications. Arline, 480 U.S., at 287-289.

Respondent argues, however, that a case-by-case assessment of whether a claimant's alcoholism was the result of willful misconduct is not necessary for two reasons. First, respondent contends that Congress, in enacting the 1977 amendment (the extension-of-time provision, see 91 Stat. 1439) to @ 1662(a), mandated a conclusive presumption that primary alcoholism is caused by willful misconduct. Second, respondent contends that the VA's determination that primary alcoholism always is due to willful [***37] misconduct is reasonable, and that therefore the presumption is not based on the kind of stereotyping that @ 504 forbids. The Court today finds each of these arguments persuasive. In my view, each patently is without merit.

III

The Court explains:

"As we see it, @ 504 does not demand inquiry into whether factors other than mental illness rendered an individual veteran's drinking so entirely beyond his control as to negate any degree of 'willfulness' where Congress and the Veterans' Administration have reasonably determined for purposes of the veterans' benefits statutes that no such factors exist." Ante, at 551.

As I see it, @ 504 demands precisely the inquiry the Court says is unnecessary. While Congress certainly has the authority to determine that primary alcoholism always should be attributed to willful misconduct, I find no support whatever for the Court's conclusion that Congress made that determination when it amended @ 1662(a) in 1977.

The Court is correct, of course, see ante, at 546, when it says that we must assume that Congress intended the term "willful misconduct" in @ 1662(a)(1) to have the same meaning it had been given in other veterans' benefits statutes. Indeed, the [***38] legislative history indicates that Congress did [*557] "intend that the same standards be applied as are utilized in determining eligibility for other VA programs under title 38." S. Rep. No. 95-468, pp. 69-70 (1977). If @ 504 had not been amended one year later to cover specifically all executive agency programs, including the VA's benefits programs, see Pub. L. 95-602, @@ 119, 122(d)(2), 92 Stat. 2982, 2987, 29 U. S. C. @ 794, there would be little reason to question the application of the VA's interpretation of the willful-misconduct regulation to @ 1662(a)(1).

But the Court goes further and finds that Congress' reference to the VA's willful-misconduct regulation in amending @ 1662(a) is a congressional adoption of the VA's rule. The Court transforms Congress' uncontroversial statement that the willful-misconduct regulation should be given the same meaning throughout the statutory scheme into a "specific determination" by Congress that primary alcoholics are presumed to have engaged in willful misconduct. See ante, at 551, n. 11; see also ante, at 547 (Congress' "1977 determination that primary alcoholism is not the sort of disability that warrants an exemption"); ante, at 548 (Congress [***39] had "'narrow, precise, and specific'" intent to exclude primary alcoholics in enacting @ 1662(a)(1)); ante, at 551 ("original congressional intent [in amending @ 1662(a)] that primary alcoholics not be excused from the 10-year delimiting period"). This magical transformation is the linchpin in [**1387] the Court's analysis, for unless Congress itself actually took a position in 1977 endorsing the association of primary alcoholism with willful misconduct, the subsequent amendment of @ 504 in 1978 to include benefit programs like the VA's would simply be read to impose new constraints on the VA's treatment of alcoholics. There is nothing whatever that is inconsistent about Congress' willingness, in 1977, to allow the VA to apply its own rules in determining which alcoholic veterans were entitled to benefits, and its decision, one year later, to require such determinations to comply with the antidiscrimination provisions of @ 504 then being amended.

[*558] In order to escape @ 504's requirements, the majority must conclude that in 1977 Congress defined a primary alcoholic as not "otherwise qualified," within the meaning of @ 504, for the extension of time available under @ 1662(a)(1). The language of [***40] @ 1662(a)(1) itself merely establishes that a willfully incurred disability, as a general matter, does not entitle a veteran to the extension of time. And the Senate Report, upon which the Court exclusively relies, makes only passing reference to the relevant regulations -- regulations which encompass the VA's entire policy on the applicability of the willful-misconduct provisions, not just the application of that term to alcoholism. Finally, even those portions of the regulations expressly addressed to alcoholism do not state that primary alcoholism is to be equated with willful misconduct. That interpretation is derived from a 1964 Administrator's Decision, which itself discusses the VA's irrebuttable presumption only briefly. Administrator's Decision, Veterans' Administration No. 988, Interpretation of the Term "Willful Misconduct" as Related to the Residuals of Chronic Alcoholism 1 (1964). n3 [*559] See 37 Fed. Reg. 20335, 20336 (1972) (proposing regulation and announcing that it was intended to incorporate principles of the 1964 administrative issue).

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n3 The regulation provides:

"If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin." 38 CFR @ 3.301(c)(2) (1987).

On its face, the regulation does not appear to address the condition of alcoholism itself, despite the fact that the paragraph of the regulation, of which the above-quoted material is a part, bears the title "Alcoholism." The condition of alcohol dependency is neither an immediate effect of drinking, nor a secondary organic disability resulting from the chronic use of alcohol. Alcoholism seems to fall between the two categories set out in the regulation; it is the condition of being a chronic alcohol user.

The Administrator's Decision from which the VA's irrebuttable presumption is derived focuses on this same distinction: "The proximate and immediate effects consisting of disabling injuries or death resulting from a state of intoxication" are to be deemed willful misconduct, but the "remote, organic secondary effects of the continued use of alcohol resulting in impairment of body organs or systems leading to disability or death" are not to be so deemed. Administrator's Decision, No. 988, p. 1. The Decision, however, also includes two sentences from which the VA derives its current interpretation of the willful-misconduct regulation:

"In miscondut determinations, however, with respect to mental disorders where the use of alcohol as a beverage has been involved, a distinction has heretofore been recognized between alcoholism as a primary condition (or as secondary to an underlying personality disorder), and alcoholism as secondary to and a manifestation of an acquired psychiatric disorder. If the latter condition is found the resulting disability or death is not to be considered as willful misconduct." Ibid.

While the VA's interpretation of its own regulation and its antecedents would have been entitled to deference, see United States v. Larionoff, 431 U.S. 864, 872 (1977), Congress cannot be presumed to have codified this less-than-apparent interpretation by a mere reference to the relevant regulations.

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[***41]

Surely something more than two sentences quoted from a Senate Report should be required before we interpret general statutory language to conflict with the most natural reading of subsequent specific legislation. It is only the Court's strained reading of @ 1662(a)(1) to embrace [**1388] a congressional

"determination that primary alcoholism is not the sort of disability that warrants an exemption," ante, at 547, that leads the Court to reject as a disfavored "implicit repeal" @ 504's requirement that qualifications for the exemption be determined on a case-by-case basis. The "'basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum,'" ante, at 547-548, has no application here, where the earlier enactment is not narrowly or specifically addressed to the matter treated generally in the subsequent enactment: federal agencies' treatment of alcoholics. I have been no more successful than the VA or the Court in turning up evidence that Congress [*560] expressly considered, or intended, in amending @ 1662(a), to adopt legislatively the VA's presumption that primary alcoholism [***42] always is attributable to willful misconduct. I therefore see no reason to defer to the VA's rule in interpreting a subsequent and entirely separate congressional enactment that the VA has not been empowered to administrate.

IV

I am reluctant to conclude that anything short of a congressional determination linking all primary alcoholism to willful misconduct could justify the VA's substitution of its generic rule for the individualized assessment generally required under @ 504. It is conceivable that an agency legitimately could eschew individualized assessments of disabled individuals' qualifications if it were evident, as a matter of medical fact, that a particular disqualifying characteristic always is associated with a particular disability. n4 But it is not at all evident that an absolute correlation exists between the condition of primary alcoholism and the disqualifying factor of willful misconduct, as defined by the VA. Nor has the VA successfully demonstrated that such an absolute correlation is medically justified. The VA suggests that it is enough that "although the policy may not produce in an individual case the same conclusion another arbiter might reach, the VA policy [***43] provides a reasonable and workable accommodation of modern medico-psychological evidence." Brief for Respondents 35 (emphasis added). This position is unsatisfactory for several reasons.

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n4 For example, a blind person, by definition, cannot see. While the Rehabilitation Act does not expressly recognize the absolute correlation between the qualification of seeing and the condition of blindness, it seems appropriate for an employer to rely on that absolute correlation in making certain hiring decisions. Presumably, an employer subject to @ 504 could refuse to hire blind individuals for jobs clearly requiring sighted employees without first conducting an individualized assessment of each blind applicant's qualifications.

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[*561] A

The VA seems to suggest that generalizations about attributes associated with individuals suffering from a particular disability can be relied upon to assess those individuals' qualifications, as long as the generalizations are shown to be reasonable. But reliance on generalizations, even "reasonable" ones, is clearly prohibited under Arline. In that case, the Court ruled that @ 504 prevented the Nassau County School Board from generalizing about the contagiousness [***44] of tuberculosis. 480 U.S., at 281-286. Acknowledging that in some cases contagiousness would justify altering or perhaps terminating a tuberculosis sufferer's employment in order to avoid infecting others, id., at 287, n. 16, the Court nevertheless found impermissible a generalization built on that less-than-perfect correlation between disability and qualification. The Court explained:

"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 [**1389] 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.' Rather, they would be vulnerable to discrimination on the basis of mythology -- precisely the type of injury Congress sought to prevent." 480 U.S., at 285 (emphasis in original).

The myth to which the Court was referring was not that some tuberculosis sufferers [***45] were contagious, but that they all were. The parallel myth in the present cases, of course, is that all primary alcoholics became disabled as a result of their own willful misconduct. Just as @ 504 entitles each person suffering from tuberculosis to an individualized determination, based on sound medical evidence, as to whether [*562] that person is contagious and therefore not "otherwise qualified" for a job, 29 U. S. C. @ 794, the statute entitles each alcoholic veteran to an individualized determination, based on the medical evidence in his own case, of the causes of his disability. If this individualized assessment leads the adjudicator to conclude that the particular veteran's alcoholism was brought on by willful misconduct, that veteran will have been adjudicated to be not "otherwise qualified" to collect the education benefits. But only after this individualized inquiry has been conducted, can the VA deprive him of benefits available to all whose disabilities were not caused by willful misconduct.

B

The VA's attemptto justify its reliance upon the irrebuttablepresumption that primary alcoholism is caused by willful misconduct is further underminedby the meagernessof the medical support [***46] it summons. Nothing in the record suggests that the VA based its continuing reliance on the presumption, after @ 504 was amended, on any factual findings of the kind found to be requiredin Arline. And its post hoc rationalizationof that reliance in this litigation consists of a hodgepodgeof medical conclusions, some of only marginal relevance. For example, the VA relies upon the comments of a number of "medical writers" who note that "volition plays a significant role" in the treatmentof alcoholism. See Brief for Respondents43; see id., at 45-46, and nn. 32 and 33, citing, among others, G. Vaillant, The Natural History of Alcoholism 299 (1983), and S. Zimberg, The Clinical Managementof Alcoholism 67-69, 118 (1982). While cure and cause are likely to be somewhat related, the fact that alcoholism is "highly treatable, but . . . will require great responsibility from the patient," G. Vaillant, supra, at 299, provides little assistance in assessing whether the original onset of the disability can always be ascribed to willful misconduct.

In contrast, ample evidence supports petitioners' contrary contentionthat the degree of willfulness associatedwith the [*563] onset of alcoholism varies [***47] from case to case. Recent medical research indicates that the causes of primary alcoholism n5 are varied and complex, only some of which conceivably could be attributedto a veteran's [**1390] will. n6 Indeed, even the VA acknowledges that "alcoholism is not a unitary condition [but rather] has multiple forms and ranges of severity." Brief for Respondents34, and nn. 21, 22, citing, among others, Bohman, Sigvardsson, & Cloninger, Maternal Inheritanceof Alcohol Abuse: Cross-Fostering Analysis of AdoptedWomen, 38 Archives Gen. Psychiatry 965, 968 (1981) (describing genetically different types of alcoholism, each producing a different form of the condition); Cloninger, Bohman, & Sigvardsson, Inheritanceof Alcohol Abuse: Cross-Fostering Analysis of AdoptedMen, 38 Archives Gen. Psychiatry 861, 867 (1981) (identifying two types of alcohol abuse with different genetic and environmentalcauses); G. Vaillant 17 ("Alcohol abuse reflects a multidetermined continuum of drinking behaviors [*564] whose determinantsare differently weighted for different people and include culture, habits, social mores, and genes"). A sensitivity to this case-to-case variation is precisely what @ 504 requires of employers and federal agencies in [***48] their assessments of the qualifications for employment or benefits of an individual with handicaps. As the medical community's understandingof the causes of alcoholism continues to develop, @ 504 requires the VA to take these new developmentsinto account in making "sound medical judgments" about the source of a particular veteran's alcoholism. n7 Presumably, evidence concerning the circumstances surrounding a veteran's developmentof alcohol dependence-- including his age, home environment, and psychological health n8 -- always will be relevant to this assessment.

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n5 The American Medical Association and American Psychiatric Association (AMA/APA) and the National Council on Alcoholism, Inc. (NCA), emphasize in their respective amicus briefs that the primary/secondary distinction is a crude one. A diagnosis of alcoholism as primary or secondary may depend as much on the nature of the facility in which the diagnosis is made as it does on the alcoholic's true clinical history. See Brief for NCA as Amicus Curiae 18-19, n. 9. The primary/secondary distinction is particularly difficult to apply to an alcoholic who, like petitioners, began drinking as a child before underlying psychiatric disorders could be diagnosed. See Brief for AMA/APA as Amici Curiae 7. AMA/APA also emphasizes that the distinction between the two kinds of alcoholism was developed, and is properly used, only for treatment purposes and reveals little about the degree of willfulness involved in the onset of the alcoholism. Id., at 5. [***49]

n6 Notable among the studies are those that suggest that heredity plays a significant role in the development of primary, but not secondary, alcoholism. See, e. g., Schuckit, Genetic Aspects of Alcoholism, 15 Annals Emergency Medicine 991, 992 (1986). Some evidence suggests that the genetic predisposition to alcoholism can be attributed to a biochemical abnormality that prevents proper metabolism of alcohol. See App. 44 (affidavit of Dr. Anne Geller). From this it would appear that there may be a more purely physiological explanation for the onset of some cases of primary alcoholism than there is for most cases of secondary alcoholism.

n7 In light of this Court's emphasis in School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987), on the importance of basing assessments of a person's qualifications on sound medical evidence, it is difficult to understand the VA's suggestion that "citations to the medical literature circa 1987" are not of great relevance to an analysis of @ 504's application. See Brief for Respondents 26.

n8 AMA/APA notes that there is often a "psychological component in the development of alcoholism" which may not "rise to the level of psychiatric disorders." Brief for AMA/APA as Amici Curiae 6.

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[***50]

C

Finally, in asserting that its automatic association of primary alcoholism with willful misconduct is supported by medical evidence, the VA adopts, perhaps for purposes of this litigation alone, a definition of willful misconduct which

is inconsistent with the definition articulated in the VA's own regulations and practices. According to the VA, primary alcoholism is appropriately attributed to willful misconduct because medical evidence suggests that "many alcoholics are not completely helpless," in controlling their disability. Brief for Respondents 47 (emphasis added). But a "not completely helpless" test is not the standard the VA has established [*565] for determining whether other disabilities are incurred willfully.

The VA defines willful misconduct as "an act involving conscious wrongdoing or known prohibited action," 38 CFR @ 3.1(n) (1987), and "the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." VA Manual M21-1, change 239, subch. I, @ 14.04a (Aug. 21, 1979). n9 This definition of willful misconduct is a far cry from a "not completely [**1391] helpless" standard. While some primary alcoholics may well [***51] owe their disability to willful misconduct, as delineated by the regulation, the VA has failed to demonstrate that all primary alcoholics had any awareness that their initial drinking was likely to result in serious injury. Nor, in many cases, would it be appropriate to describe one's gradual development of alcohol dependency as evidence of "wanton and reckless disregard of [drinking's] probable consequences." Indeed, I wonder how one meaningfully can ascribe such intent and appreciation of long-range consequences to a 9- or 13-year-old boy who follows the lead of his adult role models in taking his first drinks. n10

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n9 Outside the alcoholism context, the Board of Veterans Appeals has found willful misconduct when, for example, a veteran "placed [a] gun to his head and pulled the trigger," No. 86-22-350 (March 23, 1987); or intentionally put his arm through window glass, No. 85-31-331 (Feb. 14, 1986); or attempted to ride his motorcycle on one wheel, No. 84-33-060 (May 13, 1985); or engaged in an altercation, No. 81-10-510 (June 12, 1981); or drove about 100 miles per hour in a 25-mile-per-hour zone on a wet road at dusk, No. 80-31-502 (June 5, 1981).

n10 That puzzle, of course, would have to be worked out by the VA when considering petitioners' claims on remand.

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[***52]

The awkwardness of attributing all primary alcoholism to willful misconduct is made apparent in the Administrator's Decision No. 988, which elaborates on the meaning of the term in the context of explaining why the VA does not bar recovery for those suffering organic secondary effects of the continued use of alcohol:

[*566] "[The] development of the secondary condition does not meet the definition of intentional wrongdoing with knowledge or wanton disregard of its probable consequences. Secondary results are not the usual and probable effects of drinking alcohol as a beverage. By the time there is sufficient awareness of any probable deleterious consequences, the process has developed to a point where it is irreversible without professional help. At such time, the person by himself, may lack the capacity to avoid the continued use of alcohol. While it is proper to hold a person responsible for the direct and immediate results of indulgence in alcohol, it cannot be reasonably said that he expects and wills the disease and disabilities which sometimes appear as secondary effects." Decision No. 988, p. 2 (1964) (emphasis in original).

All of this surely can be said of some primary alcoholics, whose drinking [***53] begins innocently enough and who feel only much later the effects of a dependency so disabling that it requires repeated hospitalization.

Individuals suffering from a wide range of disabilities, including heart and lung disease and diabetes, usually bear some responsibility for their conditions. And the conduct that can lead to this array of disabilities, particularly dietary and smoking habits, is certainly no less voluntary than the consumption of alcohol. Nevertheless, the VA has expressed an unwillingness to extend the definition of willful misconduct to all voluntary conduct having some relation to the development of a disability. In justifying the exclusion of secondary organic effects of alcoholism, such as cirrhosis of the liver, from the reach of the willful-misconduct presumption, the VA has explained:

"Historically, the question of willful misconduct has never been raised in other related situations where personal habits or neglect are possible factors in the incurrence of disability. For example, the harmful effects of tobacco smoking on circulation and respiration were [*567] known long before tobacco was incriminated as a causative factor in the high incidence of cancer, [***54] emphysema and heart disease. Yet smoking has not been considered misconduct. It is unreasonable and illogical to apply one set of rules with respect to alcohol and a different one in a situation closely analogous." Ibid.

In deferring to the VA's "reasonable" determination that all primary alcoholism is attributable to willful misconduct, the Court obscures the meaning of "willful misconduct" in a similar fashion. The Court discusses the propriety of denying [**1392] benefits to those who "bear some responsibility for their disabilities," and suggests that the attribution of all primary alcoholism to willful misconduct is justified because "the consumption of alcohol is not regarded as wholly involuntary." Ante, at 549, 550. The degree of personal responsibility for their disability attributed to alcoholics by the VA in its brief and echoed by the Court in its opinion is clearly not of the magnitude contemplated by the VA's general definition of willful misconduct.

V

Section 504 guarantees Eugene Traynor and James P. McKelvey federal benefits absent a demonstration that they, as individuals, fail to satisfy the legitimate qualifications Congress has imposed upon receipt of those [***55] benefits. The VA has failed to demonstrate that any legislative or medical determinations justify its conclusive presumption that Mr. Traynor and Mr. McKelvey's alcoholism was incurred willfully. Both cases therefore should be remanded to the VA for individualized determinations, based on "sound medical judgments" of whether these men are "otherwise qualified" to receive veterans' educational benefits beyond the 10-year period.

I dissent.

MICHAEL COUSINS, Plaintiff, Appellant, v. SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, Defendant, Appellee

No. 88-1106

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

857 F.2d 37; 1988 U.S. App. LEXIS 12854; 47 Fair Empl. Prac. Cas. (BNA) 1640; 47 Empl. Prac. Dec. (CCH) P38,353

September 20, 1988

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Dsitrict of Maine, Hon. Gene Carter, U.S. District Judge.

COUNSEL: Harold L. Lichten with whom Angoff, Goldman, Manning, Pyle, Wanger & Hiatt P.C., Marc P. Charmatz and Sarah S. Geer, National Association of the Deaf Legal Defense Fund, and Sy DuBow and E. Elaine Gardner, National Center for Law and the Deaf were on brief for appellant.

Robert K. Rasmussen, Appellate Staff, Civil Division, Department of Justice, with whom John R. Bolton, Assistant Attorney General, Robert S. Mueller III, Deputy United States Attorney, and Michael Jay Singer, Appellate Staff, Civil Division, Department of Justice, were on brief for appellee.

JUDGES: Bownes, Torruella and Selya, Circuit Judges.

OPINION BY: BOWNES

OPINION: [*38]

BOWNES, Circuit Judge.

This appeal raises the question of whether there is a private right of action under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. @ 794, against the federal government acting in its regulatory capacity. n1 Plaintiff-appellant, Michael Cousins, is a deaf man who was unable to obtain employment in Maine as a tractor-trailer driver because a regulation promulgated by the United States Department [**2] of Transportation (DOT) effectively prohibits deaf persons from driving motor carriers in interstate commerce, regardless of their ability to perform such duties. See 49 C.F.R. @ 391.41(b)(11) (1987). n2 Plaintiff challenged this regulation in the United

States District Court for the District of Maine by bringing suit under section 504 against Elizabeth Dole in her official capacity as the Secretary of DOT. He alleged that, by promulgating and threatening to enforce the regulation against him, defendant caused him to be denied employment as a commercial truck driver. n3 The district court found that the plaintiff had no private right of action against DOT under section 504, and accordingly, dismissed the complaint without prejudice to the filing of an amended complaint stating a claim for relief under the Administrative Procedure Act. See Cousins v. Dole, 674 F. Supp. 360 (D. Me. 1987). Plaintiff appealed. n4

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n1 Section 504 provides in relevant part 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. @ 794 (1982). By issuing regulations, the federal government is "conducting a program or activity." Because this case raises a challenge to a federal regulation, we describe the action against the federal government as a challenge to the government "acting in its regulatory capacity." We do not mean to imply that such a challenge is different from one directed at the "conduct" of a federal program. We simply prefer to use a phrase describing precisely the nature of the federal activity claimed by the plaintiff to be discriminatory. [**3]

n2 The regulation provides in relevant part that "[a] person is physically qualified to drive a motor vehicle if that person

first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1000 Hz, and 2000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard. . . ."

49 C.F.R. @ 391.41(b)(11) (1987).

n3 On or about June 17, 1986, a representative of DOT advised the plaintiff's attorney that the regulation would be enforced against the plaintiff even if he were "engaged in the intrastate portion of interstate movements of property." Therefore, the plaintiff could not obtain employment by confining his driving to within the state of Maine.

n4 The plaintiff also alleged that defendantviolated the due process clause of the fifth amendmentby depriving him of valuable property rights without an opportunityfor a hearing. The district court found "that the existence of an effective and substantialstatutory remedy in the AdministrativeProcedureAct obviate[d] the need to imply a constitutionalremedy's" under the fifth amendment.Cousins v. Dole, 674 F. Supp. 360, 363 (D. Me. 1987). Plaintiff does not appealthis holding.

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I.

Our analysis is controlled and thereforesimplified by Traynor v. Turnage, 108 S. Ct. 1372 (1988), in which the SupremeCourt rested its holding on the assumptionthat there is a private right of action under section 504 of the RehabilitationAct against the federal [*39] governmentacting in its regulatory capacity. A proceduralexegesis of Traynor is necessary.

Traynor was a consolidationof cases from different circuits challenging the same regulation issued by the Veterans' Administration(VA). VeteransTraynor and McKelvey were recovered alcoholics who sought veterans' educational assistance benefits under the G.I. Bill. See 38 U.S.C. @ 1661. Although these benefits generally must be used within ten years following discharge or release from active duty, veterans may obtain an extension beyond this ten-year period, if they were preventedfrom using their benefits earlier by "a physical or mental disability which was not the result of [their] own willful misconduct. . . ." 38 U.S.C. @ 1662(a)(1). Traynor and McKelvey claimed an extension under this provision on the ground that they had been disabled by alcoholism during much of the ten-year period. The VA rejected [**5] their position, relying on that part of the challenged regulationwhich characterizesa disability resulting from "the drinking of a beverage to enjoy its intoxicating effects" as "willful misconduct." See 38 C.F.R. @ 3.301(c)(2).

Traynor sought review of the VA decision in the UnitedStates District Court for the SouthernDistrict of New York, and McKelvey, in the UnitedStates District Court for the District of Columbia. Both claimed that the VA's refusal to extend them benefits, a decision made pursuantto the challenged regulation, violated their right under section 504 not to be discriminatedagainst solely on the basis of a handicap, in their case, alcoholism. The district courts agreed. See Traynor v. Walters, 606 F. Supp. 391 (S.D.N.Y. 1985); McKelvey v. Walters, 596 F. Supp. 1317 (D.D.C. 1984).

On appeal, the Second Circuit reversed the decision in favor of Traynor on the ground that a separateprovision of the Veterans' Benefits statute, 38

U.S.C. @ 211(a), n5 barred review of the section 504 claim. See Traynor v. Walters, 791 F.2d 226 (2d Cir. 1986). The District of Columbia Circuit

disagreed, but reversed the decision in favor of McKelvey on [**6] the merits. See McKelvey v. Turnage, 792 F.2d 194 (D.C. Cir. 1986). The Supreme Court granted certiorari "to decide whether the Veterans' Administration is decision is subject to judicial review and, if so, whether that decision violates @ 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U.S.C. @ 794, which requires that federal programs not discriminate against handicapped individuals solely because of their handicap." Traynor, 108 S. Ct. at 1376.

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n5 Section 211(a) provides in relevant part:

The decisions of the [VA] Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C. @ 211(a).

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The Court concluded that the question of "whether a [VA] regulation violate[d] the Rehabilitation Act is not foreclosed from judicial review by @ 211(a)[,]" id. at 1380, but that the regulation in question did not violate the Act. Id. at 1380-84. In [**7] spite of the Court's explicit reference to the Rehabilitation Act, defendant-appellee argues that it is unclear from Traynor whether the petitioners' claims arose directly under the Rehabilitation Act, or under the Administrative Procedure Act (APA). Specifically, defendant suggests that the Supreme Court might have been assessing the validity of the veterans' benefit regulation under the APA provision which provides that agency action must be set aside if it is "arbitrary, capricious, . . . or otherwise not in accordance with law." 5 U.S.C. @ 706(2)(A). We think that defendant's argument defies the plain meaning of the Supreme Court's decision.

At no point in Traynor did the Court mention the APA. Its only reference to the type of claim that might be brought pursuant to the APA appears implicitly in its discussion of whether section 211(a) barred judicial review of the section 504 claim. The Court stated:

[*40] The cases now before us involve the issue whether the law sought to be administered is valid in light of a subsequent statute whose enforcement is not

the exclusive domain of the Veterans' Administration. There is no claim that the regulation at issue is inconsistent [**8] with the statute under which it was issued.

. . . .

Traynor, 108 S. Ct. at 1379 (footnote omitted) (emphasis added).

In fact, a claim that the regulation was "inconsistent with the statute under which it was issued" had been advanced and rejected in one of the courts below. In McKelvey v. Walters, 596 F. Supp. 1317, the district court described the issue "presented for determination" as

whether the regulation [was] arbitrary, irrational and exceed[ed] the agency's statutory authority by denying lawful benefits to veterans who suffer from alcoholism. The plaintiff's challenge arises under the Administrative Procedure Act, 5 U.S.C. @ 706(2)(A), and the due process and equal protection prongs of the Fifth Amendment. The plaintiff's challenge also calls for consideration of his claim that in denying his request for relief, his rights under the Rehabilitation Act of 1973, 29 U.S.C. @ 794, which prohibits discrimination against alcoholics, were violated.

596 F. Supp. at 1319. The district court rejected the APA claim because it found that the challenged regulation did not "contravene any implicit or explicit congressional intent" reflected in the statutory provision allowing [**9] art extension of the ten-year delimiting period for those veterans prevented from using their benefits by a disability not the result of their own "willful misconduct." Id. at 1321. In contrast, the court found that the regulation did violate section 504. Only the claim arising under section 504 was appealed. See McKelvey v. Turnage, 792 F.2d 194.

In Traynor v. Walters, the district court considered whether the regulation violated "the nondiscrimination provisions of the Rehabilitation Act of 1973, as amended, 29 U.S.C. @@ 701-794, and the fifth amendment." 606 F. Supp. at 393. Although the court found that the "regulations challenged herein with [stood] constitutional scrutiny, [it also found that] they violate[d] @ 504 of the Rehabilitation Act, 29 U.S.C. @ 794. " Id. at 401. n6 It based its conclusion on a finding that the VA policy "contravene[d] the Rehabilitation Act by discriminating against those rehabilitated alcoholics (a remarkable accomplishment) most deserving of aid." Id. Only the claim arising under section 504 was appealed. See Traynor v. Walters, 791 F.2d 226.

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n6 The district court used the term "regulations" because it assessed not only the regulation eventually challenged before the Supreme Court, see 38

C.F.R. @ 3.301(c)(2), but also the regulation setting forth definitions of "willful misconduct." see 38 C.F.R. @ 3.1(n).

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The issue before the Supreme Court therefore was whether the regulation characterizing alcoholism as "willful misconduct" violated section 504 of the Rehabilitation Act of 1973. The question of whether the regulation also violated the APA mandate that agency action not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. @ 706(2)(A), was not before the Court. Had it been, the Court would have said so. Moreover, it would have referred to the standard of review applicable under 5 U.S.C. @ 706(2)(A). In defining this standard, known as the "arbitrary and capricious" standard, the Supreme Court has directed that a reviewing court must "'consider whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974)). See also Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-17 (1971). This standard of review is a "narrow" one, requiring that a court [**11] not "substitute its judgment for that [*41] of the agency," Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. If, therefore, the Court in Traynor had been reviewing the petitioners' claim under the APA, it would have conducted a limited inquiry to assess whether the VA had advanced a "'rational connection between the facts found [about alcoholism] and the choice made [to characterize alcoholism as "willful misconduct"].'" Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (quoting Burlington Truck Lines, Inc., v. United States, 371 U.S. 156, 168 (1962)). n7

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n7 Defendant asserts that the standard of review under section 504 of the Rehabilitation Act of 1973 and 5 U.S.C. @ 706(2)(A) is the same. It claims that the phrase in 5 U.S.C. @ 706(2)(A) precluding agency action not "otherwise in accordance with law," incorporates by reference all laws (including the Rehabilitation Act) and riot just the law of the enabling statute itself. We express no opinion on this interpretation of 5 U.S.C. @ 706(2)(A). It suffices to say that the interpretation is a novel one that has been rejected by at least two circuits. See Davidson v. U.S. Dep't of Energy, 838 F.2d 850 (6th Cir.), cert. denied, 108 S. Ct. 2849 (1988); Cleghorn v. Herrington, 813 F.2d 992 (9th Cir. 1987). Therefore, it seems very unlikely that the Supreme Court in Traynor used this interpretation without even mentioning it, as the basis for a holding on the meaning of the Rehabilitation Act.

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The Court did not approachthe issue before it as one implicating the APA. Rather, it reasonedthat the same Congress which in 1977 "created an exception to th[e] 10-year delimiting period for veterans who delayed their education because of 'a physical or mental disability which was not the result of [their] own willful misconduct,'" Traynor, 108 S. Ct. at 1380 (quoting 38 U.S.C. @ 1662(a)(1)), also, one year later, "extended @ 504's prohibition against discrimination on the basis of handicap to 'any program or activity conducted by any Executive agency. '" Id. at 1381 (quoting 29 U.S.C. @ 794). Accordingly, the Court held that the "petitioners can prevail under their RehabilitationAct claim only if the 1978 legislation can be deemed to have implicitly repealed the 'willful misconduct' provision of the 1977 legislation or forbade the Veterans' Administration to classify primary alcoholism as willful misconduct." Id. n8 The Court concluded that there was no implicit repeal: the "1978 legislation [would not be] rendered meaningless, even with respect to those who claim to have been handicapped as a result of alcoholism, if the 'willfull misconduct' provision of @ 1662(a)(1) [**13] [were] allowed to retain the import originally intended by Congress." Id. at 1381-1382. Construing this "original import" to mean that the alcoholism from which the petitioners had recovered was "willful misconduct," id. at 1380-81, the Court upheld the challenged regulation.

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n8 The Court used the term "primary alcoholism," as did the VA, to distinguish it from alcoholism that is "'secondary to and a manifestation of an acquired psychiatric disorder.'" Traynor, 108 S. Ct. at 1376 n.2 (quoting Administrator's Decision, Veterans' Administration No. 988, Interpretation of the Term "Willful Misconduct" as Related to the Residuals of Chronic Alcoholism, Aug. 13, 1964).

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II.

We have detailed the decision in Traynor in order to make clear that the Supreme Court rested its holding in that case on the assumption that a private action could be maintained under section 504 of the Rehabilitation Act of 1973 against the federal government acting in its regulatory capacity. To explicate the basis for this assumption, we turn to an assessment of the Rehabilitation Act in light of the Supreme Court's teachings on implied causes of action.

In its most recent case, the Supreme Court [**14] held that in determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute. . . . Congress' "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment."

Thompson v. Thompson, 108 S. Ct. 513, 516 (1988) (quoting Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979)). See Transamerica, 444 U.S. at 15-16 [*42] ("what must ultimately be determined is whether Congress intended to create the private remedy asserted"). But the Court also warned that the "implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action." Thompson, 108 S. Ct. at 516. Therefore, the Court directed, there must be an initial examination of "the context of the [statute] with an eye toward determining Congress' perception of the law that it was shaping or reshaping." Id. (citations omitted).

There can be no doubt that in 1974, when Congress first amended the Rehabilitation Act of 1973, it intended that there [**15] be a private remedy under section 504. At that time, section 504 read as follows:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, 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.

29 U.S.C. @ 794. The Senate Report discussing the 1974 amendments (none of which are relevant here) noted that section 504

was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964 . . . and section 901 of the Education Amendments of 1972. . . . [It] envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate. . . . Such sanctions would include, where appropriate, the termination [**16] of Federal financial assistance to the recipient or other means authorized by law. . . . This approach. . . would . . . permit a judicial remedy through a private action.

S. Rep. No. 1297, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6373, 6390-91 (emphasis added). In reliance on this language, a number of federal courts found an implied cause of action under section 504. See, e.g., Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Lloyd v. Regional

Transp. Auth., 548 F.2d 1277 (7th Cir. 1977); see also Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1377-78 (10th Cir. 1981) (listing cases).

In 1978, Congress amended the Act in two ways relevant to our inquiry. At the end of section 504, it added the phrase: "or under any program or activity conducted by any Executive Agency or by the United States Postal Service." It also added a completely new section, section 505, which provided in relevant part:

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), [**17] shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. @ 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

29 U.S.C. @ 794a.

Two questions are raised by the 1978 amendment. First, do the remedies specified in section 505(a)(1) and (2) allow for [*43] claims against an executive agency when it conducts a "program or activity"? In other words, do the remedies allow for private actions against the federal government when it acts, as it did in the case at bar, in its regulatory capacity? Second, if not, are these remedies [**18] exclusive, i.e., is an action against the federal government in its regulatory capacity confined to the remedies available under the APA?

The district court found that the plaintiff's challenge to the DOT could be brought pursuant to section 505(a)(2) and that the remedy under that section was limited to the APA. As mandated by section 505(a)(2), the court looked to the remedies "set forth" in Title VS of the Civil Rights Act of 1964, specifically to those in section 603 of the Act. That section, which is the only one to "set forth" any remedies at all, provides that any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided

by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action [**19] in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

42 U.S.C. @ 2000d-2.

The district court correctly concluded from the second sentence in the quoted provision that a "recipient of federal funds may obtain review of an agency decision denying or terminating grant funding. . . ." Cousins, 674 F. Supp. at 364. But the court misread the first sentence by inferring from it that a person aggrieved by agency action when that agency acts in its regulatory capacity must confine his or her challenge to a remedy under the APA. Id. The first sentence makes no such pronouncement. Rather, it requires that agency action "taken pursuant to section 2000-1" be subject to judicial review "as may otherwise be provided by law." Section 2000-1, in turn, provides that federal agencies granting financial assistance to recipients may effect compliance with the antidiscrimination mandate of Title VI by issuing rules and regulations and by terminating or refusing to grant or continue assistance to any recipient failing to comply with that mandate. See 42 U.S.C. @ 2000d-1. n9 It is an [**20] agency's action or inaction in effecting compliance with Title VI through its control over a recipient's funding that makes it subject to such judicial review "as may otherwise be provided by law." On its face, then, Title VI provides an avenue for challenging agency action only when that agency acts as a provider of federal funds. And section 505(a)(2), which refers to the "remedies, procedures, and rights set forth in title VI," 29 U.S.C. @ 794(a)(2) (emphasis added), reinforces this conclusion by stating that such remedies, procedures and rights are "available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance. . . ." Id. (emphasis added).

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n9 This section, which is section 602 under Title VI of the Civil Rights Act of 1964, provides in relevant part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, . . . is authorized and directed to effectuate the provisions of . . . this title . . . by issuing rules, regulations, or orders . . . . Compliance with any requirement adopted pursuant to this section may be effected (I) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient

as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement. . ., or (2) by any other means authorizedby law. . . .

42 U.S.C. @ 2000d-1.

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[**21]

The question remains whether the remedies set forth in section 505 are exclusive. The defendantargues that they are, [*44] claiming that Congress' mere act of adding them in 1978 showed congressional intent to make them the exclusive remedies under the Act, at least for plaintiffs pursuing actions against the federal government. The legislative history, the defendant concludes, "is devoid of any implication that Congress wished to provide a cause of action against a federal agency when it issues general safety regulations."

We do not agree. The short and conclusive answer rejecting the defendant's argument comes from the Senate CommitteeReporton the 1978 legislation. In that report, the Committeestated that the rights extended to handicappedindividuals under title V . . . are, and will remain, in need of constantvigiliance, by handicappedindividuals to assure compliance, and the availability of attorney's fees should assist in vindicating private rights of action in the case of section 502 and 503 cases, as well as those arising under section 501 and 504.

S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978). This language, we think, conclusively shows Congress' continuedintent -- even [**22] after amending the statute to include section 505 -- to allow private rights of action under the Act.

Moreover, the "fact that other provisions of a complex statutory scheme create express remedies has not been acceptedas a sufficient reason for refusing to imply an otherwise appropriateremedy under a separatesection." Cannon v. Univ. of Chicago, 441 U.S. 677, 711 (1979) (citations omitted). Section 505 provides two express remedies. The first, in section 505(a)(1), states that the "remedies, procedures, and rights" set forth in Title VII of the Civil Rights Act of 1964 are available "with respect to any complaint brought under section 791 of this title." 29 U.S.C. @ 794a(a)(1). Section 791, in turn, applies to action by the federal government in its capacity as an employer. The second remedy, in section 505(a)(2), states that the "remedies, procedures, and rights" set forth in Title VI of the Civil Rights Act of 1964 are available to "any person aggrieved" under section 794. 29 U.S.C. @ 794a(a)(2). As discusssed above, see supra at 15-16, section 505(a)(2) applies to action by the federal government in its capacity as a provider of federal funds.

Both sections, by referring [**23] to Titles VII and VI, make available to handicapped plaintiffs the administrative procedures available under those laws. For example, under section 505(a)(1), a plaintiff seeking to file an action against a federal employer must, before attempting judicial review, first file his or her complaint with the Equal Employment Opportunity Commission (Title VII procedure). Similarly, under section 505(a)(2), a plaintiff seeking to file an action against a recipient of federal funds may attempt to resolve his or her complaint by filing it with the federal provider. n10 If the provider does not take action against the recipient, then the aggrieved person can pursue his or her complaint through judicial review (Title VI procedure). n11 Neither of these remedies is so [*45] comprehensive as to indicate a congressional intent to foreclose alternate avenues of relief. Cf. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under @ 1983."). Placing them within "'the structure of the statute,'" Thompson, [**24] 108 S. Ct. at 516 (quoting Transamerica, 444 U.S. at 18), they are quite similar to the administrative enforcement procedures that were available under Title IX when the Supreme Court found an additional remedy of a private cause of action under that statute. See Cannon, 441 U.S. 677. n12

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n10 As the Supreme Court recently held, the legislative history of section 505(a)(2) reveals that Congress enacted the section to make clear that handicapped individuals could use the procedures of Title VI for filing complaints. See Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 635 (1984) (section 505(a)(2) "was intended to codify the regulations of the Department of Health, Education, and Welfare governing enforcement of @ 504"). These procedures had already been expressly incorporated by reference in regulations governing enforcement of section 504. See 45 C.F.R. @ 84.61 (1987). It is undisputed that a plaintiff may also pursue an action against the recipient directly under section 504. See Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984).

n11 It is unclear from section 505(a)(2) whether a plaintiff who claims that a federal provider is not taking sufficient enforcement action against a discriminatory recipient must pursue his or her action through the APA, or may, additionally, claim against the provider directly under section 504. We refrain from issuing a definitive ruling on this matter, and simply note the different approaches among the circuits. Compare Baker v. Bell, 630 F.2d 1046, 1055-57 (5th Cir. 1980) (finding private cause of action against provider directly under section 504) with Marlow v. U.S. Dept. of Educ., 820 F.2d 581 (2d Cir. 1987), cert. denied, 108 S. Ct. 780 (1988) (refusing to find private cause of action against provider directly under section 504); Salvador v. Bennett, 800 F.2d 97 (7th Cir. 1986) (same). [**25]

n12 Section 902 of the Title IX provides in relevant part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, . . . is authorized and directed to effectuate the provisions . . . of this title . . . by issuing rules, regulations, or orders. . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement. . ., or (2) by any other means authorized by law. . . .

20 U.S.C. @ 1682. See supra note 9 for a comparison of the language above with that of section 602 of Title VI.

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Furthermore, like the private action found implicit in Title IX, a private action under section 504 against the federal government acting in its regulatory capacity would promote the underlying legislative scheme. The purpose of section 504, like that of the two statutes from which its language is drawn (Title VI and Title IX) is to "avoid the use of federal [**26] resources to support discriminatory practices. . . [and] provide individual citizens effective protection against those practices." Id. at 704. As stated repeatedly by the Court, the primary goal of the Rehabilitation Act is to enhance the employment rights of those who are, or are perceived to be, handicapped. See Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 633 n.13 (1984); School Bd. of Nassau County v. Arline, 107 S. Ct. 1123 (1987); see also Alexander v. Choate, 469 U.S. 287, 307 n.28 (1985) (citing Consolidated). Allowing individuals the opportunity to sue directly under section 504, not just when a recipient allegedly discriminates, but also when the federal government itself allegedly discriminates by issuing safety regulations which preclude the employment of the handicapped, "is not only sensible but is also fully consistent with . . . orderly enforcement of the [Rehabilitation Act]." Cannon, 441 U.S. at 705-06 (footnote omitted).

In another attempt to prevail on its claim that the plaintiff is limited to review under the APA, the defendant relies on N.A.A.C.P. v. Secretary of Housing & Urban Dev., 817 F.2d 149 (1st Cir. [**27] 1987). It focuses on language in that decision in which we noted that "one would ordinarily expect . . . that when Congress means to permit a private party to ask a court to review the legality of federal actions in a manner that differs from APA review, Congress will say so explicitly in the statute." 817 F.2d at 153 (citation omitted). Because there is no language in the Rehabilitation Act providing for actions against federal agencies acting in their regulatory capacity, defendant argues

chat we must as a matter of First Circuit law find that Congress meant to limit actions against such agencies to those provided by the APA.

Defendant treads too much into this holding. First, our decision in N.A.A.C.P. was controlled by our prior decision in Latinos Unidos de Chelsea en Accion v. Secretary of Housing and Urban Dev., 799 F.2d 774, 791-93 (1st Cir. 1986), in which we found that there was no private cause of action [*46] under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. @@ 3601-3631. The plaintiff in N.A.A.C.P. also sought a private remedy under Title VIII, and in reliance upon Latinos, we simply rejected the claim.

Second, we noted in N.A.A.C.P. that there [**28] might be "a few instances in which a court might, notwithstanding the APA, wonder whether Congress meant to create a private right of action against the federal government." 817 F.2d at 153. Because the APA does not award attorney's fees, one of these instances is when a statute provides for such fees. Then, we said, a court "might . . . have to decide . . . whether the action arises under the particular act or whether it is simply a general APA-based request for judicial review." Id. (emphasis in original) (citing Cannon, 441 U.S. at 699-700, for proposition that explicit authorization of attorney's fee award against the federal government in certain actions to enforce Title VI is support for conclusion that Title VI confers private right of action) (other citation omitted).

The Rehabilitation Act falls squarely within the exception put forward in N.A.A.C.P. For, in addition to setting forth the express remedies discussed above, section 505 also allows attorney's fees to the prevailing party "in any action or proceeding to enforce or charge a violation of a provision of this subchapter. . . ." 29 U.S.C. @ 794a(b). The defendant argues, and the court below held, [**29] that this provision applies only to the two express remedies contained in the same section. See Cousins, 674 F. Supp. at 364 n.9. But the language of the provision itself belies such an interpretation: it provides attorney's fees for any action to enforce a violation of "this subchapter." "Subchapter" refers to subchapter V, which extends from 29 U.S.C. @ 790 through 29 U.S.C. @ 794a. Had Congress sought to limit the attorney's fees provision to the remedies contained only in section 505, 29 U.S.C. @ 794a, it would have said so. See also supra at 16 (setting forth the Senate Report discussing the attorney's fee provision in the 1978 amendment).

Traynor v. Turnage, 108 S. Ct. 1317, other Supreme Court teachings, and the legislative history of the statute mandate a holding that section 504 of the Rehabilitation Act of 1973, 29 U.S.C. @ 794 (1982) carries with it a private right of action against the federal government acting in its regulatory capacity.

Case remanded for a trial on the merits.
Costs on appeal awarded to appellant.

WILLIAM N. SIMMS, a minor, by his next friend Debra Simms; DEBRA SIMMS, individually; LYLE STEPHENS; and SPECIAL TRANSPORTATION, INC., Plaintiffs, v. SAMUEL SKINNER, in his capacity as Secretary of the United States Department of Transportation; DEPARTMENT OF TRANSPORTATION; and NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, Defendants

File No. 5:90-CV-20

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

1990 U.S. Dist. LEXIS 13080

September 26, 1990, Decided
September 26, 1990, Filed

JUDGES: [*1]

Richard A. Enslen, United States District Judge.

OPINIONBY: ENSLEN

OPINION: OPINION

This matter is before the Court on defendants' motion to dismiss. Defendants make their motion pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6) for lack of jurisdiction and failure to state a claim upon which relief can be granted.

FACTS

Section 504 of the Rehabilitation Act, 29 U.S.C. @ 794 (a), as Amended by the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, ("Section 504"), prohibits discrimination solely on the basis of handicap in programs or activities conducted by federal executive agencies, including the Department of Transportation. Executive agencies are required under Section 504 to promulgate regulations necessary to implement the Section and to ensure that programs or activities conducted by the Department are in compliance with the non-discrimination mandate of Section 504.

Plaintiffs in this case, a handicapped child who is transported to and from school while seated in a wheelchair, his parent, and a provider of transportation services for handicapped students, filed a Complaint in July 1989 with the United States Department of Transportation [*2] ("DOT") alleging a violation of Section 504. Plaintiffs assert that they utilized the procedures promulgated by the United States Department of Justice because DOT had failed to promulgate Section 504 complaint procedures, and sought DOT's advice regarding other compliant procedures that should be followed if those undertaken were not applicable. The gravamen of plaintiffs' complaint was that DOT had violated Section 504 by its exclusion of handicapped students from regulations addressing school bus passenger seating and crash protection, and by DOT's failure to promulgate specific regulations to address the transportation safety needs of handicapped students.

DOT acknowledged receipt of plaintiffs' complaint and advised plaintiffs that it was being referred to the National Highway Traffic Safety Administration ("NHTSA"), a division of DOT which is responsible for the development and promulgation of federal motor vehicle safety standards. By letter dated February 14, 1990, nearly seven months after plaintiffs' complaint was filed, NHTSA advised plaintiffs that their complaint would be treated as a petition for a

rulemaking to amend Federal Motor Vehicle Safety Standard 22, school [*3] bus passenger seating and crash protection (49 C.F.R. 571.222), to address seating for the handicapped. The letter also stated that NHTSA had decided to grant the petition for a rulemaking, and that a notice announcing the granting of the petition would be published shortly in the Federal Register. Plaintiffs' Complaint Exhibit ("Ex.") E.

Plaintiffs were unsatisfied with NHTSA's actions and filed the instant case on March 19, 1990. Plaintiffs' complaint seeks injunctive and declaratory relief. First, plaintiffs ask this Court to declare that the Department of Transportation ("DOT") has violated Section 504 by failing to promulgate regulations establishing complaint procedures through which individuals may challenge DOT's adherence to the requirements of Section 504 in its programs and activities. Complaint, page 13, para. (A)(1). Second, plaintiffs seek a declaratory judgment that NHTSA improperly treated their request as a petition for rulemaking rather than as a complaint for adjudication under Section 504. Complaint, page 13, para. (A)(3). Third, plaintiffs seek a declaratory judgment that defendants violated Section 504 by failing to amend the existing school bus seating standard, [*4] and an injunction ordering the defendants to issue final regulations on this matter, pursuant to a court-imposed rulemaking schedule. Complaint, page 13 para. (B)(1-4)

DISCUSSION

Complaint Procedures

Plaintiffs request a declaratory judgment finding that DOT has violated Section 504 by failing to promulgate regulations implementing Section 504's mandate to establish procedures by which an individual may bring a complaint against DOT regarding an alleged violation of Section 504. Defendants submit evidence that on February 9, 1990, one month before plaintiffs' complaint was filed, DOT issued a Notice of Proposed Rulemaking ("NPRM") to implement Section 504 and establish complaint and compliance procedures. 55 Fed. Reg. 4633 (Defendants' Ex. A). This NPRM was published pursuant to a joint stipulation of settlement and dismissal entered into in Paralyzed Veterans of America v. Skinner, No. 89-1709 (D.D.C. 1990). Defendants assert that the corrective action which they are undertaking renders plaintiffs' claim for declaratory relief moot.

The Sixth Circuit outlined the controlling principles for determining whether a claim is moot in International Union, United Automobile, [*5] Aerospace, Agricultural and Implement Workers of America v. Dana Corporation, 697 F.2d 718 (6th Cir. 1983). The Court stated:

Mootness is a jurisdictional question. That is, the exercise of judicial power under Article III of the Constitution depends on the existence of a case or controversy. U.S. Const. Art. III @ 2. The court may not render an advisory opinion; it is confined to real and substantial controver[sies] admitting a specific relief through a decree of a conclusive character. . . . North Carolina v. Rice, 404 U.S. 244, 246 (1971) (citations omitted). See also Preiser v. Newkirk, 422 U.S. 395, 4-1 (1975); DeFunis v. Odegaard, 416 U.S. 312 (1974). Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. Powell v. McCormack, 395 U.S. 486, 496 (1969), quoted with approval in County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). Jurisdiction, even if once acquired, may abate if interim relief or events resolve all issues in the litigation. DeFunis, 416 U.S. 312.

Id. at 720. No controversy is presented "when the question sought to be adjudicated has been [*6] mooted by subsequent developments." Flast v. Cohen, 392 U.S. 83, 95 (1968). A case can become moot when corrective action is taken by an agency, including the issuance or revision of regulations. Natural Resources Defense Council v. United States Nuclear Regulatory Commission, 680 F.2d 810, 814 (D.C. Cir 1982); Sannon v. United States, 631 F.2d 1247, 1250-51

(5th Cir. 1980).

Plaintiffs assert that their claim cannot be moot until the procedural regulations exist in their final form, and that the steps which defendants have taken do not moot their request. Plaintiffs request a declaratory judgment stating that defendants have violated Section 504 by failing to issue promulgations. In fact, however, defendants have begun the process of promulgating the requested rules. Furthermore, under the settlement stipulation. in the Paralyzed Veterans of America case, DOT recently submitted a proposed timetable for the promulgation of the requested rules to the District Court for the District of Columbia. That timetable indicates that DOT will complete drafting and internal clearance of a final regulation by September 11, 1990. Thereafter, subsequent to clearance by the Office [*7] of Management and Budget and the Civil Rights Division of the Department of Justice, the final rule will be published. Defendants' Reply to Plaintiffs Opposition Ex. A paras. 3, 4. A declaratory judgment from this court that defendants have failed to promulgate regulations would serve no purpose at this juncture.

In the alternative, defendants move for dismissal on the grounds of judicial comity. I believe this is an appropriate consideration. Judge Johnson of the District of Columbia District Court is supervising the stipulation entered into in the Paralyzed Veterans case, and "federal courts long have recognized that the principle of comity requires federal district courts -- courts of coordinate jurisdiction and equal rank -- to exercise care to avoid interference with each other's affairs." West Gulf Maritime Association v. ILA Deep Sea Local 24, 751 F.2d 721, 728 (5th Cir. 1985). This issue continues to fall under the jurisdiction of the District Court in D.C. For all these reasons plaintiffs' request for a declaratory judgment finding that DOT has violated Section 504 by failing to promulgate complaint procedures is dismissed.

NHTSA's Handling of Plaintiffs' Request [*8]

Plaintiffs also request a declaratory judgment stating that defendants were without authority to treat plaintiffs' complaint as a request for a rulemaking. Defendants submit that this claim should be dismissed for failure to state a claim for which relief can be granted.

Standard: Motion to Dismiss

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the pleading. Elliot Co., Inc. v. Caribbean Util. Co., 513 F.2d 1176 (6th Cir. 1975). Technically, of course, the 12(b)(6) motion does not attack the merits of the case -- it merely challenges the pleader's failure to state a claim properly. 5 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure @ 1364, at 340 (Supp. 1987). In deciding a 12(b)(6) motion, the court must determine whether plaintiff's complaint sets forth sufficient allegations to establish a claim for relief. The court must accept all allegations in the complaint at "face value" and construe them in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983); Amersbach v. City of Cleveland, 598 F.2d 1033, 1034-35 (6th Cir. 1979); [*9] Davis H. Elliot Co. v. Caribbean Utilities Co., 513 F.2d 1176 (6th Cir. 1975).

The complaint must in essence set forth enough information to outline the elements of a claim or to permit inferences to be drawn that these elements exist. Jenkins v. McKeithan, 869 U.S. 411 (1969); German v. Killeen, 495 F. Supp. 822, 827 (E.D. Mich. 1980). Conclusory allegations are not acceptable, however, where no facts are alleged to support the conclusion or where the allegations are contradicted by the facts themselves. Vermillion Foam Products Co. v. General Electric Co., 386 F. Supp. 255 (E.D. Mich. 1974). The court cannot dismiss plaintiff's complaint unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Defendants submit that plaintiffs' complaint to DOT and their letter to NHTSA sought relief in the form of a rulemaking to amend the existing school bus seating standard, and that NHTSA acted properly in treating this complaint as a petition for a rulemaking. Defendants argue that plaintiffs would have gained nothing if their request was treated as [*10] a "complaint" under the Department of Justice regulations rather than as a request for a rulemaking. 28 C.F.R.@ 39.170 requires an agency, 180 days after a complaint is filed, to issue findings of fact and conclusions of law on the relief sought, and a description of the remedy for each violation found. Thus, defendants submit that even if plaintiffs' complaint had been processed under these procedures, and NHTSA concluded that it had failed to comply with Section 504, the sole remedy would have been the commencement of a rulemaking, as NHTSA has already done. Brief at 12 n.9 Plaintiffs claim that this analysis is incomplete and if their finding had been treated as a complaint and NHTSA had concluded that it had failed to comply with Section 504, DOT would have been compelled to actually promulgate regulations, not merely to commence the rulemaking process. Answer at 14. They also assert that they stated in a letter to defendants dated December 29, 1989, that treating their filing as a request for a rulemaking would be acceptable only if it included a firm, written commitment from DOT that DOT would act within a specific time frame to develop and promulgate the substantial regulations [*11] plaintiffs were seeking. Plaintiffs assert that defendants ignored this condition; defendants claim that they must follow the requirements of the Administrative Procedure Act, 5 U.S.C. @ 551 et seq, and the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C @ 1392(a) and are powerless to guarantee in advance a particular result in a rulemaking procedure.

Defendants' argument may have merit; however, until DOT promulgates final regulations, I cannot, as a matter of law, dismiss plaintiffs' claim. Obviously, work toward the results that plaintiffs seek has begun. When defendants finally promulgate the requested regulations, a declaratory judgment will most likely be inappropriate, as it would serve no "useful purpose in clarifying and settling the legal relations in issue." See Allstate v. Mercier, Lexis 15339 (6th Cir. September 3, 1990). Until that time, however, I cannot overlook plaintiffs' assertion that defendants would be forced to actually promulgate regulations if plaintiffs' filing had been treated as a complaint. Accordingly, defendants' motion for dismissal of this portion of plaintiffs' claim is denied.

Jurisdiction

Plaintiffs also request a declaratory [*12] judgment stating that defendants' failure to promulgate standards for school bus passenger seating and crash protection for handicapped students violates Section 504, and request an injunction ordering defendants to promulgate final regulations for school bus passenger seating and crash protection in accordance with a court imposed schedule. Defendants assert that this Court lacks jurisdiction to review this portion of plaintiffs' claim.

Standard for Jurisdiction on a 12(b)(1) Motion

In reviewing a 12(b)(1) motion, the inquiry of the Court is whether or not the challenged pleading sets forth allegations sufficient to show that the Court has subject matter jurisdiction in the case. In making this determination, the pleadings are to be taken as true and construed in a light most favorable to the party opposing the motion. Scheur v. Rhodes 416 U.S. 232 1974). The Court is not restricted, however, to examining only the pleadings, but may review any evidence such as affidavits to resolve factual disputes. E.g. Land v. Dollar, 330 U.S. 731 (1947). Should the pleader allege facts from which jurisdiction may be inferred, the motion must be denied. Mountain Fuel Supply Co. v. [*13] Johnson, 586 F.2d 1375 (10th Cir. 1978). If there are genuine issues of material facts at issue, a decision must be made on the factual questions before the motion is decided. If, as in the instant case, "the facts are relatively simple [and] substantially uncontroverted, and the law is not complex" the court may rule on a 12(b)(1) motion without pausing to make findings on disputed motions of fact. Commodities Export Company v. U.S. Customs Service, 888 F.2d 431 (6th

Cir. 1989).

Section 105(a)(1) of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. @ 1394(a)(1), establishes jurisdiction in the court of appeals to review orders pertaining to Federal motor vehicles safety standards promulgated by NHTSA. n1 It is clear, and plaintiffs' agree, that jurisdiction lies with the court of appeals to review the substance of any final safety standard adopted by NHTSA, Chrysler Corp. v. Department of Transportation, 472 F.2d 659 (6th Cir. 1972), or to review the denial of a rulemaking petition. Standard Forge and Axle Co., Inc. v. Coleman, 551 F.2d 1268 (D.C.Cir. 1977). Defendants assert that plaintiffs are soliciting review of an existing safety standard, noting [*14] that in 1976 extensive school bus safety standards were promulgated including Federal Motor Vehicle Safety Standard 222 ("FMVSS") found at 49 C.F.R. @ 571.222 and entitled School Bus Passenger Seating and Crash Protection. This standard expressly excludes "seats installed to accommodate the handicapped" from its definition of a school bus passenger seat. 49 C.F.R. @ 571.222 S4. Defendants contend plaintiffs are challenging the failure of the existing school seating bus standard to address the needs of handicapped students.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 15 U.S.C. @ 1394(a)(1) provides:

In the case of actual controversy as to the validity of any order under [section 1392] any person who will be adversely affected by such order when it is effective may at any time prior to the sixtieth day after such order is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for judicial review of such order.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Plaintiffs respond that they are not challenging [*15] any existing motor vehicle safety standards adopted by DOT. Rather, they assert that they seek to compel DOT to issue new substantive regulations. They assert that the exercise of jurisdiction by this Court, and a determination that defendants have violated 504 and must promulgate new school bus passenger safety regulations for handicapped children, will not affect the future jurisdiction of the court of appeals to review the substance of any regulations ultimately promulgated, should such a review prove to be necessary. See Telecommunications Research and Action Center v. F.C.C., 750 F.2d 70 (D.C.Cir. 1984).

I believe that plaintiffs are correct in their interpretation of their complaint. A review of plaintiffs' complaint, including those sections to which defendants cite in support of their motion to dismiss for lack of jurisdiction, shows that plaintiffs seek the promulgation of regulations for handicapped students. Although the 1976 regulations are mentioned in plaintiffs' complaint and its supporting documents, the complaint does not call for an amendment or revision of existing regulations. Rather, plaintiffs clearly request that defendants be directed to "promulgate [*16] pursuant to the Administrative Procedures Act final regulations for school bus passenger seating and crash protection for handicapped student. . . ." Complaint at 14 para. B. Accordingly, this Court has jurisdiction over this section of plaintiffs' complaint and defendants' motion to dismiss for lack of jurisdiction is denied.

Dated: September 26, 1990

ORDER - September 26, 1990, Filed

In accordance with the opinion entered this date;

IT IS HEREBY ORDERED that defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART.

PATRICK E. SMITH, JR., Plaintiff, v. UNITED STATES POSTAL SERVICE, Defendant.

Civil Action No. 82-60328

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

570 F. Supp. 1415; 32 Fair Empl. Prac. Cas. (BNA) 1791; 33 Empl. Prac. Dec. (CCH) P34,141

September 16, 1983

COUNSEL: Janet M. Tooley, 2300 First National Building, Detroit, MI 48226, for Plaintiff

Francis L. Zebot, Assistant U.S. Attorney, 817 Federal Building, Detroit, MI 48226, Sherry A. Cagnoli, Kevin B. Rachel, Office of Labor Law, U.S. Postal Service, Washington, D.C. 20260, for Defendant

OPINIONBY: JOINER

OPINION: [*1416] HONORABLE CHARLES W. JOINER

MEMORANDUM OPINION AND ORDER

The principle question in this case is whether or not a private civil action for employment discrimination on the basis of handicap can be maintained against the United States Postal Service, a quasi- executive agency, under 29 U.S.C. @ 794 (the Rehabilitation Act) .

FACTS

The facts in this case are uncontroverted. Plaintiff decided in 1979 that he wanted to be a mailman. To that end, he took the Civil Service Examination, which he passed, and a physical examination, which he also passed. He was then hired as a mail handler. However, before he could begin work, the doctor who had conducted the physical exam informed the Postal Service that plaintiff had filed a worker's compensation claim. The Postal Service thereupon withdrew its offer of employment and plaintiff was never able to assume the job he had sought. These events all transpired prior to December of 1972.

On October 15, 1981, the Michigan State Bureau of Worker's Disability Compensation conducted a hearing concerning plaintiff's worker's compensation claim against his previous employer. During the course of this hearing plaintiff learned for the first time that his offer of employment from the Postal Service had been withdrawn due to his filing of this claim.

In October of 1982, plaintiff brought this action in two counts, alleging a violation of the Rehabilitation Act and a violation of his equal protection and due process rights under the Fifth Amendment of the United States Constitution.

[*1417] The case is before the court on defendant's motion for dismissal or in the alternative, for summary judgment.

THE REHABILITATION ACT

In 1978, Congress amended @ 794 of Title 29, the Rehabilitation Act, to read as follows:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, soley 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 assistance or under any program or activity conducted by any Executive agency

or by the United States Postal Service.

The highlighted portion of this provision was added by the 1978 amendments to the Act. In addition, Congress in 1978 enacted @ 794(a) of the Act, which provides in part:

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k) shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. . . .

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title. (emphasis added)

Section 791 of the Act, identified in @ 794(a)(1), addresses the employment of handicapped persons by the federal govvernment. Subsection (b) is of particular interest to this litigation. It requires each federal executive agency and federal instrumentality, including the Postal Service, to adopt an affirmative action plan for the hiring, placement, and advancement of handicapped individuals. The Civil Service Commission was originally empowered in 1973 to oversee the promulgation and operation of these affirmative action programs. That function was transferred in 1978 to the Equal Employment Opportunity Commission, the agency charged with the administration of Title VII, see section 4 of the 1978 Reorganization Plan No. 1, 43 Fed.Reg. 19,807.

While @ 791 does not by express terms proscribe employment discrimination against handicapped individuals by the federal government, regulations adopted pursuant to @ 791 do in fact prohibit such discrimination, 29 C.F.R. @ 1613.703 (1982). n1 In addition, these regulations direct aggrieved individuals to pursue the administrative remedies available under @ 717 of Title VII, 42 U.S.C. @ 2000e-16, when they feel that they have been discriminated against by a federal agency on the basis of handicap, 29 C.F.R. @ 1613.708. Thus, handicapped persons are afforded the same protection against employment discrimination by the federal government under @ 791 of the Rehabilitation Act as are members of the classes protected by @ 717 of Title VII, which prohibits discrimination on the basis of race, religion, national origin, and gender.

n1 That section read as follows:

General Policy

Agencies shall give full consideration to the hiring, placement, and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person. (emphasis added).

The regulations adopted pursuant to @ 717 set forth extensive administrative procedures for the investigation and resolution of complaints of employment discrimination brought against a federal agency, 29 C.F.R. @@ 1613.213-1613.271. The governing statute also provides complainants with the right to file a civil action in district court within 30 days of the receipt of notice of final action taken by the agency or by the EEOC, or within 180 days after the [*1418] filing of a complaint if no action is taken, 42 U.S.C. @

2000e-16(c).

It is well settled that exhaustion of the administrative remedies is a condition precedent to the initiation of a civil action in federal court under Title VII, Brown v. G.S.A., 425 U.S. 820 (1976); McKenzie v. Calloway, 456 F.Supp. 590, 605-06 (E.D.Mich. 1978), aff'd, 625 F.2d 755 (6th Cir. 1980). By implication, an action brought against the federal government for employment discrimination under @ 791 and its attendant regulations must also be preceded by resort to administrative remedies. Plaintiff in this case has failed to resort to these procedures, and in any event, his action is now barred by the period of limitations established by @ 2000e-16(c).

Plaintiff maintains, however, that this action is brought not under @ 791, but under @ 794, and therefore the exhaustion requirements and period of limitations do not apply this case. The question presented then, is whether or not a private action can be maintained against a federal instrumentality under @
794 for employment discrimination on the basis of handicap.

Prior to the adoption of the 1978 amendments to the Rehabilitation Act, the Tenth Circuit had squarely faced this question and answered it in the negative, Coleman v. Darden, 595 F.2d 533, 538-39 (10th Cir. 1979). The court concluded that a federal agency could not be construed as a recipient of federal financial assistance and thus fall subject to the prohibition against discrimination on the basis of handicap.

The 1978 amendments to the Act, however, have extended the prohibition against handicap discrimination to the federal agencies, and to the Postal Service in particular. Furthermore, @ 794a provides that the remedies available under Title VI of the 1964 Civil Rights Act are to be made available to persons asserting violations of @ 794.

Title VI, unlike Title VII, does not provide for an express private right of action. The courts have consistently read an implied private right of action into Title VI, however, see e.g. Drayden v. Needville Ind. School Dist., 642 F.2d 129 (5th Cir. 1981); Yakin v. Univ. of Illinois, 508 F.Sup. 848 (N.D.Ill. 1981).Furthermore, every Court of Appeals that had addressed the issue since the adoption of @ 794 has concluded that a private right of action can be maintained by a handicapped person who seeks participation in a program operated by a recipient of federal funds, see, e.g. Miener v. State of Missouri, 673 F.2d 969 (8th Cir. 1982). Finally, exhaustion of administrative procedures is not a necessary prerequisite to maintaining a private action under @ 794, Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980).

The courts which have found an implied private right of action under @ 794 have done so in the context of lawsuits brought against recipients of federal financial assistance, however, and not against federal agencies or other instrumentalities. This fact is not a mere fortuity.Any implied right of action which arose under @ 794 prior to the adoption of @ 794a must now be interpreted in light of the express remedies created by the latter statute, cf. Miener, supra 673 F.2d at 274. Section 794a poses two distinct impediments to the maintenance of the current action.

First, that provision states that the remedies available under Title VI are available "to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." This language parallels the additions to @ 794 enacted by Congress in 1978, with the exception that the Postal Service, which is specifically included in amended @ 794, is excluded from @ 749a. Although the Postal Service is commanded by @ 794 not to discriminate on the basis of handicap, the private remedies of Title VI for such discrimination are not authorized against the Postal Service by @ 794(a). Congress thus has established a discretely tailored set of procedural rules. For claims alleging employment discrimination on the basis of handicap against the Postal Service,

the Title VII remedies and procedures should be [*1419] followed. For claims alleging handicap discrimination on the part of recipients or providers of Federal assistance, Title VI remedies and procedures should be followed. The Postal Service is neither a recipient of federal financial assistance as that term is contemplated by @ 794, cf. Coleman v. Darden, supra, nor is it a provider of federal financial assistance to institutions outside of the federal government. Thus, the Title VI remdies (and the implied private right of action that is modified by @ 794a) that are available against recipients of federal assistance and the providers of that assistance are not available against the Postal Service.

Second, the remedies that are available under Title VI explicity exclude redress for employment discrimination. Section 604 of Title VI provides:

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employmment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. @ 2000d-3.

With respect to the instant action, the question is whether @ 604 creates a limitation on the standing of a handicapped person to bring a civil action against a federal instrumentality alleging employment discrimination. The Courts of Appeal that have addressed this issue in the context of claims brought againts recipients of federal funds have concluded that the same restriction that applies against the maintenance of an employment discrimination suit under Title VI is applied to actions brought by handicapped persons under @ 794 of the Rehabilitation Act, Simon v. St. Louis County, 656 F.2d 316, (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982); Simpson v. Reynolds Metal Co., 629 F.2d 1226 (7th Cir. 1980); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672 (8th Cir. 1980); Trageser v. Libbie Rehab. Center, Inc., 590 F.2d 87 (4th Cir. 1979). Thus, unless the program from which plaintiff has been denied employment receives federal funds, and a primary objective of the dispersal of such funds was to create employment in that program, plaintiff would not have standing under @ 794 to sue recipient of federal funds.

If such a result obtains with respect to lawsuits brought against the recipients of federal funds, who are not subject to a statutory prohibition against employment discrimination on the basis of handicap, it would apply with even greater force in a case such as this where a federal agency or the Postal Service is the defendant. The latter may not discriminate in their employment practices against qualified handicapped persons, and such persons are protected by the procedures available under @ 717 of Title VII, 42 U.S.C. @ 2000e-16, when they have reason to believe that discriminatory action has occurred.

For the foregoing reasons, the court holds that a private action for employment discrimination can not be brought against the Postal Service under @ 794 of the Rehabilitation Act. n2

n2 The precise holding of this case is apparently at odds with the case of Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1982).The Fifth Circuit in Prewitt concluded that "by its 1978 amendments to the Rehabilitaton Act, Congress clearly recognized both in section 501 (29 U.S.C. @ 791) and in section 504 (@ 794) that individuals now have a private cause of action to obtain relief for handicap discrimination on the part of the federal government and federal agencies," id. at 304. The Prewitt court reasoned that "when there are two acts upon the same subject, the rule is to give effect to both if possible," id.

We believe that sections 791 and 794 do not address the same subject. Section 794 specifically addresses the employment of handicapped persons in the federal government. Section 794 is a broader provision, which prohibits

discrimination against the handicapped by recipients of federal financial assistance and by the executive branch itself. However, @ 794a indicates, according to our analysis, that Congress has carved out the area of discrimination in employment from the general prohibition of @ 794 and placed it within the exclusive scope of @ 791, at least, for purposes of this opinion, when the alleged discriminator is a branch of the federal government. For this reason, we decline to follow the reasoning of the Prewitt court.Conspicuous by

its absence from the Prewitt opinion is any reference to the language of 794(a)(2) which limits the remedies under 794 to those available untile Title VI, nor a citation to any of the case law which has consistently held that a private action for employment discrimination is not available under @ 794.

Finally, even if this court were to follow the holding of the Prewitt court, plaintiff in this case would still be subject to dismissal. The Prewitt court concluded, erroneously in our view, that exhaustion of administrative remedies was required prior to proceeding under @ 794, in order to preserve symmetry of remedies under sections 791 and 794, 622 F.2d at 304. As the clear language of @
794a indicates, the remedies available under @ 791 are different from those available under @ 794. Were we to follow Prewitt, however, plaintiff's claims would be dismissed in this case for failing to exhaust his administrative remedies under @ 794.

[*1420] TOLLING OF THE LIMITATIONS PERIOD

Plaintiff correctly points out that the limitations period of Title VII, which is applicable to his employment discrimination claim in this case, is not a jurisdictional bar to the maintenance of this suit. Rather, it is similar to a statute of limitations, which is subject to the equitable principles of waiver, estoppel, and equitable tolling, Zipes v. T.W.A., 455 U.S. 385 (1982). The applicable regulations provide that an agency before whom a complaint of employment discrimination is brought "shall extend the time limits in (@ 1613.214)" for three reasons:

1) When the complainant shows that he was not notified of the time limits and was not otherwise aware of them,

2) when he was prevented by circumstances beyond his control from submitting the matter with the time limits, or

3) for other reasons considered sufficient by the agency.

29 C.F.R. @ 1613.214(a)(4).

Plaintiff has yet to seek such an extension of the time limits for the filing of an administrative complaint. Even assuming that plaintiff did not know of the reason for the Postal Service's refusal to hire him until October 15, 1980, as is indicated in the plaintiff's affidavit, he could have filed a complaint at that time and requested that the filing deadline be extended by the Postal Service. This he did not do.

Plaintiff contends that an evidentiary hearing is necessary in this case in order to determine whether or not he knew of the existence of the time limitations for the filing of this aciton. In Oaxaca v. Roscoe, 641 F.2d 386 (5th Cir. 1981), the Court of Appeals reversed the district court's dismissal of plaintiff's Title VII claim for failure to comply with the limitations period. The court remanded the case in order that the district court could hold an evidentiary hearing to determine whether or not plaintiff was aware of the filing requirements established by Title VII, id. at 391.

While the holding Oaxaca might lend support to plaintiff's contention that he is entitled to an evidentiary hearing on the issue of his knowledge of the filing deadlines, the court believes that the law in the Sixth Circuit does not

go as far as that case. The courts in this circuit have generally concluded that, in order for the filing deadline of a Title VII claim to be tolled, the defendant must have somehow mislead the plaintiff as to the facts supporting a claim for employment discrimination, or with regard to the applicable law.

In this regard, the Court of Appeals has recently stated:

Appellants have not claimed that Chrysler concealed relevant facts or that the corporation's actions unfairly prevented them from asserting their federal statutory rights. Accordingly, there is no possibility that Chrysler's conduct tolled the applicable statute of limitations.See, e.g. Zipes v. T.W.A., 455 U.S. 385 (1982). E.E.O.C. v. Chrysler Corp., 683 F.2d 146, 149, n.1.

In this case, plaintiff argues that the was not aware of the filing deadline for a claim alleging employment discrimination, nor was he even aware until October 15, 1981 that his application for employment had [*1421] been denied because he had a pending worker's compensation claim. His argument is that, as a healthy white male, he believed that the reasons for the Postal Service's withdrawal of its offer of employment were not discriminatory. He does not allege that the defendants mislead him in any way concerning the facts underlying his present claim, but rather, that he was not fully informed until October of 1981.

This is therefore not a case like Jones v. Cassens Transport, 538 F.Supp. 929 (E.D.Mich. 1982), in which the court found the criteria justifying the application of equitable estoppel to have been satisfied. The court concluded in that case:

If there can be a case in which equity requires relief from the filing requirement, that is one.As if fully discussed below, both defendants herein pursued a course of secrecy and concealment in their dealings with the plaintiffs; and plaintiffs each testified that they were told by EEOC personnel that the EEOC could afford them no relief against the union when they filed their charges against the employer. They were misadvised (either willfully or inadvertently) by every source of representation with which they consulted until they reached the judicial process, and will not be penalized here by a technical requirement.

Id. at 932.

In this case, plaintiff was never mislead by the Postal Service. Rather, he is alleging that, at the worst, defendant never informed him of the reason for the withdrawal of the offer of employment. Plaintiff apparently never asked for this reason. This case is therefore much closer to the case of Graves v. University of Michigan, 553 F.Supp. 532 (E.D.Mich. 1982) in which the court concluded that the defendants, while failing to inform plaintiff of facts which might have given rise to an employment discrimination claim, never sought to mislead her, id. at 535. The court concluded that even if the limitations period did not begin to run until plaintiff learned of the facts giving rise to her Title VII claim, her failure to invoke the administrative process within the applicable period commencing at that time resulted in the dismissal of her action, id.

Finally, it should be noted that, even if the very accommodating Oaxaca standard was applied in this case, the court feels that there still exists in sufficient reason to toll the limitations period in this case. In Oaxaca, the court defined the issue on remand as whether or not plaintiff personally was aware of the filing requirements of Title VII. Although the opinion is not explicit on this point, it appears that plaintiff himself conducted the initial investigations into the facts giving rise to his claim, and made the initial contact with the EEOC counselor. There was no indication that he was represented by counsel until he filed his untimely civil action in federal court. By contrast, the record in this case indicates that plaintiff was represented by his present counsel on October 15, 1981, when he first learned of

the reason for his failure to obtain employment with the Postal Service. Even if a layman can not be charged with constructive knowledge of the filing requirements of employment discrimination actions under federal law, certainly an attorney who handles employment cases must be. Yet plaintiff never filed an administrative complaint with the Postal Service, seeking an extension of the filing deadline under 29 C.F.R. @ 613.214(a)(4). Further, plaintiff did not file the present action until October 5, 1982, almost a full year after he and his attorneys had become aware of the facts giving rise to this lawsuit, and almost two years since the occurrence of the allegedly discriminatory event. Under these circumstances the court concludes that equitable tolling should not be applied to prevent the operation of the limitations period.

THE CONSTITUTIONAL CLAIMS

Count II of the complaint alleges violations of plaintiff's equal protection and due process rights. In Brown v. G.S.A., 425 U.S. 820 (1976), the Supreme Court held that the creation of statutory rights for redress of employment discrimination by the federal government pre-empted the availability of [*1422] a cause of action under the more general anti-discriminatory provisions of the Constitution. The Court concluded that @ 717 of Title VII, with is elaborate procedural mechanisms for administrative investigation and reconciliation prior to the filing of a civil action was the exclusive means for asserting claims of employment discrimination againt the federal government. For the same reason, the adoption of the Title VII remedies for persons alleging employment discrimination on the basis of handicap under @ 791 of the Rehabilitation act now provides the exclusive means for vindicating rights against federal government employers, Shirey v. Campbell, 24 E.P.D. P31,409 (D.D.C. 1980).

For the foregoing reasons, the defendant's motion to dismiss or for summary judgment is granted.

So Ordered.